THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Mx. North Gallery

Digitized by the Internet Archive
in 2026

https://archive.org/details/weekly-law-reports_1958_1

THE WEEKLY LAW REPORTS 1958

The House of Lords

The Privy Council

The Supreme Court of Judicature

Assize Courts

and

Ecclesiastical Courts

VOLUME 1

London

THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

BIBL.
LONDIN
UNIV.

Published by the Incorporated Council of Law Reporting for England and Wales · 3 Stone Buildings, Lincoln's Inn, London, W.C.2, and printed by The Eastern Press, Ltd., London and Reading

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—The Hon. Mr. Justice McNair

Vice-Chairman—Sir Leslie Farrer, K.C.V.O.

*

EX-OFFICIO MEMBERS

The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., M.P.
Attorney-General

The Rt. Hon. Sir Harry Hylton-Foster, Q.C., M.P.
Solicitor-General

L. E. Peppiatt, Esq., M.C.
President of the Law Society

*

ELECTED MEMBERS

Lincoln's Inn
The Rt. Hon. Lord Justice Jenkins C. Montgomery White, Esq., Q.C.

Inner Temple
J. V. Nesbitt, Esq. R. T. Monier-Williams, Esq., O.B.E.

Middle Temple
W. Latey, Esq., M.B.E., Q.C. Montague L. Berryman, Esq., Q.C.

Gray's Inn
The Hon. Mr. Justice McNair The Hon. Mr. Justice Edmund Davies
* A. G. P. Johnson, Esq.

Appointed on the nomination of the General Council of the Bar
R. E. Megarry, Esq., Q.C. G. W. Tookey, Esq., Q.C.

The Law Society
Sir Leslie Farrer, K.C.V.O. (Firm: Messrs. Farrer & Co.)
Kenneth D. Cole, Esq. (Firm: Messrs. Linklaters & Paines)

* Co-opted Member.

*

Secretary—F. G. Hudson, Esq. *Assistant Secretary*—F. E. Smith, Esq.
3 Stone Buildings, Lincoln's Inn, W.C.2

EDITORS AND REPORTERS

*

Editor—R. P. Colinvaux, Barrister-at-Law

Assistant Editor—Charles Clayton, Barrister-at-Law

*

REPORTERS

House of Lords
F. H. Cowper

Privy Council
Charles Clayton

Court of Appeal No. 1
B. A. Bicknell E. Dangerfield

Court of Appeal No. 2
A. W. Grant M. M. Hill

Court of Appeal No. 3
F. R. Dymond J. A. Griffiths

Chancery Division
K. R. A. Hart I. G. R. Moses P. Price

Queen's Bench Division, Court of Criminal Appeal and Courts-Martial Appeal Court
J. D. Pennington J. F. Lamb C. J. Ellis
E. M. Wellwood

Probate and Divorce
J. B. Gardner E. Jones

Admiralty Division
A. L. G. Stewart-Richardson

Restrictive Practices Court
J. F. Lamb

Barristers-at-Law

HOUSE OF LORDS

Lord Chancellor: Lord Kilmuir

Lords of Appeal in Ordinary

Lord Simonds
Lord Morton of Henryton
Lord Reid
Lord Radcliffe
Lord Tucker
Lord Cohen
Lord Keith of Avonholm
Lord Somervell of Harrow
Lord Denning

COURT OF APPEAL

Lord Chancellor: Lord Kilmuir

Lord Chief Justice of England: Lord Parker of Waddington

Master of the Rolls: Lord Evershed

President of the Probate, Divorce, and Admiralty Division: Lord Merriman

Sir David Llewelyn Jenkins
Sir Francis Lord Charlton Hodson
Sir John William Morris
Sir Charles Robert Ritchie Romer
Sir Frederick Aked Sellers
Sir Benjamin Ormerod
Sir Edward Holroyd Pearce
Sir Henry Gordon Willmer

CHANCERY DIVISION

Lord Chancellor: Lord Kilmuir

Sir Harry Bevir Vaisey
Sir Ronald Francis Roxburgh
Sir Henry Wynn-Parry
Sir Charles Eustace Harman
Sir Harold Otto Danckwerts
Sir George Harold Lloyd-Jacob
Sir Gerald Ritchie Upjohn

QUEEN'S BENCH DIVISION

Lord Chief Justice of England: Lord Parker of Waddington

Sir Malcolm Hilbery
Sir Wintringham Norton Stable
Sir James Dale Cassels
Sir Gonne St. Clair Pilcher
Sir Austin Ellis Lloyd Jones
Sir Laurence Austin Byrne
Sir Donald Leslie Finnemore
Sir Geoffrey Hugh Benbow Streatfeild
Sir Gerald Osborne Slade
Sir Patrick Arthur Devlin
Sir William Gorman
Sir Patrick Redmond Joseph Barry
Sir Terence Norbert Donovan
Sir William Lennox McNair
Sir Cecil Robert Havers
Sir Colin Hargreaves Pearson
Sir Hildreth Glyn-Jones
Sir John Percy Ashworth
Sir Kenneth Diplock
Sir George Raymond Hinchcliffe
Sir Gilbert James Paull
Sir Cyril Barnet Salmon
Sir Herbert Edmund Davies
Sir Richard Everard Augustine Elwes
Sir Gerald Alfred Thesiger

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

President: Lord Merriman

Sir Hubert Joseph Wallington
Sir Henry William Barnard
Sir Charles Arthur Collingwood
Sir Seymour Edward Karminski
Sir William Arthian Davies
Sir Eric Sachs
Sir Aubrey Melford Steed Stevenson
Sir Geoffrey Walter Wrangham
Sir Joseph Bushby Hewson

Attorney-General

Sir Reginald Edward Manningham-Buller

Solicitor-General

Sir Harry Braustyn Hylton-Foster

TABLE OF CASES

(VOL. 1)

A

PAGE

ADAIR, REGINA *v.* 786
ADEY, RECTOR AND CHURCHWARDENS OF BISHOPWEARMOUTH *v.* *In re* ST. MICHAEL AND ALL ANGELS, BISHOPWEARMOUTH 1183
AEROMARINE OF EMSWORTH LTD., MCDOUGALL *v.* 1126
AIREY *v.* AIREY 729
ALDERMAN *v.* ALDERMAN AND DUNN 177
ALLAN, DECD., *In re.* CURTIS *v.* NALDER 220
AMERICAN JURIST, THE, AND THE CLAYCARRIER 792
ASSIMAKIS, FICK & FICK LTD. *v.* 1006
ATTORNEY-GENERAL, ALLIANCE ASSURANCE CO. LTD. *v.* *In re* SAHAL'S WILL TRUSTS 1243
ATTORNEY-GENERAL, DINIZULU *v.* 1252
AUTEN *v.* BAKER TODMAN & CO. 1300
AUTEN *v.* RAYNER 1300
AYU, REGINA *v.* 1264

B

B. (ORSE. S.) *v.* B. 619
BAKER *v.* T. E. HOPKINS & SON LTD. 993
BAKER TODMAN & CO., AUTEN *v.* 1300
BAKER (G. L.) LTD. *v.* MEDWAY BUILDING AND SUPPLIES LTD. 1216
BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD 181
BARFORD (INSPECTOR OF TAXES), WESTMINSTER BANK LTD. *v.* 406
BASTIAN, REGINA *v.* 413
BAYLIS BAXTER LTD. *v.* SABATH 529
BEAVERBROOK NEWSPAPERS LTD., SILKIN *v.* 743
BERNARD *v.* BERNARD (SUTTON CITED) 1275
BIRCH *v.* COUNTY MOTOR AND ENGINEERING CO. LTD. 980
BLAKELEY *v.* C. & H. CLOTHING CO. (A FIRM) 378
BOSLEY *v.* BOSLEY 645
BOWEN *v.* BOWEN 508
BOYCE (INSPECTOR OF TAXES), WRIGHT *v.* 593, 832
BRAITHWAITE *v.* SOUTH DURHAM STEEL CO. LTD. 986
BRITISH BOXING BOARD OF CONTROL (1929), WILLIAMSON *v.* 539
BRITISH TRANSPORT COMMISSION, HAZELL *v.* 169
BRITISH TRANSPORT COMMISSION, HICKS *v.* 493
BRITISH TRANSPORT COMMISSION, KEMSHEAD *v.* .. .. 173n.
BRITISH TRANSPORT COMMISSION, O'CONNOR *v.* 346
BUCKINGHAM COUNTY COUNCIL, FAWCETT PROPERTIES LTD. *v.* 1161
BUCKINGHAMSHIRE COUNTY COUNCIL, FYSON *v.* 634
BUCKINGHAMSHIRE COUNTY COUNCIL, METAL RECOVERY AND STORAGE CO. LTD. *v.* .. 634
BUNTING, COSTAGLIOLA *v.* 580
BURCH *v.* BURCH 480
BURGESS *v.* BURGESS 608
BYATT *v.* BYATT 1
BYRNE *v.* KINEMATOGRAPH RENTERS SOCIETY LTD. 762

C

C. & H. CLOTHING CO. (A FIRM), BLAKELEY *v.* 378
CAISTER-ON-SEA, PARISH OF, *In re.* NORFOLK COUNTY COUNCIL *v.* KNIGHTS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE 309
CARGO LATELY LADEN ON BOARD THE FEHMARN (OWNERS) *v.* FEHMARN (OWNERS). THE FEHMARN 159
CASTIGLIONE, ERSKINE & CO. LTD., *In re* 688
CATTAN (L. E.) LTD. *v.* MICHAELIDES (A.) & CO. 717
CENTRAL COMMERCIAL PROPERTIES LONDON LTD., LYONS *v.* 869
CENTRAL LAND BOARD, LONDON COUNTY COUNCIL *v.* 1296
CHEMISTS' FEDERATION AGREEMENT (NO. 2), *In re* 1192

PAGE

CHESTER RURAL DISTRICT COUNCIL, NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* *In re* NORTH OF ENGLAND ZOOLOGICAL SOCIETY 1258
CLARKE, LES FILS DREYFUS ET CIE SOCIÉTÉ ANONYME *v.* 300
CLAYCARRIER, THE, AMERICAN JURIST AND 792
CLEAR *v.* CLEAR 467
CLUEIT *v.* CLUEIT 463
COLLIER (W.) LTD. *v.* FIELDING (VALUATION OFFICER) 323
COLMAN, DECD., *In the Estate of* 457
COOK, RAYMOND *v.* 1098
COSTAGLIOLA *v.* BUNTING 580
COSTS: PRIVY COUNCIL (PRACTICE NOTE) 39
COUNTY MOTOR AND ENGINEERING CO. LTD., BIRCH *v.* 980
COURT FEES AND FIXED COSTS (PRACTICE DIRECTION) 308
COUTTS & CO. *v.* DUNTROON INVESTMENT CORPORATION LTD. 116
COX *v.* COX 340
CRADDOCK *v.* HAMPSHIRE COUNTY COUNCIL 202
CURTIS *v.* NALDER. *In re* ALLAN, DECD. 220
CUSACK-SMITH *v.* GOLD 611

D

D., AN INFANT, *In re* 197
DAFNIS THOMAIDES & CO. (U.K.) LTD., MARGULIES BROTHERS LTD. *v.* 398
DAVIES *v.* PRICE 434
DEBTOR, *In re* (NO. 472 OF 1950). *Ex parte* SWIRSKY 283
DENNING, DECD., *In the Estate of* 462
DENTAL MANUFACTURING CO. LTD., NOLAN *v.* 936
DINIZULU *v.* ATTORNEY-GENERAL 1252
DISTRICT BANK LTD. *v.* WEBB 148
DISTRICT BANK LTD. *v.* WEBB (PRACTICE NOTE) 66
DONALDSON *v.* DONALDSON 827
DOWNEY *v.* MOXON. *In re* MOXON'S WILL TRUSTS 165
DUNLOP RUBBER CO. LTD. *v.* LONGLIFE BATTERY DEPOT (A FIRM) 1033
DUNN, ALDERMAN AND, ALDERMAN *v.* 177
DUNTROON INVESTMENT CORPORATION LTD., COUTTS & CO. *v.* 116

E

EDGE *v.* JARVIS. *In re* JARVIS, DECD. 815
EDWARDS (VALUATION OFFICER), WILSON BROTHERS LTD. *v.* 955
EKE OJA *v.* KANU UKPAI 151
ESPRESSO COFFEE MACHINE CO. LTD. *v.* GUARDIAN ASSURANCE CO. LTD. 900
EVANS MEDICAL SUPPLIES LTD., MORIARTY *v.* 66

F

FATSTOCK MARKETING CORPORATION LTD. *v.* MORGAN (VALUATION OFFICER) 357
FAWCETT PROPERTIES LTD. *v.* BUCKINGHAM COUNTY COUNCIL 1161
FEHMARN, THE 159
FICK & FICK LTD. *v.* ASSIMAKIS 1006
FIELD, REGINA *v.* 793
FIELDING (VALUATION OFFICER), W. COLLIER LTD. *v.* 323
FILBY BROS. (PROVENDER) LTD., *In re* 683
FITZPATRICK, REGINA *v.* 793
FOMENTO (STERLING AREA) LTD. *v.* SELSDON FOUNTAIN PEN CO. LTD. 45
FOREIGN MARRIAGES (PRACTICE DIRECTION) 177
FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE 6
FREDIANI, HARDIE *v.* 318
FREEHOLD INVESTMENTS (LEYTONSTONE) LTD., GRANADA THEATRES LTD. *v.* .. 845
FYNN *v.* INLAND REVENUE COMMISSIONERS 585
FYSON *v.* BUCKINGHAMSHIRE COUNTY COUNCIL 634

G

GALE, SIMONS *v.* 678
GALLEY, NATIONAL COAL BOARD *v.* 16
GIBBARD, SAMROSE PROPERTIES LTD. *v.* 235
GLANVILLE (R. E.) & SONS (BOVEY TRACEY) LTD., RUTHERFORD *v.* 415
GODDARD *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT 1151
GOLD, CUSACK-SMITH *v.* 611

PAGE
GOLD *v.* PATMAN & FOTHERINGHAM LTD. 697
GOODYEAR TYRE & RUBBER CO. (GREAT BRITAIN) LTD. *v.* LANCASHIRE BATTERIES LTD. 655, 857
GORFIN *v.* ODHAMS PRESS LTD. 314
GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENTS (LEYTONSTONE) LTD. 845
GREEN (A BANKRUPT), *In re. Ex parte* THE TRUSTEE 405
GREEN *v.* GREEN AND PARTRIDGE 1104
GREEN, WERNICK *v.* 92
GRIFFIN *v.* SQUIRES 1106
GRIFFITH *v.* PELTON 65
GRIFFITHS, *Ex parte.* REGINA *v.* MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT 517
GRIMTHORPE, DECD., *In re* 381
GUARDIAN ASSURANCE CO. LTD., ESPRESSO COFFEE MACHINE CO. LTD. *v.* 900
GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM BOROUGH COUNCIL 541

H

HAMPSHIRE COUNTY COUNCIL, CRADDOCK *v.* 202
HARDIE *v.* FREDIANI 318
HAREWOOD HOTELS LTD. *v.* HARRIS 108
HARLOW URBAN DISTRICT COUNCIL, SAYERS *v.* 623
HARRIS, HAREWOOD HOTELS LTD. *v.* 108
HARRODS LTD., *Ex parte* THE DEBTOR *v. In re* MANN, A DEBTOR 1272
HARROWER, LEACH AND, LEACH *v.* (PRACTICE NOTE) 146
HASHAM *v.* ZENAB 1214
HASLIP, DECD., *In the Estate of* 583
HASTINGS, *In re* 372
HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* NORUM 721
HAYNES *v.* QUALCAST (WOLVERHAMPTON) LTD. 225, 491
HAZELL *v.* BRITISH TRANSPORT COMMISSION 169
HEAVEN & KESTERTON LTD. *v.* SVEN WIDAEUS A/B 248
HICKS *v.* BRITISH TRANSPORT COMMISSION 493
HOLST & CO. LTD., WALSH *v.* 800
HOLYOAK (VALUATION OFFICER), SHELL-MEX AND B.P. LTD. *v.* 331
HOPKINS (T. E.) & SON LTD., BAKER *v.* 993
HORACE PLUNKETT FOUNDATION *v.* ST. PANCRAS BOROUGH COUNCIL 50
HUDSON'S BAY CO. *v.* THOMPSON (VALUATION OFFICER) 955
HYER, BARCLAYS BANK LTD. *v. In re* TARNPOLSK, DECD. 1157

I

IDDENDEN (ORSE. BRAINS) *v.* IDDENDEN 1041
INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION 1171
INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* INLAND REVENUE COMMISSIONERS 943
INGRAM AND, WIGGINS *v.* WIGGINS (ORSE. BROOKS) 1013
INLAND REVENUE COMMISSIONERS, FYNN *v.* 585
INLAND REVENUE COMMISSIONERS, INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* 943
INLAND REVENUE COMMISSIONERS, PYE-SMITH *v.* 905
INLAND REVENUE COMMISSIONERS *v.* RACECOURSE BETTING CONTROL BOARD .. 122, 705
INLAND REVENUE COMMISSIONERS, WIGRAM FAMILY SETTLED ESTATES LTD. *v.* .. 213
INLAND REVENUE COMMISSIONERS *v.* WOOD BROTHERS (BIRKENHEAD) LTD. 64
INSANITY: APPOINTMENT OF GUARDIAN (PRACTICE NOTE) 1015

J

JARVIS, DECD., *In re.* EDGE *v.* JARVIS 815
JEFFREY *v.* KENT COUNTY COUNCIL 927
JOHN SUMMERS & SONS LTD., TAYLOR *v.* 491
JOHNSTONE, MCNEILL *v.* 888
JOYCE, REGINA *v.* 140
JUBILEE COFFEE ROASTING CO. LTD., LONDON EXPORT CORPORATION LTD. *v.* 271, 661

K

KANU UKPAI, EKE OJA *v.* 151
KEMSHEAD *v.* BRITISH TRANSPORT COMMISSION .. .. 173n.

PAGE
KENT COUNTY COUNCIL, JEFFREY *v.* 927
KINEMATOGRAPH RENTERS SOCIETY LTD., BYRNE *v.* 762
KITCHEN *v.* ROYAL AIR FORCE ASSOCIATION 563
KNIGHT, REGINA *v.* 793
KNIGHTS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE, NORFOLK COUNTY COUNCIL *v.* *In re* PARISH OF CAISTER-ON-SEA 309
KOESSLER, WOODWARD *v.* 1255
KRUHLAK *v.* KRUHLAK (NO. 2) 606

L

LANCASHIRE BATTERIES LTD., GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. *v.* 655, 857
LEACH *v.* LEACH AND HARROWER (PRACTICE NOTE) 146
LEACH *v.* PUBLIC TRUSTEE. *In re* FRASER 6
LES FILS DREYFUS ET CIE SOCIÉTÉ ANONYME *v.* CLARKE 300
LITHERLAND URBAN DISTRICT COUNCIL *v.* LIVERPOOL CORPORATION 913
LIVERPOOL CORPORATION, LITHERLAND URBAN DISTRICT COUNCIL *v.* 913
LLOYD-JONES, REGINA *v.* *Ex parte* THOMAS 1110
LOCK *v.* LOCK 1248
LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD 1296
LONDON EXPORT CORPORATION LTD. *v.* JUBILEE COFFEE ROASTING CO. LTD. 271, 661
LONDON UNIVERSITY KING'S COLLEGE, WESTMINSTER CITY COUNCIL *v.* 920
LONG *v.* LLOYD 753
LONGLIFE BATTERY DEPOT (A FIRM), DUNLOP RUBBER CO. LTD. *v.* 1033
LYONS *v.* CENTRAL COMMERCIAL PROPERTIES LONDON LTD. 869

M

MCCARTAN, REGINA *v.* 933
MCDOUGALL *v.* AEROMARINE OF EMSWORTH LTD. 1126
MAINTENANCE AGREEMENTS (PRACTICE DIRECTION) 258
MCNEILL *v.* JOHNSTONE 888
MANCHESTER REGIONAL HOSPITAL BOARD, BARBER *v.* 181
MANCHESTER CORPORATION, INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* 1171
MANN, A DEBTOR, *In re.* *Ex parte* THE DEBTOR *v.* HARRODS LTD. 1272
MARGULIES BROTHERS LTD. *v.* DAFNIS THOMAIDES & CO. (U.K.) LTD. 398
MARLEY, REGINA *v.* 750
MARTINS BANK LTD., WOODS *v.* 1018
MATHESON, DECD., *In re* 246
MATHESON, REGINA *v.* 474
MEDCALF *v.* MEDCALF 338
MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT, REGINA *v.* *Ex parte* GRIFFITHS 517
MEDWAY BUILDING AND SUPPLIES LTD., BAKER (G. L.) LTD. *v.* 1216
METAL RECOVERY AND STORAGE CO. LTD. *v.* BUCKINGHAMSHIRE COUNTY COUNCIL .. 634
MICHAELIDES (A.) & CO., L. E. CATTAN LTD. *v.* 717
MINISTER OF HOUSING AND LOCAL GOVERNMENT, GODDARD *v.* 1151
MINISTER OF HOUSING AND LOCAL GOVERNMENT, REGINA *v.* *Ex parte* RANK ORGANIZATION LTD. 1093
MORGAN (VALUATION OFFICER), FATSTOCK MARKETING CORPORATION LTD. *v.* .. 357
MORIARTY *v.* EVANS MEDICAL SUPPLIES LTD. 66
MOXON'S WILL TRUSTS, *In re.* DOWNEY *v.* MOXON 165
MOYSE, THOMPSON (INSPECTOR OF TAXES) *v.* 1063

N

NALDER, CURTIS *v.* *In re* ALLAN, DECD. 220
NATIONAL COAL BOARD, *Ex parte* 599
NATIONAL COAL BOARD *v.* GALLEY 16
NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER, REGINA *v.* *Ex parte* RICHARDSON 851
NATTRASS, WHITTINGHAM *v.* 1016
NELSON *v.* NELSON 894
NELSON *v.* RIDER. *In re* RIDER'S WILL TRUSTS 974
NEWMAN *v.* NEWMAN 35
NOLAN *v.* DENTAL MANUFACTURING CO. LTD. 936
NORFOLK COUNTY COUNCIL *v.* KNIGHTS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE. *In re* PARISH OF CAISTER-ON-SEA 309
NORUM, HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* 721

PAGE

NORTH OF ENGLAND ZOOLOGICAL SOCIETY, *In re.* NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL 1258
NOSEDA, REGINA *v.* 793

O

ODHAMS PRESS LTD., GORFIN *v.* 314
O'CONNOR *v.* BRITISH TRANSPORT COMMISSION 346

P

PAPADOPOULLOS, ROSS-CLUNIS *v.* 546
PAROJCIC (ORSE. IVETIC) *v.* PAROJCIC 1280
PATMAN & FOTHERINGHAM LTD., GOLD *v.* 697
PIOTROWSKA *v.* PIOTROWSKI 797
POTTER, REGINA *v.* 638
PRACTICE DIRECTION (APPEAL) 1258
PRACTICE DIRECTION (APPLICATIONS) 1299
PRACTICE DIRECTION (AUCTIONEERS' REMUNERATION) 1279
PRACTICE DIRECTION (COURT FEES AND FIXED COSTS) 308
PRACTICE DIRECTION (FOREIGN MARRIAGES) 177
PRACTICE DIRECTION (INSANITY: APPOINTMENT OF GUARDIAN) 1015
PRACTICE DIRECTION (MAINTENANCE AGREEMENTS) 258
PRACTICE DIRECTION (MATRIMONIAL CAUSES ON CIRCUIT) 1105
PRACTICE DIRECTION (ORIGINATING SUMMONS FOR FORECLOSURE) 655
PRACTICE DIRECTION (PAYMENT OUT) 856
PRACTICE DIRECTION (REPRESENTATION: MENTAL INCAPACITY) 791
PRACTICE DIRECTION (RESTRICTIVE PRACTICES) 1213
PRACTICE DIRECTION (SERVICE OF NOTICE OF APPEAL OUT OF TIME) 761
PRACTICE DIRECTION (TRIALS IN MIDDLESEX) 1291
PRACTICE NOTE. DISTRICT BANK *v.* WEBB 66
PRACTICE NOTE (FEES FOR INTERLOCUTORY WORK IN MATRIMONIAL CAUSES) 492
PRACTICE NOTE (PRIVY COUNCIL: COSTS) 39
PRACTICE NOTE. WING *v.* SPRING 926
PRITAM SINGH, REGINA *v.* 143
PRIVY COUNCIL: COSTS (PRACTICE NOTE) 39
PUBLIC TRUSTEE, LEACH *v.* *In re* FRASER 6
PYE-SMITH *v.* INLAND REVENUE COMMISSIONERS 905

Q

QUALCAST (WOLVERHAMPTON) LTD., HAYNES *v.* 225
QUEEN, SURUJPAUL *v.* 1050

R

RACECOURSE BETTING CONTROL BOARD *v.* INLAND REVENUE COMMISSIONERS .. 122, 705
RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES) .. 122, 705
RATCLIFFE, SCALA BALLROOM (WOLVERHAMPTON) LTD. *v.* 1057
RAYMOND *v.* COOK 1098
RAYNER, AUTEN *v.* 1300
REGINA *v.* ADAIR 786
REGINA *v.* AYU 1264
REGINA *v.* BASTIAN 413
REGINA *v.* FIELD 793
REGINA *v.* FITZPATRICK 793
REGINA *v.* HONE 522
REGINA *v.* JOYCE 140
REGINA *v.* KNIGHT 793
REGINA *v.* LLOYD-JONES. *Ex parte* THOMAS 1110
REGINA *v.* MCCARTAN 933
REGINA *v.* MARLEY 750
REGINA *v.* MATHESON 474
REGINA *v.* MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT. *Ex parte* GRIFFITHS 517
REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* RANK ORGANIZATION LTD. 1093
REGINA *v.* NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER. *Ex parte* RICHARDSON 851
REGINA *v.* NOSEDA 793

PAGE
REGINA *v.* OLIVER AUTOS LTD. 522
REGINA *v.* POTTER 638
REGINA *v.* PRITAM SINGH 143
REGINA *v.* RICHARD 522
REGINA *v.* ST. MARGARETS TRUST LTD. 522
REGINA *v.* SMITH 312
REGINA *v.* VACCARI 297
REID *v.* THOMAS BOLTON & SONS LTD. 266
RICHARDS *v.* RICHARDS 1116
RICHARDSON, *Ex parte.* REGINA *v.* NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER 851
RIDER'S WILL TRUSTS, *In re.* NELSON *v.* RIDER 974
RIGBY, *Ex parte* 843
ROSS-CLUNIS *v.* PAPADOPOULLOS 546
ROYAL AIR FORCE ASSOCIATION, KITCHEN *v.* 563
ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE BOROUGH COUNCIL 95
RUTHERFORD *v.* R. E. GLANVILLE & SONS (BOVEY TRACEY) LTD. 415, 491
RUTTER *v.* SHERIDAN-YOUNG 444

S

S. (AN INFANT), *In re* 391
SABATH, BAYLIS BAXTER LTD. *v.* 529
SAGE, *In re* 387
SAHAL'S WILL TRUSTS, *In re.* ALLIANCE ASSURANCE CO. LTD. *v.* H.M. ATTORNEY-GENERAL 1243
ST. MARGARETS TRUST LTD., REGINA *v.* 522
ST. MARYLEBONE BOROUGH COUNCIL, ROYAL COLLEGE OF NURSING *v.* 95
ST. MICHAEL AND ALL ANGELS, BISHOPWEARMOUTH, *In re.* RECTOR AND CHURCHWARDENS OF BISHOPWEARMOUTH *v.* ADEY 1183
ST. PANCRAS BOROUGH COUNCIL, HORACE PLUNKET FOUNDATION *v.* 30
SAMROSE PROPERTIES LTD. *v.* GIBBARD 235
SAYERS *v.* HARLOW URBAN DISTRICT COUNCIL 623
SCALA BALLROOM (WOLVERHAMPTON) LTD. *v.* RATCLIFFE 1057
SCHLESINGER *v.* SCHLESINGER 882
SELSDON FOUNTAIN PEN CO. LTD., FOMENTO (STERLING AREA) LTD. *v.* 45
SERENE SHOES LTD., *In re* 1087
SHELL-MEX AND B.P. LTD. *v.* HOLYOAK (VALUATION OFFICER) 331
SHERIDAN-YOUNG, RUTTER *v.* 444
SILKIN *v.* BEAVERBROOK NEWSPAPERS LTD. 743
SILVER *v.* SILVER 259
SIMONS *v.* GALE 678
SKINNER, DECD., *In the Estate of* 1043
SMITH, REGINA *v.* 312
SOUTH DURHAM STEEL CO. LTD., BRAITHWAITE *v.* 986
SPRING, WING *v.* (PRACTICE NOTE) 926
SQUIRES, GRIFFIN *v.* 1106
STONE *v.* STONE 1287
SURUJPAUL *v.* THE QUEEN 1050
SUSSMAN (J. & P.) LTD., *In re* 519
SVEN WIDAEUS A/B, HEAVEN & KESTERTON LTD. *v.* 248
SWAN HUNTER & WIGHAM RICHARDSON LTD., TATE *v.* 39
SWANSEA CORPORATION, WORKING MEN'S CLUB AND INSTITUTE UNION LTD. *v.* .. 1135
SWIRSKY, *Ex parte. In re* A DEBTOR (NO. 472 OF 1950) 283

T

TARNPOLSK, DECD., *In re.* BARCLAYS BANK LTD. *v.* HYER 1157
TATE *v.* SWAN HUNTER & WIGHAM RICHARDSON LTD. 39
TAYLOR *v.* JOHN SUMMERS & SONS LTD. 491
TEASDALE *v.* WALKER 1076
TERSONS LTD., WOODLEY *v.* 1011
THOMAS, WILSON *v.* 422
THOMAS BOLTON & SONS LTD., REID *v.* 266
THOMSON (INSPECTOR OF TAXES) *v.* MOYSE 1063
THOMPSON (VALUATION OFFICER), HUDSON'S BAY CO. LTD. *v.* 955
TOBACCO TRADE BENEVOLENT ASSOCIATION CHARITABLE TRUSTS, *In re* 1118
TRANSPLANTERS (HOLDING COMPANY) LTD., *In re* 822
TROTT, DECD., *In re* 604
TRUSTEE, *Ex parte. In re* GREEN (A BANKRUPT) 405

V

PAGE
VACCARI, REGINA *v.* 297
VIENIT LTD. *v.* W. WILLIAMS & SON (BREAD STREET) LTD. 1267

W

W. WILLIAMS & SON (BREAD STREET) LTD., VIENIT LTD. *v.* 1267
WALKER, TEASDALE *v.* 1076
WALSH *v.* HOLST & CO. LTD. 800
WARD *v.* WARD 693
WEBB, DISTRICT BANK LTD. *v.* 148
WEBB (PRACTICE NOTE), DISTRICT BANK LTD. *v.* 66
WERNICK *v.* GREEN 92
WEST HAM BOROUGH COUNCIL, GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* 541
WESTMINSTER BANK LTD. *v.* BARFORD (INSPECTOR OF TAXES) 406
WESTMINSTER CITY COUNCIL *v.* LONDON UNIVERSITY KING'S COLLEGE 920
WHITTINGHAM *v.* NATTRASS 1016
WIGGINS *v.* WIGGINS (ORSE. BROOKS) AND INGRAM 1013
WIGRAM FAMILY SETTLED ESTATES LTD. *v.* INLAND REVENUE COMMISSIONERS .. 213
WILLIAMSON *v.* BRITISH BOXING BOARD OF CONTROL (1929) (PRACTICE NOTE) .. 539
WILSON *v.* THOMAS 422
WILSON *v.* WILSON 1090
WILSON BROTHERS LTD. *v.* EDWARDS (VALUATION OFFICER) 955
WING *v.* SPRING (PRACTICE NOTE) 926
WOOD BROTHERS (BIRKENHEAD) LTD., INLAND REVENUE COMMISSIONERS *v.* 64
WOODLEY *v.* TERSONS LTD. 1011
WOODS *v.* MARTINS BANK LTD. 1018
WOODWARD *v.* KOESSLER 1255
WORKING MEN'S CLUB AND INSTITUTE UNION LTD. *v.* SWANSEA CORPORATION .. 1135
WRIGHT *v.* BOYCE (INSPECTOR OF TAXES) 593, 832

Y

YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD .. 122, 705

Z

ZENAB, HASHAM *v.* 1214

ERRATA

Page 67, Headnote, last line: *For* "affirmed" *read* "affirmed "in part."

Page 140: Appearances: *M. D. L. Worsley* appeared with J. H. Buzzard for the Crown.

Page 445: Appearances: *A. E. Holdsworth* appeared for the defendant.

Page 664: *H. A. P. Fisher* appeared for the buyers.

Page 688: Solicitors in *In re Filby Bros. (Provender) Ltd.* should read: *Cosmo Cran & Co.; Hatchett Jones & Co.*

INDEX TO SUBJECT-MATTER

ACCOUNTANT—Duties. *See* PATENT.

ADMINISTRATION — *Administration pendente lite — Possibility of minority or life interest arising—Power to appoint a sole administrator—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 163 (1).
* IN THE ESTATE OF HASLIP, DECD.
Karminski J. 1 W.L.R. **583**

ADMIRALTY — *Practice — Appeal — Time for appealing—Period calculated from date when decree is perfected — Decree perfected when settled in Admiralty Registry—R.S.C., Ord.* 58, *r.* 4 (1).
THE AMERICAN JURIST AND THE CLAYCARRIER - - Willmer J. 1 W.L.R **792**

ADOPTION — *Consent of person liable to maintain — "Unreasonably withheld" — Test in case of putative father—Welfare of infant —"Parent"—Adoption Act*, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4) (*a*), 3.
* *In re* D., AN INFANT - C.A. 1 W.L.R. **197**

ADVANCEMENT — Presumption. *See* HUSBAND AND WIFE—Property.

AGENCY — *Auctioneer — Remuneration — Sales of freehold and leasehold properties—Variation of basic scale.*
* PRACTICE DIRECTION (AUCTIONEERS' REMUNERATION) - - Ch.D. 1 W.L.R. **1279**

2. —— Company auditor. *See* LIMITATION OF ACTION.

AGRICULTURE — *Agricultural holding—Notice to quit—Death of tenant—Administratrix of tenant—Whether "tenant with whom "the contract of tenancy was made"—Agricultural Holdings Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*g*).
* COSTAGLIOLA *v.* BUNTING
Norwich Assizes 1 W.L.R. **580**

2. —— *Agricultural holding — Notice to quit—Interests of efficient farming—Duty of tribunal to compare existing régime with that proposed by landlord—Jurisdiction of tribunal —Appeal — Certiorari or case stated — Agricultural Holdings Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 25 (1) (*a*), (5)—*Agriculture (Miscellaneous Provisions) Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 39), *s.* 6 (1).
Crown Practice — Certiorari — Error of law on face of record—Agricultural land tribunal —Whether statement of case part of record—Wrong exercise of jurisdiction—Whether case stated or certiorari appropriate remedy.
* DAVIES *v.* PRICE - C.A. 1 W.L.R. **434**

3. —— Agricultural holding. *See* LANDLORD AND TENANT—Business premises.

ANIMAL—*Poultry—Disease—Poultry bought and resold day later for slaughter—Poultry fed—Whether poultry "fed" for slaughter—Live Poultry (Movement Records) Order*, 1954 (*S.I.* 1954, *No.* 122), *art.* 2 (1).
* WERNICK *v.* GREEN Divl.Ct. 1 W.L.R. **92**

APPEAL — Admiralty — Time for. *See* ADMIRALTY.

2. —— Costs—Jurisdiction. *See* COSTS.

3. —— Criminal. *See* CRIMINAL LAW—Summing up.

4. —— To Divisional Court. *See* HUSBAND AND WIFE—Justices.

5. —— To House of Lords. *See* HOUSE OF LORDS.

6. —— Service of notice out of time. *See* COURT OF APPEAL.

7. ——. *See* HUSBAND AND WIFE—Practice.

ARBITRATION — *Arbitrator — Misconduct —Trade custom — Agreement to arbitrate according to rules of trade association—Trade custom that umpire should remain with appeal board in the absence of parties—Communication by umpire to board—Provision in rules that umpire not to be member of board or to elect members of board—Whether adoption of custom contrary to natural justice—Whether custom excluded by implication from terms of arbitration agreement.*
Contract — Custom or usage. Natural justice—Arbitration.
* LONDON EXPORT CORPORATION LTD. *v.* JUBILEE COFFEE ROASTING CO. LTD.
Diplock J. 1 W.L.R. **271**
C.A. 1 W.L.R. **661**

2. —— *Award—Form—Implied term that award capable of enforcement as judgment—Jurisdiction to remit—Uncertainty—Arbitration Act*, 1950 (14 *Geo.* 6, *c.* 27), *s.* 26.
Contract—Implied term.
* MARGULIES BROTHERS LTD. *v.* DAFNIS THOMAIDES & CO. (U.K.) LTD.
Diplock J. 1 W.L.R. **398**

3. —— *Costs — Discretion of arbitrator — Successful party normally entitled—Claimants awarded one-tenth of their claim—Ordered to pay whole costs of arbitration — Whether judicial exercise of discretion — Based on mistake of law—Whether judge may consider mistake of law.*
* HEAVEN & KESTERTON LTD. *v.* SVEN WIDAEUS A/B - Diplock J. 1 W.L.R. **248**

4. —— Costs. *See* COSTS.

5. —— *Stay of judicial proceedings—Submission to foreign court—Assignment of contract—Both parties strangers to foreign court*

ARBITRATION—*continued.*

—*Refusal to stay—Arbitration Act*, 1950 (14 *Geo.* 6, *c.* 27), *s.* 4.

* Cargo Lately Laden on Board the Fehmarn (Owners) *v.* Fehmarn (Owners). The Fehmarn
C.A. 1 W.L.R. **159**

BANKING — *Duty to customer — Advice on investment—Liability to customer.*

Practice and Procedure — Discovery — Affidavit of documents—Duty of solicitor.

Solicitor — Officer of court — Duty as — Discovery.

* Woods *v.* Martins Bank Ltd.
Salmon J. 1 W.L.R. **1018**

BANKRUPTCY — Gambling — Bankruptcy offence. *See* Criminal Law—Gambling.

2. —— Hearing in camera. *See* Court of Appeal.

3. —— *Inquiry as to debtor's dealings—Summons against solicitor—Proceedings under R.S.C., Ord.* 52, *r.* 25 *for an account against bankrupt's former solicitor and attorney—Failure by solicitor to furnish information concerning certain property transactions—No order made in the proceedings — Subsequent issue of summons by trustee under Bankruptcy Act*, 1914 — *Whether matter res judicata — Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.

Estoppel—Per rem judicatam.

* *In re* A Debtor (No. 472 of 1950). *Ex parte* Swirsky. - C.A. 1 W.L.R. **283**

4. —— *Receiving order—Payment of debt relied on — Application for withdrawal of original petition on debt being paid — Proceedings adjourned to ascertain position of other creditors—Receiving order made without substitution of another petitioner—Validity—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 111.

* *In re* Mann, A Debtor. *Ex parte* The Debtor *v.* Harrods Ltd.
Divl.Ct. 1 W.L.R. **1272**

BARRISTER — Fees — Adjourned hearings. *See* Costs—Trustee.

2. —— *Fees — Leading counsel — Issue of quantum of damages only — Disallowance of costs of leading counsel—Objection to taxation —Taxing master's discretion — R.S.C., Ord.* 65, *r.* 27 (41).

* Gorfin *v.* Odhams Press Ltd.
C.A. 1 W.L.R. **314**

3. —— Fees for interlocutory work in matrimonial causes. *See* Husband and Wife —Practice.

BUILDING — *Contract — R.I.B.A. form—Insurance — Subsidence of adjoining properties — No negligence by contractor—Damage covered by insurance by contractor in respect of own liability — Whether contractor bound under contract also to cover building owner, by insurance, against claim by adjoining owners.*

Insurance — Provision for, in contract — Whether interests of both parties to be covered—Building contract—R.I.B.A. form—Injury to adjoining properties—Whether contractor liable to cover by insurance liability of building owner as well as his own liability.

Contract—Uncertainty.

* Gold *v.* Patman & Fotheringham Ltd.
C.A. 1 W.L.R. **697**

CHARITY—*Children—Deprived of parents—Gift of dwelling-house for use as children's home—Gift of fund for benefit of children in home — Whether valid charitable gifts — Charitable Uses Act*, 1601 (43 *Eliz.* 1, *c.* 4), *preamble.*

* *In re* Sahal's Will Trusts. Alliance Assurance Co. Ltd. *v.* H.M. Attorney-General
Danckwerts J. 1 W.L.R. **1243**

2. —— *Education — Zoological Society — Objects — Advancement of education — Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

Rates and Rating—Social welfare, etc.—"Main objects" — Meaning — Distinction between objects and powers — Education — Zoological Society — Memorandum — Main objects to encourage study of zoology and kindred sciences — Whether main objects "charitable or . . . otherwise concerned with "the advancement of . . . education"— Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

* *In re* North of England Zoological Society. North of England Zoological Society *v.* Chester Rural District Council - - Vaisey J. 1 W.L.R. **1258**

3. —— *Profession — Nursing — Rates and rating—"Social welfare"—Royal College of Nursing—Claim for rating relief—Two main objects—Whether both charitable—"Advance "of nursing as a profession" — Meaning — Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

* Royal College of Nursing *v.* St. Marylebone Borough Council
Divl.Ct. 1 W.L.R. **95**

4. —— *Rules — Alteration — Unincorporated association — No power in original rules to alter rules — Subsequent purported alterations to rules—Whether effective.*

Charity — Investments — Rules — Scope of power to invest outside trustee securities.

* *In re* Tobacco Trade Benevolent Association Charitable Trusts
Harman J. 1 W.L.R. **1113**

CHILD—Fall from railway carriage. *See* Railway.

COMPANY — Amalgamation — Scheme — Transfer of rights and duties—Continuation by transferor company of duties as executors. *See* Executor and Administrator.

2. —— Auditor—Agency. *See* Limitation of Action.

3. —— *Capital — Reduction — Conditional resolution — Resolutions that upon "reduc-"tions of capital taking effect" operations*

COMPANY—*continued.*

to take place not requiring sanction of court preceding operation requiring sanction of the court—All operations requiring sanction of the court to be treated as preceding conditional resolution—Not correct procedure when operations not requiring sanction of court part of scheme of reduction of capital—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 61, 66, 67, 69.
* *In re* CASTIGLIONE, ERSKINE & CO. LTD.
Roxburgh J. 1 W.L.R. **688**

4. —— Shares—Issue—Passing of property to shareholder. *See* REVENUE—Estate duty.

5. —— *Winding up — Petition — Incorrect spelling of company's name in petition, advertisement and winding-up order—Application for leave to amend—Jurisdiction.*
* *In re* J. & P. SUSSMAN LTD.
Vaisey J. 1 W.L.R. **519**

6. —— *Winding up — Petition — Petition presented in county court—Subsequent petition presented in High Court—Concurrent jurisdiction — Transfer of proceedings to High Court—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 219.
* *In re* FILBY BROS. (PROVENDER) LTD.
Roxburgh J. 1 W.L.R. **683**

7. —— *Winding up — Voluntary liquidation — Report by official receiver — Whether appropriate — Meaning of "the official "receiver"—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 256 (1) (2), 307 (1) (2).
* *In re* SERENE SHOES LTD.
Vaisey J. 1 W.L.R. **1087**

COMPULSORY PURCHASE—*Declaration of clearance area—Validity—Condition precedent —Whether council can be "satisfied" acting through their committees — "Resources" — Housing Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 56), *ss.* 42 (1), 43 (1) (2).
* GODDARD *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT
Lord Parker C.J. 1 W.L.R. **1151**

CONDONATION. *See* HUSBAND AND WIFE.

CONFLICT OF LAWS—*Domicile—Change—Soldier—Acquisition of domicile of choice by soldier.*
* STONE *v.* STONE
Collingwood J. 1 W.L.R. **1287**

CONSPIRACY—*Lawful protection of interest — Colour bar — Exclusion of coloured people from dance hall—Musicians' Union retaliate by banning members from performing in orchestra — Predominate reason for ban — Interest of members.*
* SCALA BALLROOM (WOLVERHAMPTON) LTD. *v.* RATCLIFFE - - C.A. 1 W.L.R. **1057**

CONSTITUTIONAL LAW. *See* DELEGATED LEGISLATION.

CONTRACT—Implied term. *See* ARBITRATION.

2. —— Innocent misrepresentation. *See* SALE OF GOODS.

CONTRACT—*continued.*

3. —— Notice of conditions. *See* RESTRICTIVE PRACTICES.

4. —— R.I.B.A. *See* BUILDING.

5. —— transfer of hospital consultant. *See* NATIONAL HEALTH SERVICE.

COSTS — *Appeal — Jurisdiction — Judgment for plaintiffs at trial—Plaintiffs refused costs because of unsatisfactory witness—Appeal as to costs without leave of judge—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 31 (1), 50 (1)—*R.S.C., Ord.* 65, *r.* 1.
Costs — Set-off — Counterclaim or set-off—Counterclaim amounting to equitable set-off.
* BAYLIS BAXTER LTD. *v.* SABATH
C.A. 1 W.L.R. **529**

2. —— of application to settle terms of new tenancy. *See* LANDLORD AND TENANT—Business premises.

3. —— Counsel's fees for interlocutory work—Matrimonial causes. *See* HUSBAND AND WIFE—Practice.

4. —— *County court action — Action for "payment of money"—Claim for unliquidated damages—Costs incurred by plaintiff before issue of summons — Fixed costs marked on summons by court officers — Payment into court within eight days—Whether plaintiff can recover taxed costs—Whether claim for damages an action for "the payment of "money"—County Court Rules*, 1936 (*S.R. & O.*, 1936, *No.* 626/*L.*17), *Appendix D—County Court (Amendment) Rules*, 1957 (*S.I.* 1957, *No.* 174 (*L.*1)), *Ord.* 11, *r.* 1 (1) (*b*).
* REID *v.* THOMAS BOLTON & SONS LTD.
C.A. 1 W.L.R. **266**

5. —— *Court fees and fixed costs—Alteration—Supreme Court Fees (Amendment) Order*, 1958 (*S.I.* 1958, *No.* 160 (*L.*3)).
PRACTICE DIRECTION (COURT FEES AND FIXED COSTS) - Sup.Ct. 1 W.L.R. **308**

6. —— Disallowance of leading counsel's fees. *See* BARRISTER.

7. —— Discretion of arbitrator. *See* ARBITRATION.

8. —— judicial separation—Woman named. *See* HUSBAND AND WIFE.

9. —— Lump sum—Non-contentious business — Client's right to itemised bill. *See* SOLICITOR.

10. —— *Taxation — Objection — Taxing master's certificate irregular — Summons to review incompetent—"Donaldson" practice —R.S.C., Ord.* 65, *r.* 27 (39) (40) (41).
* *In re* FRASER. LEACH *v.* PUBLIC TRUSTEE
Roxburgh J. 1 W.L.R. **6**

11. —— *Third party proceedings—Sale of goods—String contract—Claim for price of goods sold and delivered — Counterclaim by buyers that goods not of contract quality—Sellers joined suppliers as third party—Third*

COSTS—*continued.*

party joined by fourth party — Failure of counterclaim—Sellers ordered to pay costs of third and fourth parties—Buyers ordered to pay sellers' own costs but not costs payable to third and fourth parties — Injudicial exercise of discretion.

Arbitration—Costs—Discretion of arbitrator.

* L. E. Cattan Ltd. *v.* A. Michaelides & Co. (Turkie, Third Party, George (Trading as Yarns & Fibres Co.) Fourth Party)

Diplock J. 1 W.L.R. **717**

12. —— *Trustee—Indemnity as to costs—Counsel's fees — Hearings adjourned and curtailed—Payment of full fees demanded—Whether trustees entitled to indemnity.*

Barrister—Fees—Brief fee—Hearings frequently adjourned — Trustee's right to indemnity.

* *In re* Grimthorpe, decd.

Danckwerts J. 1 W.L.R. **381**

13. ——. *See* Legal Aid.

COUNTERCLAIM—Set-off. *See* Costs.

COUNTY COURT—Costs. *See* Costs.

2. —— *Transfer of proceedings to other county court—Proceedings "more conveniently "or fairly tried in another court"—Second action arising out of same facts as first action —Application to transfer—Discretion of judge —Judge's duty on trying second action — County Court Rules*, 1936, *Ord.* 16, *r.* 1 (1).

* Birch *v.* County Motor and Engineering Co. Ltd. - C.A. 1 W.L.R. **980**

COURT OF APPEAL—*Hearing in camera — Bankruptcy — Application for private examination of witness — Interests of justice—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.

Bankruptcy—Hearing in camera—Court of Appeal.

* *In re* Green (A Bankrupt), *ex parte* The Trustee - - C.A. 1 W.L.R. **405**

2. —— *Notice of appeal — Service out of time — Dispensation with application for extension of time—R.S.C., Ord.* 64, *r.* 7.

* Practice Direction (Service of Notice of Appeal out of Time)

C.A. 1 W.L.R. **761**

CRIMINAL LAW—*Accessory before the fact — Counselling or procuring felony — Alleged principals acquitted but another found guilty as accessory—Whether verdicts inconsistent—Murder—Criminal Law (Offences) Ordinance (Laws of British Guiana*, 1930, *c.* 18), *ss.* 24, 25—*Accessories and Abettors Act*, 1861 (24 *&* 25 *Vict. c.* 94), *ss.* 1, 2.

Criminal Law — Evidence — Confession — Hearsay—Whether confession based on hearsay evidence against confessor.

British Guiana.

Surujpaul *v.* The Queen

J.C. 1 W.L.R. **1050**

2. —— *Carrying offensive weapon—"Offen-"sive weapon"—Boys breaking into cinema —Sheath knife used to frighten caretaker—*

CRIMINAL LAW—*continued.*

Whether knife an offensive weapon—Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (4).

* Woodward *v.* Koessler

Divl.Ct. 1 W.L.R. **1255**

3. —— *Evidence — Confession — Inducement—Must relate to charge or accusation to render admission inadmissible.*

* Regina *v.* Joyce - C.C.C. 1 W.L.R. **140**

4. —— *Evidence — Statutory declaration — Goods stolen from railway station—Proof of dispatch — Statutory declaration made by packers—Form—Exact terms of statute to be complied with—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 41 (3).

* Regina *v.* Marley - C.C.A. 1 W.L.R. **750**

5. —— *False pretences—Procuring delivery of chattel with intent to defraud—Impersonation at driving test in order to obtain certificate of competence to drive to enable another person to obtain driving licence—Larceny Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

Criminal Law—Forgery—False document —Signature on certificate of competence to drive — Signature in driving examiner's journal — Impersonation at driving test to enable another person to obtain driving licence—Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 1—*Criminal Justice Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 35 (1).

* Regina *v.* Potter

Leicester Assize 1 W.L.R. **638**

6. —— *Gambling — Contribution to insolvency by gambling—Liability for income tax at date of receiving order—Large sums lost by gambling within two previous years—Whether offence committed—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 157 (1) (*a*) (*b*).

* Regina *v.* Vaccari - C.C.A. 1 W.L.R. **287**

7. —— Indictable offence triable summarily —*See* Justices.

8. —— *Indictment—Separate indictments—One charging manslaughter, the other stealing or receiving — Common evidence — Joinder of charges in one indictment—Purpose of joinder —Voluntary bill.*

Criminal Law — Evidence — Depositions — Reading at trial—Substituted voluntary bill of indictment—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 13 (3).

* Regina *v.* Smith - C.C.C. 1 W.L.R. **312**

9. —— *Mens rea — Statutory prohibition — Hire-purchase — Finance company unaware that requirements not complied with—Whether guilty of an offence—Hire-Purchase and Credit Sale Agreements (Control) Order*, 1956 (*S.I.* 1956, *No.* 180), *art.* 1.

Hire-Purchase—Credit control.

* Regina *v.* St. Margarets Trust Ltd. Regina *v.* Oliver Autos Ltd. Regina *v.* Richard. Regina *v.* Hone

C.C.A. 1 W.L.R. **522**

10. —— *Murder—Diminished responsibility —Right of prosecution to prove insanity—Onus of proof—Homicide Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

Criminal Law — Insanity — Diminished

CRIMINAL LAW—*continued.*
responsibility—right of prosecution to prove insanity on plea of diminished responsibility.
* REGINA *v.* BASTIAN - C.C.C. 1 W.L.R. **413**

11. —— *Murder—Diminished responsibility—Standard of proof—Medical evidence as to state of mind—Unchallenged medical evidence that abnormality such as substantially to impair mental responsibility—No evidence to contrary—Verdict of murder—Whether in accordance with evidence—Homicide Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.
Criminal Law — Murder — Diminished responsibility — Practice — Plea of guilty to manslaughter not to be accepted—Practice to be followed when defence ask for verdict of manslaughter on ground of diminished responsibility and some other ground.
* REGINA *v.* MATHESON
C.C.A. 1 W.L.R. **474**

12. —— *Perjury — Oath — Sikh — Oath impracticable — Affirmation — Whether lawfully sworn—Oaths Act,* 1888 (51 *&* 52 *Vict. c.* 46), *s.* 1—*Perjury Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 6), *ss.* 1 (1), 15.
Evidence—Oath.
* REGINA *v.* PRITAM SINGH
Leeds Assizes 1 W.L.R. **143**

13. —— *Sentence — Borstal training — Further offence—Appropriate sentence.*
* REGINA *v.* NOSEDA. REGINA *v.* FIELD. REGINA *v.* KNIGHT. REGINA *v.* FITZPATRICK - - C.C.A. 1 W.L.R. **793**

14. —— *Sentence — Concurrent sentences — Form — Indictment containing several counts—Sentence of "four years' corrective "training" — conviction on first count quashed — Whether concurrent sentences—Whether particular form of words necessary—Clear intention to pass concurrent sentences—Whether sentence on other counts in existence.*
* *In re* HASTINGS - Divl.Ct. 1 W.L.R. **372**

15. —— *Sentence — Irish, dealing with — Probation order — Recognizance — Citizen of Ireland—Power to make term of order that he should return to Ireland—Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 3.
* REGINA *v.* MCCARTAN
C.C.A. 1 W.L.R. **933**

16. —— *Sentence — Overseas, sending offender back—Binding over—Recognizance—Power to make term of order that Nigerian offender should return to Nigeria.*
* REGINA *v.* AYU - C.C.A. 1 W.L.R. **1264**

17. —— *Summing up — Direction to jury after retirement — Question from jury—Whether relevant evidence should be reviewed.*
Criminal Law—Court of Criminal Appeal—Substitution of verdict—Alternative counts—Conviction on larceny count—No verdict on receiving count—Court's power to substitute verdict of receiving — Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).
Criminal Law—Larceny—Alternative counts for larceny or receiving—Conviction on one and no verdict on other—Appeal—Substitution of verdict—Criminal Appeal Act, 1907, *s.* 5 (2).
* REGINA *v.* ADAIR - C.C.A. 1 W.L.R. **786**

CRIMINAL LAW—*continued.*

18. ——. *See* MENTAL DEFICIENCY.

CROWN — *Privilege — Evidence — Police reports and other documents falling within privileged class—Public interest—Minister's certificate — Whether conclusive — Nature of Minister's function.*
* AUTEN *v.* RAYNER - C.A. 1 W.L.R. **1300**

CROWN PRACTICE—Mandamus—Marriage Register. *See* HUSBAND AND WIFE.

2. ——. *See* AGRICULTURE.

DAMAGES — Acceptance by widow of lump sum for herself and infants. *See* FATAL ACCIDENTS ACTS.

2. —— Continuing breach. *See* MASTER AND SERVANT.

3. —— Fatal Accidents Acts — Insurance. *See* NEGLIGENCE.

4. —— *Personal injuries — Husband and wife — Wife in hospital at distance from home—Unpaid leave taken by husband to be near wife — Consortium — Whether husband entitled to recover loss of earnings during unpaid leave.*
* MCNEILL *v.* JOHNSTONE
Devlin J. 1 W.L.R. **888**

DEFAMATION—Fair comment. *See* LIBEL AND SLANDER.

DELEGATED LEGISLATION — *Public safety or order—Relation to purpose—Cyprus—Collective punishment regulations—Validity — Collective fine order — Prior inquiry — Whether statutory requirements complied with—Emergency Powers Order in Council,* 1939, *s.* 6 (1)—*Emergency Powers (Collective Punishment) Regulations,* 1955 *to* (*No.* 1), 1955, *regs.* 3, 5 (1) (2). *Cyprus.*
Minister—Determination by—Whether subject to review by courts — Required to be "satisfied"—Whether any grounds on which he could be satisfied—"As he thinks fit"—Cyprus commissioner—Collective fine order.
* ROSS-CLUNIS *v.* PAPADOPOULLOS
J.C. 1 W.L.R. **546**

DESERTION. *See* HUSBAND AND WIFE.

DOMICILE. *See* CONFLICT OF LAWS.

ECCLESIASTICAL LAW—*Faculty—Burial ground—Disinterment—Jurisdiction to grant faculty for disinterment of body from consecrated ground for cremation and subsequent re-interment of ashes.*
* *In re* MATHESON, DECD.
Liverpool Consistory Court
1 W.L.R. **246**

2. —— *Faculty — Burial ground — Disinterment followed by reinterment in communal grave—Road widening scheme.*
Cemetery.
**In re* PARISH OF CAISTER-ON-SEA. NORFOLK COUNTY COUNCIL *v.* KNIGHTS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE - - Norwich Consistory Ct.
1 W.L.R. **309**

ECCLESIASTICAL LAW—*continued.*

3. —— *Faculty — Aumbry — Reservation —Whether reservation of the Blessed Sacrament theologically permissible and whether reservation an illegal ceremony — Whether aumbry an illegal ornament.*
**In re* St. Michael and All Angels, Bishopwearmouth. Rector and Churchwardens of Bishopwearmouth *v.* Adey.
Garth Moore Ch. 1 W.L.R. **1183**

ESTOPPEL—*By conduct—Mortgage—Recital in conveyance that vendors "seised in un-"encumbered fee simple in possession"—Conveyance subject to lease — Vendors in possession as lessees — Legal charge — Claim for possession by mortgagee—Whether vendors estopped from setting up existence of lease.*
* District Bank Ltd. *v.* Webb
Danckwerts J. 1 W.L.R. **148**

2. —— *Per rem judicatam — Husband and wife—Divorce—Petition for divorce on the ground of adultery and desertion dismissed in exercise of court's discretion—Contents of the petition "sufficiently proved" — Whether parties estopped in subsequent suit for divorce from repeating and denying same charges.*
* Bernard *v.* Bernard (Sutton cited)
Barnard J. 1 W.L.R. **1275**

3. —— Res judicata. *See* Bankruptcy.

EVIDENCE—Admission by infant. *See* Husband and Wife—Divorce.

2. —— Confession. *See* Criminal Law.

3. —— Oath—Perjury. *See* Criminal Law.

4. —— Privilege — Police reports. *See* Crown.

5. —— Statutory declaration. *See* Criminal Law.

6. —— To explain latent ambiguity in will —Admissibility in specific performance action. *See* Vendor and Purchaser.

7. ——. *See* Criminal Law—Indictment; Husband and Wife.

EXECUTOR AND ADMINISTRATOR — *Trust corporation—Pending dissolution—Bank named as executor in will—Probate action commenced by bank—Subsequent amalgamation with another bank—Whether first bank entitled to continue action or act as executor after transfer date.*
Company — Amalgamation — Scheme — Transfer of rights and duties—Continuation by transferor company of duties as executors —Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 206 *and* 208—*Public Trustee Rules,* 1912, *as amended* (*S.R. & O.* 1912, *No.* 348 (*L.*9) *r.* 30).
**In the Estate of* Skinner, decd.
Sachs J. 1 W.L.R. **1043**

FACTORY — *Dangerous machinery (fencing) —Injury from fence—Carborundum wheel—Disintegration — Fence shifted — Injury — Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16.
* Rutherford *v.* R. E. Glanville & Sons (Bovey Tracey) Ltd.
C.A. 1 W.L.R. **415**

FACTORY—*continued.*

2. —— Definition. *See* Rates and Rating.

3. —— *Eyes — Protection — Dry-grinding —Failure to provide goggles—Breach of duty not shown to be cause of accident—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 49 *—Protection of Eyes Regulations,* 1938 (*S.R. & O.*, 1938, *No.* 654), *reg.* 1, *Sch.*
Negligence—Safe system of work—Goggles —Dry-grinding—Employers' statutory duty to provide goggles—Goggles not provided—Probability that goggles would not have been used except under compulsion—Common law duty to provide goggles and ensure their use.
* Nolan *v.* Dental Manufacturing Co. Ltd. - - - Paull J. 1 W.L.R. **936**

4. —— *Floor — Opening — Plankway — Whether plankway used by workmen for access to different parts of shipyard gantries a "floor" — Workman falling through unfenced aperture in plankway—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (3).
* Tate *v.* Swan Hunter & Wigham Richardson Ltd. - C.A. 1 W.L.R. **39**

5. —— *Lift—Gates—Duty to prevent person coming into contact with moving part —Person inserting hand through gates—Injury to hand by movement of lift—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 22 (3).
* Blakeley *v.* C. & H. Clothing Co. (a Firm) - Manchester Assizes 1 W.L.R. **378**

FAMILY PROVISION — *Limitation — Extension of time — Person having "an "interest in the estate" — Circumstance affecting the administration or distribution of the estate—Posthumous child of deceased —Summons issued after expiration of six-month period — Inheritance (Family Provision) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *as amended, s.* 2 (1a) (*b*) *and* (*c*).
**In re* Trott, decd. Trott *v.* Miles
Upjohn J. 1 W.L.R. **604**

FATAL ACCIDENTS ACTS — *Damages — Administration — Administration by trustees instead of court—R.S.C., Ord.* 22, *r.* 14 (1) (9).
* Woodley *v.* Tersons Ltd.
Devlin J. 1 W.L.R. **1011**

2. —— *Damages — Voluntary payment — Acceptance by widow of lump sum on behalf of herself and infants — Whether binding — Jurisdiction of court—R.S.C., Ord.* 22, *r.* 14 (1), (9).
* Jeffrey *v.* Kent County Council
Paull J. 1 W.L.R. **927**

FRAUD—On court. *See* Husband and Wife —Practice.

GAMING—Bankruptcy offence. *See* Criminal Law—Gambling.

HIRE PURCHASE — Credit control. *See* Criminal Law—Mens rea.

HOSPITAL—Dismissal of consultant. *See* National Health Service.

HOUSE OF LORDS—*Leave to appeal—Terms—Money in dispute deposited at low rate of interest.*
* INLAND REVENUE COMMISSIONERS *v.* WOOD BROTHERS (BIRKENHEAD) LTD.
H.L.(E.) 1 W.L.R. **64**

HOUSING—*Rent—Scheme by local authority — Differential rent scheme — Rebates lost if tenant's income increased — Duty to inform council of increase — Failure of tenant to inform council — Under-payments of tenant added to next year's rent — Tenancy determined—Whether tenant liable for rebates not refunded.*
* HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* NORUM - C.A. 1 W.L.R. **721**

HUSBAND AND WIFE—*Alimony pendente lite—Judicial separation—Appeal pending—Appeal by wife against her own decree—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (1).
* SCHLESINGER *v.* SCHLESINGER
Sachs J. 1 W.L.R. **882**

2. —— *Condonation — "Knowledge" of adultery — Ingrained suspicion — Wrong man suspected of adultery—Continuance of conjugal cohabitation — Whether with requisite knowledge of all material facts.*
* BURCH *v.* BURCH - Sachs J. 1 W.L.R. **480**

3. —— *Cruelty — Intention to injure — Frigidity — Wife's deliberate refusal to have children ripening into complete refusal of sexual intercourse — Knowledge of injurious effect of refusal on husband.*
* WARD *v.* WARD - Scarborough District Registry (Mr. Commissioner McKee)
1 W.L.R. **693**

4. —— *Desertion — Just cause — Adultery, reasonable belief in—Evidence—Whether evidence of opportunity necessary.*
* COX *v.* COX - Divl.Ct. 1 W.L.R. **340**

5. —— *Desertion—Separation agreement—Consensual oral separation — Written agreement for maintenance—No term in agreement defining period of separation — Subsequent offer by wife to return rejected by husband—Whether husband in desertion — Copies of agreement dated and exchanged after rejection of wife's offer — Whether consensual separation revived.*
* BOSLEY *v.* BOSLEY - C.A. 1 W.L.R. **645**

6. —— *Divorce — Evidence — Admissions by infants—Admissibility.*
Evidence — Admission — Infant, by — Admissions by infants before proceedings—Admissibility.
* ALDERMAN *v.* ALDERMAN AND DUNN
Sachs J. 1 W.L.R. **177**

7. —— *Divorce—Insanity—Care and treatment — Incurable unsoundness of mind — Divorce (Insanity and Desertion) Act*, 1958 (6 *& 7 Eliz.* 2, *c.* 54), *s.* 1.
* LOCK *v.* LOCK
Mr. Commr. Latey Q.C. 1 W.L.R. **1248**

8. —— *Divorce — Insanity — Incurable unsoundness of mind—Appointment of guardian*

HUSBAND AND WIFE—*continued.*
—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 66 (9).
* PRACTICE DIRECTION (INSANITY: APPOINTMENT OF GUARDIAN)
Probate 1 W.L.R. **1015**

9. —— *Judicial separation—Costs—Power of court to order woman named to pay wife's costs—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 3 (2), 14 (1).
* LEACH *v.* LEACH AND HARROWER (PRACTICE NOTE) - Mr. Commissioner Latey Q.C.
1 W.L.R. **146**

10. —— *Justices — Appeal to Divisional Court—Fraud alleged—Procedure—Appeal by notice of motion — Summary Jurisdiction (Married Women) Act*, 1895 (58 *& 59 Vict. c.* 39), *s.* 11—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619 (*L.*4)), *rr.* 36 (1), 73 (2).
* BYATT *v.* BYATT
Probate Div. 1 W.L.R. **1**

11. —— *Justices — Appeal to Divisional Court—Certificate of other pending matrimonial proceedings.*
* PRACTICE DIRECTION (APPEAL)
Probate 1 W.L.R. **1258**

12. —— *Maintenance — Agreement — Death of party—Alteration of agreement after death of one party—Permission of court to apply—Application to be included in summons for directions—Maintenance Agreements Act*, 1957 (5 *& 6 Eliz.* 2, *c.* 35), *s.* 2 (1).
* PRACTICE DIRECTION (MAINTENANCE AGREEMENTS) - - - Probate 1 W.L.R. **258**

13. —— *Maintenance—High Court—Quantum—Husband's capital made over to mistress to invest in business—Business run by both—Husband ordered to pay whole of private income to wife and children — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.
* DONALDSON *v.* DONALDSON
Karminski J. 1 W.L.R. **827**

14. —— *Maintenance — Justices — Adultery by wife—Fresh evidence—Application to discharge order—Practice—Summary Jurisdiction (Married Women) Act*, 1895 (58 *& 59 Vict. c.* 39), *s.* 7.
* NEWMAN *v.* NEWMAN
Divl.Ct. 1 W.L.R. **35**

15. —— *Maintenance — Justices — Jurisdiction — Application to vary order — Order revoked without complaint to revoke being made—No jurisdiction to revoke.*
Husband and Wife—Maintenance—Justices —Revocation of order—Possibility of reviver.
* BOWEN *v.* BOWEN - Divl.Ct. 1 W.L.R. **508**

16. —— *Marriage — Foreign marriages — Proof—Proof of foreign marriage in Divorce Division.*
* PRACTICE DIRECTION (FOREIGN MARRIAGES)
Probate Div. 1 W.L.R. **177**

17. —— *Marriage — Register — Amendment —Court's jurisdiction — Whether mandamus lies to correct or erase entry—Authority to register marriage—Void marriage—Meaning of "marriage"—Marriage Act*, 1836 (6 *& 7*

HUSBAND AND WIFE—*continued.*

Will. 4, *c.* 85), *s.* 23—*Marriage Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 76), *s.* 61.

Crown Practice — Mandamus — Marriage register—Whether mandamus lies to correct entry.

* DINIZULU *v.* ATTORNEY-GENERAL
Paull J. 1 W.L.R. **1252**

18. —— *Nullity — Duress — Petitioner forced to go through marriage ceremony by her father's threats.*

* PAROJCIC (ORSE. IVETIC) *v.* PAROJCIC
Davies J. 1 W.L.R. **1280**

19. —— *Nullity — Incapacity — Proof of — Parties only together for short period — Husband's impotence established.*

* B. (ORSE. S.) *v.* B.
Barnard J. 1 W.L.R. **619**

20. —— *Nullity—Remarriage—Remarriage before decree made absolute—Whether second marriage bigamous.*

* WIGGINS *v.* WIGGINS (ORSE. BROOKS) AND INGRAM
Mr. Commissioner Carr 1 W.L.R. **1013**

21. —— *Nullity—Epilepsy—Finding of recurrent fits of epilepsy at time of ceremony—Whether competent to investigate question of wilful refusal to consummate — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 8 (1) (*b*).

* IDDENDEN (ORSE. BRAINS) *v.* IDDENDEN
Collingwood J. 1 W.L.R. **1041**

22. —— *Practice—Submission of no case—Divorce—Submission of no case by husband——Election.*

* WILSON *v.* WILSON
Karminski J. 1 W.L.R. **1090**

23. —— Personal injuries—Loss of consortium. *See* DAMAGES.

24. —— *Practice — Amendment to allege adultery—Discretion statement—Amendment of petition at trial to add charge of adultery based on facts disclosed in discretion statement.*

* CLUEIT *v.* CLUEIT
Birmingham Assizes 1 W.L.R. **463**

25. —— *Practice—Appeal—Time bar—Refusal of decree—Notice of appeal served within six weeks of order—Appeal not set down within six weeks of order — Appeal against refusal of decree not governed by rule applicable to appeals against a decree nisi—Proper practice—R.S.C., Ord.* 58, *rr.* 4, 5, 15.

* MEDCALF *v.* MEDCALF - C.A. 1 W.L.R. **338**

26. —— *Practice—Fresh evidence—Application to call fresh evidence after judgment reserved—Evidence not immediately relating to issues pleaded — Irrelevance — Application refused.*

* BURGESS *v.* BURGESS
Collingwood J. 1 W.L.R. **608**

27. —— *Practice—Costs—Counsel's fee for interlocutory work.*

Barrister — Fees — Matrimonial causes — Interlocutory work.

* PRACTICE NOTE. (FEES FOR INTERLOCUTORY WORK IN MATRIMONIAL CAUSES)
1 W.L.R. **492**

HUSBAND AND WIFE—*continued.*

28. —— *Practice — New trial — Divorce—Adultery—Denial of adultery—Dismissal of wife's petition—Later confession to perjured evidence on behalf of husband—Application for new trial—R.S.C., Ord.* 58, *r.* 10.

Fraud—Fraud to court.

* PIOTROWSKA *v.* PIOTROWSKI
C.A. 1 W.L.R. **797**

29. —— *Practice — Pleading — Amendment to allege adultery—Discretion statement —Petition by wife for decree on ground of cruelty—Answer by husband denying cruelty and alleging cruelty by wife — Discretion statement by wife admitting adultery—Application by husband during trial of petition to amend answer by alleging adultery by wife and to serve notice on alleged co-respondent.*

Husband and Wife—Maintenance—Divorce —Relevance of who obtained decree—Whole conduct of parties.

* CLEAR *v.* CLEAR - C.A. 1 W.L.R. **467**

30. —— *Practice — Pleading — Petition —Amendment—Application for leave to add allegations of cruelty in petition founded on desertion—Applicability of ordinary rules as to amendment—R.S.C., Ord.* 28, *r.* 1—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 82.

* NELSON *v.* NELSON - C.A. 1 W.L.R. **894**

31. —— *Property — Proceedings under Married Women's Property Act*, 1882, *s.* 17—*House purchased for home—Purchase in name of wife—Mortgage instalments paid by husband — Presumption of advancement — Husband's claim to share in house — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.

Advancement—Presumption—Husband and wife—Purchase of matrimonial home in name of wife.

* SILVER *v.* SILVER - C.A. 1 W.L.R. **259**

32. —— *Practice—Cause list—Matrimonial causes on circuit—Remission between assizes —Order of entry in list.*

* PRACTICE DIRECTION (MATRIMONIAL CAUSES ON CIRCUIT) - Probate 1 W.L.R. **1105**

33. —— *Practice — Service of charges on woman named—Allegations by wife of associations by husband with married women—Associations not adulterous but discreditable.*

* GREEN *v.* GREEN AND PARTRIDGE
Birmingham Assizes 1 W.L.R. **1104**

34. —— *Property—Proceedings under Married Women's Property Act*, 1882, *s.* 17—*House purchased for home of two families—Purchase in name of wife and her father without husband's knowledge—Husband serving abroad at date of purchase—Purchase-money and subsequent mortgage instalments partly provided out of voluntary naval allotments made by husband to wife—Presumption of advancement in respect of allotments—Husband's claim to share in house and certain chattels not sustainable — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.

* RICHARDS *v.* RICHARDS
C.A. 1 W.L.R. **1116**

INDUSTRIAL INJURY — Proof. *See* NATIONAL INSURANCE.

INFANT — *Custody — Appeal from justices —Order directing change of custody — Stay pending appeal often necessary—Guardianship of Infants Acts*, 1886–1951.

Infant — Custody — Chancery Division — Hearing in open court—Question raised of great public importance.

* *In re* S. (AN INFANT)
Roxburgh J. 1 W.L.R. **391**

INSANITY—Diminished responsibility. *See* CRIMINAL LAW—Murder.

2. ——. *See* HUSBAND AND WIFE—Divorce.

INSURANCE — *Marine — Warranty — Construction — Carriage of cattle — All arrangements for conversion of vessel made "at inception of this insurance"—Meaning — When insurance cover was obtained — "All arrangements"—Construction.*

SIMONS *v.* GALE - J.C. 1 W.L.R. **678**

JUDICIAL PRECEDENT—Fact. *See* RAILWAY.

2. —— Statute—Construction. *See* RATES AND RATING.

3. ——. *See* LANDLORD AND TENANT—Business premises.

JUSTICES—Appeal to Divisional Court. *See* HUSBAND AND WIFE.

2. —— *Case stated — Limitation — Extending time for stating or lodging case — No power to extend time by consent—Application to court — Magistrates' Courts Rules*, 1952 (*S.I.* 1952, *No.* 2190), *r.* 63 — *R.S.C., Ord.* 59, *r.* 33.

* WHITTINGHAM *v.* NATTRASS (PRACTICE NOTE) - - Divl.Ct. 1 W.L.R. **1016**

3. —— *Indictable offence also triable summarily — Application by prosecutor for summary trial—No formal application—Plea taken by justices' court—Facts stated by prosecution —Whether implied application by prosecutor for summary trial — Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 18 (1) (2).

* *Ex parte* RIGBY - Divl.Ct. 1 W.L.R. **843**

4. —— Maintenance—Revocation of order—Review. *See* HUSBAND AND WIFE—Maintenance.

5. —— *Warrant — Bench warrant — Jurisdiction to issue—Prisoner committed on bail to quarter sessions for sentence—Failure to appear — Jurisdiction of recorder to issue warrant—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29 (3).

* REGINA *v.* LLOYD-JONES. *Ex parte* THOMAS - - Divl.Ct. 1 W.L.R. **1110**

LANDLORD AND TENANT — *Assignment of lease or underletting — Covenant not to assign or underlet without consent—Not to be unreasonably withheld—Refusal on grounds of superior landlords' refusal—Whether reasonable—Superior landlords not before the court*

LANDLORD AND TENANT—*continued.*

—Relief—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 56 (1).

* VIENIT LTD. *v.* W. WILLIAMS & SON (BREAD STREET) LTD.
Wynn-Parry J. 1 W.L.R. **1267**

2. —— *Business premises (security of tenure) — Application for a new tenancy — Landlord's intention to demolish—Whether intention merely ancillary to intention to relet — Right of landlord to possession — Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Agriculture — Agricultural holding — Smallholding — County council as smallholdings authority—Delegation of powers to "Small-"holdings committee" — Committee's intention to demolish buildings on demised premises—Premises not a "smallholding"— Whether intention of local authority established—Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 47, 66—*Landlord and Tenant Act*, 1954, *s.* 30 (1) (*f*).

Judicial Precedent—Court of Appeal decision —Decision on effect of Court of Appeal decision—Ratio decidendi—Whether early or later decision binding on Court of Appeal— Two members of court parties to both decisions.

* CRADDOCK *v.* HAMPSHIRE COUNTY COUNCIL
C.A. 1 W.L.R. **202**

3. —— *Business premises (security of tenure) — Discretion to grant new tenancy — Application for new tenancy — Landlord's notice of opposition, alleging breaches of covenant to repair — Contract for sale of tenant's interest, including any granted under Act, to third party — Breaches of covenant proved—Nature of judge's discretion to grant new tenancy — Irrelevance of contractual arrangement—Whether re-hearing appropriate —Misdirection not vitiating conclusion—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*).

* LYONS *v.* CENTRAL COMMERCIAL PROPERTIES LONDON LTD.
C.A. 1 W.L.R. **869**

4. —— *Business premises (security of tenure)—Landlords' intention to occupy for own purposes — Intention — How shown — Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

* ESPRESSO COFFEE MACHINE CO. LTD. *v.* GUARDIAN ASSURANCE CO. LTD.
Harman J. 1 W.L.R. **900**

5. —— *Business premises (security of tenure)—Occupation for purposes of tenant's business—"Mock auction" room used only in summer season—Business carried on by third party as tenant's "manager" under fictitious agreement—Premises vacated by "manager" at close of season—Application for new tenancy — Whether premises within Act of* 1954 — *Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (1), 24 (1).

* TEASDALE *v.* WALKER
C.A. 1 W.L.R. **1076**

6. —— *Business premises (security of tenure)—Terms of new tenancy—Rent—Hotel*

LANDLORD AND TENANT—*continued.*

—*Rent at which holding might "reasonably "be expected to be let in open market by will-"ing lessor"—Evidence as to hotel's profits in previous years—Admissible as indication of earning capacity to potential lessee—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 34.

Landlord and Tenant—Business premises (security of tenure)—Costs—Application to county court to settle terms of new tenancy—Discretion.

* Harewood Hotels Ltd. *v.* Harris
C.A. 1 W.L.R. **108**

7. —— *Rent restriction—Possession application—Greater hardship—Dwelling-house reasonably required for occupation by landlord's daughter—Whether reasonable to make order — Movability of other tenants of landlord — Whether relevant consideration — Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I, para. (h).*

* Hardie *v.* Frediani - C.A. 1 W.L.R. **318**

8. —— *Rent restriction—Premium—Commuted rent—Rent reduced below two-thirds of rateable value — Lump sum payment — Whether premium or rent in advance—Whether tenant protected — Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (7).

* Samrose Properties Ltd. *v.* Gibbard
C.A. 1 W.L.R. **235**

9. —— Rent restrictions. *See* Mortgage.

10. —— *Repairs—Act of* 1938—*Proceedings for damages for breach of covenants to repair—Whether "lessee" no longer in possession entitled to benefit of the Act of* 1938—*Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146—*Leasehold Property (Repairs) Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

* Cusack-Smith *v.* Gold
Pilcher J. 1 W.L.R. **611**

11. —— *Repairs — Covenant — "Struc-"tural repairs of a substantial nature"—Meaning of "structural repairs"—Meaning of "substantial."*

* Granada Theatres Ltd. *v.* Freehold Investments (Leytonstone) Ltd.
Vaisey J. 1 W.L.R. **845**

LEGAL AID—*Costs—Order for costs against aided person — Variation — Procedure in Chancery Division — Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as substituted by the Legal Aid (General) (Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166), *reg.* 26), *reg.* 17 (4).

*Wing *v.* Spring (Practice Note)
Upjohn J. 1 W.L.R. **926**

LEGITIMACY—*Subsequent marriage—Time at which earlier marriage dissolved—Decree absolute and birth of child on same day—Decree subsequent in time to birth—Whether mother married when illegitimate child born—Legitimacy Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1 (1), (2).

Practice—Order—Time of effect—Whether relating back to earliest moment of day on which made.

* Kruhlak *v.* Kruhlak (No. 2)
Divl.Ct. 1 W.L.R. **606**

LIBEL AND SLANDER—*Fair comment—Test of fairness—Question of honesty.*

* Silkin *v.* Beaverbrook Newspapers Ltd.
Diplock J. 1 W.L.R. **743**

LICENSOR AND LICENSEE — *Licensee or trespasser—Railway—Licensee involuntarily a few inches outside area of licence—Licensor's duty of care — Whether licensee constituted a trespasser.*

Trespass — Involuntary — Licensee — Foot over railway sleeper.

* Braithwaite *v.* South Durham Steel Co. Ltd.
Edmund Davies J. 1 W.L.R. **986**

LIFT. *See* Factory.

LIMITATION OF ACTION—*Acknowledgment — Debt — Documents signed by party interested in debt — Company balance-sheets—Auditors' certificate — Whether agents of company—Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 23, 24.

Company—Auditor—Whether agent of company—Statute-barred debt—Reference to debt in balance-sheet—Whether acknowledgment—Auditors' certificate of balance-sheets—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 23, 24—*Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 162 (1).

* *In re* Transplanters (Holding Company) Ltd. - Wynn-Parry J. 1 W.L.R. **822**

2. —— Case stated. *See* Justices.

3. —— *Concealment by fraud—Solicitor—Negligence—Failure to issue writ in due time—Plaintiff's claim under Fatal Accidents Acts lost—Claim against solicitor after* 13 *years—Whether "right of action . . . concealed by ". . . fraud"—Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 26 (*b*).

Solicitor—Negligence.

Damages—Negligence—Solicitor.

* Kitchen *v.* Royal Air Force Association
C.A. 1 W.L.R. **563**

4. —— *Death of tortfeasor — Limitation applicable — Lapse of six years — Letters of administration taken out — Action brought within six months thereafter—Whether action statute-barred — Law Reform (Miscellaneous Provisions) Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1) (3)—*Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 32.

* Airey *v.* Airey
Diplock J. and C.A. 1 W.L.R. **729**

5. ——. *See* Family Provision.

LOCAL GOVERNMENT — *Powers — Transport—Free travel concessions for qualified persons—Contribution of one local authority to costs of another—How assessed—Public Service Vehicles (Travel Concessions) Act*, 1955 (3 *&* 4 *Eliz.* 2, *c.* 26), *s.* 1 (4).

*Litherland Urban District Council *v.* Liverpool Corporation
Harman J. 1 W.L.R. **913**

MAINTENANCE — Justices. *See* HUSBAND AND WIFE.

MARRIAGE—Foreign—Proof of. *See* HUSBAND AND WIFE.

MASTER AND SERVANT — *Contract of service — Enforceability — Provision that servant to work for such periods weekly as might be "reasonably required."*

Damages—Continuing breach—"Continuing "cause of action" — Repeated breaches of contract of service—R.S.C., Ord. 36, *r.* 58.

Damages—Concerted action—Single defendant — Breach of contract by servant — Servant's knowledge of similar breaches by fellow-servants—Coal-mine—Servant employed as deputy — Breach of servant's contract resulting in loss of day's output of coal—Loss attributable to individual servant.

* NATIONAL COAL BOARD *v.* GALLEY
C.A. 1 W.L.R. **16**

2. —— Safe system of work. *See* NEGLIGENCE.

3. ——. *See* FACTORY.

MENTAL DEFICIENCY — *Detention order —Validity—Order on conviction—Conviction of larceny—Order under section* 8 (1) (*b*) *of the Mental Deficiency Act,* 1913 — *Medical evidence that defendant "a feeble-minded "person within the meaning of the Mental "Deficiency Acts"—Whether evidence sufficient—Whether consent of parent or guardian required—Mental Deficiency Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1 (1), (2), 6 (3), 8 (1) (*as amended by Mental Deficiency Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 33)).

Criminal Law—Mental deficiency—Detention order.

* *In re* SAGE - Divl.Ct. 1 W.L.R. **387**

MINES AND MINERALS—*Coal—Working —Application by National Coal Board for leave to work — Delay of months through extension of time to objectors to file evidence —Application for interim order to expedite working — Expense caused by delay — "National interest" — Jurisdiction to make interim order — Form of Order — Mines (Working Facilities and Support) Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *s.* 1—*Railway and Canal Commission (Abolition) Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 11), *s.* 1 (1) (*a*)—*R.S.C., Ord.* 54o.

* *Ex parte* NATIONAL COAL BOARD
Roxburgh J. 1 W.L.R. **599**

MISREPRESENTATION — Rescission. *See* SALE OF GOODS.

MORTGAGE — Effect of recital. *See* ESTOPPEL.

2. —— *Foreclosure—Default of appearance —Service of notices—R.S.C., Ord.* 55, *r.* 5A.

* PRACTICE DIRECTION (ORIGINATING SUMMONS FOR FORECLOSURE)
Ch.D. 1 W.L.R. **655**

3. —— *Interest restriction — Interest in arrear for more than* 21 *days—Arrears subsequently paid—Whether statutory protection revived—Increase of Rent and Mortgage Interest*

MORTGAGE—*continued.*

(Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 7 (*a*).

Mortgage—Interest restriction—Apportionment of principal money—Division of dwelling-house into six flats — Meaning of "other "lands" in Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (5).

Landlord and Tenant — Rent restriction — Premises within the Acts — Dwelling-house subsequently divided into six flats—Date for assessing rateable value—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7.

* COUTTS & CO. *v.* DUNTROON INVESTMENT CORPORATION LTD. AND ANOTHER
Harman J. 1 W.L.R. **116**

4. —— *Practice — Summons for possession—Claim by third party to be entitled to possession — Hearing in open court — R.S.C., Ord.* 55, *r.* 5A.

* DISTRICT BANK LTD. *v.* WEBB (PRACTICE NOTE) - Danckwerts J. 1 W.L.R. **66**

NATIONAL HEALTH SERVICE—*Hospital —Transferred officer—Transfer to service of regional hospital board on setting up of national health service — Terms and conditions of service — Consultant's refusal to accept permanent contract owing to dissatisfaction with terms offered—Termination of services by board — Validity — Duty of Minister to hear appeal — National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (2), 14 (1), 68 (1)—*National Health Service (Transfer of Officers and Compensation) Regulations,* 1948 (*S.I.* 1948, *No.* 1475), *reg.* 4.

Tribunal — Statutory — Control by courts— Declaration—Hospital board—Wrongful dismissal — Consultant on staff of hospital— Transfer to regional hospital board on appointed day — New contract incorporating terms and conditions of service issued by Minister — Termination by board — Whether board acted mala fide—Remedy for breach.

* BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD - Barry J. 1 W.L.R. **181**

NATIONAL INSURANCE — *Industrial injuries benefit—Injury arising in the course of employment — Whether arising out of employment—Burden of proof—National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 7 (4).

Burden of Proof — Industrial injuries — Whether injury arising out of employment.

* REGINA *v.* NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER. *Ex parte* RICHARDSON
Divl.Ct. 1 W.L.R. **851**

2. —— *Industrial injuries benefit—"Paired "organs" principle — Whether legs "paired "organs"—National Insurance (Industrial Injuries) (Benefit) Regulations,* 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5).

* REGINA *v.* MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT. *Ex parte* GRIFFITHS - - Divl.Ct. 1 W.L.R. **517**

NATURAL JUSTICE — *Tribunal — Trade association — Disqualification recommended*

NATURAL JUSTICE—*continued.*

—Remedy of injunction and damages—Contractual relationship—Necessity.

Trade Dispute—Act in furtherance of—Conspiracy—Predominant object—Use of unlawful means.

Restraint of Trade — Trade association—Tribunal — Quasi-judicial proceedings—Natural justice.

Trespass—Privacy, invasion of—Access to premises—False reasons given.

* Byrne *v.* Kinematograph Renters Society Ltd. - Harman J. 1 W.L.R. **762**

NEGLIGENCE — *Damages — Remoteness of damage—Novus actus interveniens—Woman locked in public lavatory — Injured while endeavouring to escape—Whether attempt to escape reasonable consequence of fault in lock.*

* Sayers *v.* Harlow Urban District Council - - C.A. 1 W.L.R. **623**

2. —— *Duty of care — Extent — Rescuer — Employees overcome by fumes in well — Dangerous system of work — Employees ordered not to go down well—Whether orders sufficiently precise and urgent to absolve employers from blame—Attempt by doctor to rescue employees—Death of doctor—Whether right of action in injured rescuer when peril caused by negligent act arising out of relationship of master and servant.*

Fatal Accidents Acts—Damages—Insurance —Estate duty—Half of estate left by deceased made up of payments under insurance policies —Whether estate duty on whole of estate to be deducted from benefit accruing to widow from the death—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

* Baker *v.* T. E. Hopkins & Son Ltd. Barry J. 1 W.L.R. **993**

3. —— *Onus of proof—Res ipsa loquitur—Brick falling from occupier's building onto user of highway — Contractors and subcontractors engaged on work involving dislodgment of bricks—Whether brick speaks against more than one defendant—No explanation as to why brick fell—Evidence of safe system—Whether onus discharged.*

* Walsh *v.* Holst & Co. Ltd. C.A. 1 W.L.R. **800**

4. —— *Safe system of work—General precautions—Metal moulding—Protective clothing available for workman—No orders or advice to wear it — Workman injured — Employers' liability.*

Causation — Negligence — Contributory negligence.

* Haynes *v.* Qualcast (Wolverhampton) Ltd. - - - C.A. 1 W.L.R. **225**

5. —— Solicitor—Concealment. *See* Limitation of Action.

6. —— Standard of care. *See* Railway.

7. —— System of work—Dry-grinding. *See* Factory—Eyes.

8. —— System of work—"Floor." *See* Factory.

9. ——. See Railway.

NUISANCE—*Noise—Byelaw—Using noisy instrument in street "so as to cause annoy-"ance" to inhabitants—Whether musical instrument capable of being "noisy"—Proof of annoyance.*

* Raymond *v.* Cook Divl.Ct. 1 W.L.R. **1098**

NURSING—Rating relief. *See* Charity.

PATENT — *Infringement — Licence — Limited licence to sell at list price — Sale below list price—Notice—Patents Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *s.* 59 (1).

Restrictive Trade Practices—Conditions as to resale prices — Whether Act retrospective —Patent—Licence to sell at list price—Sale below—No proof of acquisition by defendant after Act in force—Whether Act retrospective in operation—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 25 (1).

Statute — Retroactive effect — Restrictive practices — Conditions as to resale prices — Restrictive Trade Practices Act, 1956, *s.* 25 (1).

* Dunlop Rubber Co. Ltd *v.* Longlife Battery Depot (A Firm) Lloyd-Jacob J. 1 W.L.R. **1033**

2. —— *Licence to manufacture under — Assessment of royalties — Manufacture of patented articles — Terms as to royalties — Auditors' duties—Scope of inquiry—Sale of articles claimed to be outside patent field—Provision as to granting of licence to another trader at lower royalty—Construction of licence.*

Accountant or Auditor—Auditor—Duties—Right to obtain professional advice.

* Fomento (Sterling Area) Ltd. *v.* Selsdon Fountain Pen Co. Ltd. H.L.(E.) 1 W.L.R. **45**

PERJURY. *See* Criminal Law.

PERPETUITY RULE—*Dependent or independent trust — Void gift of income — Discretionary trust during widowhood—Gift of capital "on the determination of" that trust —Whether gift of capital valid.*

Trust and Trustee—Uncertainty, trust void for — Discretionary trust — Unascertainable class.

* *In re* Allan, decd. Curtis *v.* Nalder Danckwerts J. 1 W.L.R. **220**

POULTRY. *See* Animal.

PRACTICE—Admiralty — Time for appeal. *See* Admiralty.

2. —— Allegations of discreditable though not adulterous association. *See* Husband and Wife.

3. —— Amendment of pleadings. *See* Trust and Trustee.

4. —— *Chancery Division—Payment out of court—Application—Widow or married woman —Affidavit of no settlement—R.S.C., Ord.* 55, *r.* 2 (1).

* Practice Direction (Payment Out) Ch.D. 1 W.L.R. **856**

PRACTICE—*continued.*

5. —— Discovery — Duty of solciitor. *See* BANKING.

6. —— Matrimonial causes on circuit. *See* HUSBAND AND WIFE.

7. —— Notice of appeal — Service out of time. *See* COURT OF APPEAL.

8. —— *Settlement of action—Duty to inform Crown Office — Duty on all parties — R.S.C, Ord.* 36, *r.* 29 (6).
* WILLIAMSON *v.* BRITISH BOXING BOARD OF CONTROL (1929) (PRACTICE NOTE)
Devlin J. 1 W.L.R. **539**

9. —— *Summary procedure under Ord.* 14 *—Affidavit in support of application—Application to sign judgment under Ord.* 14, *r.* 1 (*a*) *—Plaintiff assignee of debt — Sufficiency of supporting affidavit—Whether defects curable by supplementary affidavits—Failure to verify assignment in affidavit — Whether cured by production of assignment—R.S.C., Ord.* 14, *rr.* 1, 2.
* LES FILS DREYFUS ET CIE SOCIÉTÉ ANONYME *v.* CLARKE - C.A. 1 W.L.R. **300**

10. —— *Trial — Appropriate list — Fixed dates.*
* PRACTICE DIRECTION (TRIALS IN MIDDLESEX) - - - Q.B.D. 1 W.L.R. **1291**

11. —— *Writ — Specially endorsed writ — Statement of claim—No signature shown on copy writ served on defendant — Appearance entered — Whether writ duly served — R.S.C., Ord.* 3, *r.* 6; *Ord.* 14, *r.* 1; *Ord.* 19, *r.* 4.
* FICK & FICK LTD. *v.* ASSIMAKIS
C.A. 1 W.L.R. **1006**

PRIVY COUNCIL—*Appeal—Withdrawal of appearance—Judicial Committee Rules,* 1925 *and* 1957.
* KHATIJABAI JIWA HASHAM *v.* ZENAB, EXECUTRIX OF HAJI G. HARJI
J.C. 1 W.L.R. **1214**

2. —— *Costs — Unnecessary expense — Inclusion of irrelevant matter in record—Cost of printing deducted from costs.*
* PRACTICE NOTE (PRIVY COUNCIL: COSTS)
J.C. 1 W.L.R. **39**

PROBATE — *Practice — Representation—Mental or physical incapacity—Evidence of—Non-Contentious Probate Rules,* 1954 (*S.I.* 1954, *No.* 796), *r.* 33.
* PRACTICE DIRECTION (REPRESENTATION: MENTAL INCAPACITY)
Probate 1 W.L.R. **791**

RAILWAY—*Level crossing—Accommodation road—Collision between motor-vehicle and train on foggy day—Whether special precautions to be taken by railway authorities and employees.*
Negligence—Standard of care—Question of fact—Relevance of judicial precedent.
Judicial Precedent — Question of fact—Special class of situation—Application of legal principle.
Fact or Law—Negligence—Standard of care —special class of situation.
* HAZELL *v.* BRITISH TRANSPORT COMMISSION
Pearson J. 1 W.L.R. **177**

RAILWAY—*continued.*

2. —— *Level crossing — Accommodation road — Collision between motor-vehicle and train on foggy day — Whether special precautions to be taken by railway authorities and employees.*
* KEMSHEAD *v.* BRITISH TRANSPORT COMMISSION - - C.A. 1 W.L.R. **173n.**

3. —— *Negligence — Child — Killed by falling from corridor guard's van in express train—Internal handle to door—Duty of care to three-year-old child — Whether danger reasonably foreseeable — Whether commission entitled to assume supervision of young child by responsible person—Whether insurers of safety.*
Negligence — Child — Injury to — Railway —Child killed by fall from corridor guard's van — Internal handle to door — Whether danger reasonably foreseeable.
* O'CONNOR *v.* BRITISH TRANSPORT COMMISSION - - - C.A. 1 W.L.R. **346**

4. —— *Negligence — Shunter injured by points lever—Practice tolerated by employers of riding on locomotive steps—Siting of lever —Foreseeability of risk—Failure to consider safety precautions.*
Railway — Statutory duty—Points—Lever—Lever "parallel to the adjacent lines"—Meaning of "parallel"—Meaning of "adjacent"—Prevention of Accidents Rules, 1902 (*S.R. & O.,* 1902, *No.* 616), *para.* 5.
Negligence — Contributory negligence — Inadvertence of workman — Shunter riding on locomotive steps — Duty of care enhanced—Knowledge of special risks—Failure to see lever — Inexcusable inadvertence amounting to negligence.
* HICKS *v.* BRITISH TRANSPORT COMMISSION
C.A. 1 W.L.R. **493**

RATES AND RATING — *Charity — "New list" — Notices terminating allowances — Sent before expiration of first year of new list—Whether premature—Meaning of "has effect"—When rate "made"—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 9 (2) (*d*), (*e*)—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 54, 120—*Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (2), (3), (4), (5).
* WESTMINSTER CITY COUNCIL *v.* LONDON UNIVERSITY KING'S COLLEGE
Roxburgh J. 1 W.L.R. **920**

2. —— *Industrial hereditament — Adaptation for sale — Greetings cards distributors' premises—Cards received in bulk lots of identical cards—Sorted into saleable mixed parcels —Whether "adapted for sale"—Fur sorting and auction premises—Mixed parcels of skins received from individual sellers—sorted into auction lots of identical grade and species irrespective of ownership—Sold on commission on behalf of sellers—Whether "adapted for "sale" — Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1)—*Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.
* WILSON BROTHERS LTD. *v.* EDWARDS (VALUATION OFFICER). HUDSON'S BAY CO. *v.* THOMPSON (VALUATION OFFICER)
C.A. 1 W.L.R. **955**

RATES AND RATING—*continued.*

3. —— *Industrial hereditament—Slaughterhouse—"Adapting for sale of any article"—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149—*Rating and Valuation (Apportionment) Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

Factory—Definition.

* FATSTOCK MARKETING CORPORATION LTD. *v.* MORGAN (VALUATION OFFICER)
C.A. 1 W.L.R. **357**

4. —— *Plant and machinery — Baker's oven — Provers movable parts — Whether rateable—"To such extent as any such part "is, or is in the nature of, a building or "structure"—Meaning—Rating and Valuation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24—*Plant and Machinery (Valuation for Rating) Order*, 1927 (*S.R. & O.*, 1927, *No.* 480), *Sch., Class* 4.

* W. COLLIER LTD. *v.* FIELDING (VALUATION OFFICER) - C.A. 1 W.L.R. **323**

5. —— *Plant and machinery — Petrol station — Underground petrol storage tank—Whether "a building or structure"—Whether a "tank"—Rating and Valuation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24—*Plant and Machinery (Valuation for Rating) Order*, 1927 (*S.R. & O.*, 1927, *No.* 480), *Sch., Class* 4.

* SHELL-MEX AND B.P. LTD. *v.* HOLYOAK (VALUATION OFFICER) - C.A. 1 W.L.R. **331**

6. —— *Profit—Housing trust—Trust to provide decent housing for poorer classes — Trustees required to obtain return on capital of trust fund and increase fund — Whether trust established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

* GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM BOROUGH COUNCIL. SAME *v.* SAME
Divl. Ct. 1 W.L.R. **541**

7. —— Royal College of Nursing. *See* CHARITY.

8. —— *Social welfare — Assessment — Organization whose main objects concerned with advancement of education and social welfare—Previously exempt from rates as a scientific society — Exemption no longer claimed — Rate chargeable for first year of new valuation list where no rates previously charged—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (2).

Statute—Construction—Rating and Valuation (Miscellaneous Provisions) Act, 1955.

* HORACE PLUNKETT FOUNDATION *v.* ST. PANCRAS BOROUGH COUNCIL
Divl.Ct. 1 W.L.R. **30**

9. —— *"Social welfare"—Working men's clubs union—Convalescent home—Union formed to encourage working men to form clubs —Rating relief claimed for Union's convalescent home—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

* WORKING MEN'S CLUB AND INSTITUTE UNION LTD. *v.* SWANSEA CORPORATION
Divl.Ct. 1 W.L.R. **1135**

RATES AND RATING—*continued.*

10. —— *"Social welfare" — Friendly society — Oddfellows — Society providing benefits and assurance — Claim by society for rating relief—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

Judicial Precedent—Statute—Construction—Whether doctrine of precedent to public benefit.

* INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION
C.A. 1 W.L.R. **1171**

RES IPSA LOQUITUR. *See* NEGLIGENCE.

RES JUDICATA. *See* BANKRUPTCY.

RESCUE. *See* NEGLIGENCE—Duty of care.

RESTRAINT OF TRADE—Trade association tribunal. *See* NATURAL JUSTICE.

RESTRICTIVE PRACTICES—*Conditions as to resale prices — Individual enforcement—Notice of restriction—Whether express notice of actual conditions essential — Restrictive Trade Practices Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 25.

* GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. *v.* LANCASHIRE BATTERIES LTD.
Upjohn J. 1 W.L.R. **655**
C.A. 1 W.L.R. **857**

2. —— *Practice — Interlocutory applications — To be dealt with by clerk of court —Restrictive Practices Court Rules*, 1957 (*S.I.* 1957, *No.* 603), *r.* 49.

* PRACTICE DIRECTION (APPLICATIONS)
R.P.Ct. 1 W.L.R. **1299**

3. ——. *See* PATENT.

4. —— *Practice—Statement of case—Identification of admitted restrictions—Restrictive Trade Practices Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 20 (1).

* PRACTICE DIRECTION
Restrictive Practices Court 1 W.L.R. **1213**

5. —— *Restriction — Whether contrary to public interest—General principles applicable —Task of court — Injury to public — "Reasonably necessary" to protect public—Restriction on sale to public of proprietary medicines otherwise than by qualified retail chemists—Qualified chemists competent to advise customers in relation to proprietary medicines — Advice alleged to protect public against injury from misuse of medicines—Risk of injury negligible — Whether restriction "reasonably necessary" for the protection of public — "Reasonably necessary" — Whether reasonable and prudent man would seek to enforce restriction—Whether removal of restriction would deny to public substantial benefits or advantages — Restrictive Trade Practices Act*, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 20 (1), 21 (1) (*a*) (*b*).

Injunction — Restrictive practice — Restriction contrary to public interest—Whether injunction should be granted—Whether ordinary rule applies—Form of order—Restrictive Trade

RESTRICTIVE PRACTICES—*continued.*

Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 20 (3).

Evidence—Restrictive practice—Trade witness — Evidence of conditions of particular trade — Whether trade witnesses experts in relation to their trade — Whether trade witnesses may be asked what is injurious or beneficial to public.

* *In re* CHEMISTS' FEDERATION AGREEMENT (No. 2)
Restrictive Practices Court 1 W.L.R. **1192**

REVENUE—*Estate duty—Surrender of life interest — Settlement — Release of equitable interest by life tenant — Bonus shares — Renunciation—Failure of trustees to renounce before release of equitable interest—Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43 (1) (*as amended*).

Company — Shares — Bonus shares — When property passes to shareholder — Right to renounce.

* PYE-SMITH *v.* INLAND REVENUE COMMISSIONERS - Danckwerts J. 1 W.L.R. **905**

2. —— *Income tax — Capital or income receipt — Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma—Whether receipt of company's trade or proceeds of sale of capital asset—Depreciation of capital asset—Meaning of "know-how"—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sch. D, Case I*).

* MORIARTY *v.* EVANS MEDICAL SUPPLIES LTD. - - H.L.(E.) 1 W.L.R. **66**

3. —— *Income tax — Discontinuance of trade or profession — Company — Director — Periodical payments under agreement for special services—Payable to director or "his "executors administrators or assigns"—Liability to tax after his death — Schedule D, Case III — Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123.

* WESTMINSTER BANK LTD. *v.* BARFORD (INSPECTOR OF TAXES)
Vaisey J. 1 W.L.R. **406**

4. —— *Income tax — Employment — Perquisites or profits—Professional huntsman —Whether gifts received from hunt followers and others at Christmas time part of remuneration—Whether such gifts taxable—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sch. E, paras.* 1 *and* 2; *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

* WRIGHT *v.* BOYCE (INSPECTOR OF TAXES)
Vaisey J. 1 W.L.R. **593**
C.A. 1 W.L.R. **832**

5. —— *Income tax — Expenses — Racecourse Betting Control Board — Operation of totalisator on racecourses—Totalisator fund—Expenditure prescribed by statute for benefit of owners of racecourses and racehorses—Board carrying on trade — Whether deductible expenses—Whether improvements to racecourses capital expenditure—Racecourse Betting Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 41), *s.* 3—*Betting and Lotteries Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 58),

REVENUE—*continued.*

s. 18 (5)—*Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 137 (*a*) (*f*) (*g*).

* RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES)
SAME *v.* INLAND REVENUE COMMISSIONERS
YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD
INLAND REVENUE COMMISSIONERS *v.* SAME
Upjohn J. 1 W.L.R. **122**
C.A. 1 W.L.R. **705**

6. —— *Income tax — Foreign income — Remittance to United Kingdom — Cheques drawn in dollars on foreign bank—Purchase by English bankers — Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England—Whether income from foreign securities or possessions—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D*, 1 (*a*) (i), *Cases IV, r.* 2, *and V, r.* 2.

* THOMSON (INSPECTOR OF TAXES) *v.* MOYSE
Wynn-Parry J. 1 W.L.R. **1063**

7. —— *Income tax — Transfer of assets to company incorporated abroad — Charge by company of transferred assets to bank—Subsequent payment by taxpayer into company's account at same bank of moneys on unsecured loan to company—Whether company's income deemed to be taxpayer's income—"Associated operation"—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch.* 1, *Sch. D, Case VI—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 412 (2) (4) (5), 413 (1).

* FYNN *v.* INLAND REVENUE COMMISSIONERS
Upjohn J. 1 W.L.R. **585**

8. —— *Stamp duty — Security — Agreement to provide broadcasting programmes—Fluctuating payments—Specified sums payable, variable on a contingency — Whether liable to ad valorem duty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule.*

* INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* INLAND REVENUE COMMISSIONERS
Wynn-Parry J. 1 W.L.R. **943**

9. —— *Surtax — Company — Apportionment of undistributed income pursuant to surtax direction—"In accordance with . . . "interests of members"—Meaning—Part of income to be carried to fund for redemption of preference shares — Whether preference shareholders' "interests" included such sums —Investment company—Finance Act*, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *Sch. I, paras.* 8, 10.

* WIGRAM FAMILY SETTLED ESTATES LTD. *v.* INLAND REVENUE COMMISSIONERS
H.L.(E.) 1 W.L.R. **213**

ROAD TRAFFIC—"*Road*"—*Meaning—Car park—Driving in car park without licence—Whether car park "to which the public has "access" road—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 4 (1), 121.

* GRIFFIN *v.* SQUIRES
Divl.Ct. 1 W.L.R. **1106**

SALE OF GOODS—*Innocent misrepresentation — Right of rescission — Sale of lorry—*

SALE OF GOODS—*continued.*

Delivery and acceptance — Claim to rescind —Whether claim maintainable.

Contract—Innocent misrepresentation.

* Long *v.* Lloyd - C.A. 1 W.L.R. **753**

2. —— *Property, when passing — Shipbuilding contract — Yacht to be constructed —Property to pass on payment of first instalment of price — Yacht found to be unseaworthy—Whether property passed before completion—Whether right to reject precluded by passing of property.*

Sale of Goods—Time of delivery—Whether warranty or condition—Shipbuilding contract —Pleasure yacht.

* McDougall *v.* Aeromarine of Emsworth Ltd. - - Diplock J. 1 W.L.R. **1126**

SET-OFF—Equitable. *See* Practice.

SHIPPING — *Charterparty — Demurrage — Exceptions clause—Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range — Exceptions clause excusing charterers from "any delay "if cargo intended for shipment . . . cannot "be . . . loaded . . . by reason of . . . "strikes . . ."—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause—Charterers' duty to provide alternative cargo within reasonable time.*

Ships' Names—Niki.

South African Dispatch Line *v.* Owners of the Panamanian Steamship Niki Diplock J. 3 W.L.R. **718**

SOLICITOR — *Costs — Lump or gross sum charge — Non-contentious business — Agreement for lump sum payment for costs—Whether client entitled to itemized bill—Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 57 (1).

* Rutter *v.* Sheridan-Young C.A. 1 W.L.R. **444**

2. —— Duty—Discovery. *See* Banking.

3. —— Negligence — Concealment. *See* Limitation of Action.

4. —— Remuneration—Trustee. *See* Will.

SPECIFIC PERFORMANCE. *See* Vendor and Purchaser.

STATUTE — Construction. *See* Rates and Rating.

STATUTORY DUTY —Breach. *See* Railway.

TOWN AND COUNTRY PLANNING—*Development — Assessment of development value—Land intended to be developed to be viewed as a whole—Land acquired for building purposes—High cost of making part of land suitable for building exceeding value of the whole—Whether development charge payable—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 69, 70—*Town and Country Planning (Development Charge) Regulations,* 1948 (*S.I.* 1948, *No.* 1189), *Sch.*

Practice and Procedure — Arguments of counsel—Construction of a statute—Practice notes on working the statute issued by Government Department—Not to be quoted in argument.

* London County Council *v.* Central Land Board - C.A. 1 W.L.R. **1296**

2. —— *Development — Discontinuance — Resumption of former user of land after non-user—Justices finding that resumption not a material change of user—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 23.

Town and Country Planning — Enforcement notice—Justices' jurisdiction—Question whether user changed.

* Fyson *v.* Buckinghamshire County Council. Metal Recovery & Storage Co. Ltd. *v.* Same - Divl.Ct. 1 W.L.R. **634**

3. —— *Development — Planning permission —Condition—Relation of conditions to local planning considerations—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 36.

* Fawcett Properties Ltd. *v.* Buckingham County Council Roxburgh J. 1 W.L.R. **1161**

4. —— *Purchase notice by owner — Minister's permission for other development—Limitation on Minister's power to direct development other than that for which permission refused — Undeveloped site — Permission to develop as shops with residential accommodation over refused — Permission granted for development as residential accommodation—Whether Minister's order valid—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 19 (2), *proviso* (*b*), (2A); *Sch. III —Town and Country Planning Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 70.

* Regina *v.* Minister of Housing and Local Government. *Ex parte* Rank Organization Ltd. Divl.Ct. 1 W.L.R. **1093**

TRADE DISPUTE. *See* Natural Justice.

TRADE MARK — Infringement. *See* Passing Off.

TRESPASS—False reason given for access to premises. *See* Natural Justice.

TRIBUNAL — Statutory. *See* National Health Service.

2. —— Trade association. *See* Natural Justice.

TRUST AND TRUSTEE—*Breach of trust—Fraudulent conversion by trustee—Transfer of part of proceeds to innocent third party—*

TRUST AND TRUSTEE—*continued.*

Claim by beneficiary to follow the assets—Appropriate defence to such claim.

Limitation of Action—Fraudulent breach of trust—Transfer of part of proceeds to innocent third party—Claim by beneficiary to recover from third party—Whether limitation applicable to such claim—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 19, 26.

Practice and Procedure—Pleadings—Amendment—"Such amendments . . . as may be "necessary for the purposes of determining "the real question in controversy"—Fraudulent conversion of trust fund—Claim by beneficiary to follow assets in hands of innocent third party—Application at trial to amend defence by pleading giving of value—R.S.C., Ord. 28, *r.* 1.

* G. L. Baker Ltd. *v.* Medway Buildings and Supplies Ltd.
Danckwerts J. & C.A. 1 W.L.R. **1216**

2. —— Costs—Indemnity. *See* Costs.

3. —— *Power of advancement—Exercise of power—Statutory power—Application of capital—Payment to beneficiary direct—No particular purpose expressed — "Benefit" — Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 32.

* *In re* Moxon's Will Trusts. Downey *v.* Moxon - Danckwerts J. 1 W.L.R. **165**

4. ——. *See* Perpetuity Rule.

VENDOR AND PURCHASER — *Specific performance — Proof of title — Action for — Plaintiff's title derived from will containing latent ambiguity—Whether extrinsic evidence admissible in specific performance action.*

* Wilson and Another *v.* Thomas
Roxburgh J. 1 W.L.R. **422**

WAR DAMAGE. *See* Revenue.

WEST AFRICA (NIGERIA) — *Jurisdiction —Claim to ownership of land—Not a claim to fix boundaries—Jurisdiction of Supreme Court —Not ousted by Inter-Tribal Boundaries Settlement Ordinance (No.* 49 *of* 1933) (*Laws of Nigeria,* 1948, *c.* 95), *ss.* 3, 4 *and* 5.

* Eke Oja *v.* Kanu Ukpai
J.C. 1 W.L.R. **151**

WILL — *Attestation — Proof — Signatures on back of will—Omnia praesumuntur rite esse acta.*

Omnia praesumuntur rite esse acta.

* In the Estate of Denning, decd.
Sachs J. 1 W.L.R. **462**

2. —— *Construction — Investment clause —Power to invest in stock of "any British "colony or dependency . . . but not otherwise"—Meaning of "but not otherwise"—Whether investments authorized by law excluded—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *ss.* 1 (1), 68 (2).

* *In re* Rider's Will Trusts. Nelson *v.* Rider - - Harman J. 1 W.L.R. **974**

3. —— *Construction — Uncertainty — Condition precedent—Bequests on marriage with "a person of the Jewish race" — Whether void for uncertainty.*

* *In re* Tarnpolsk, decd. Barclays Bank Ltd. *v.* Hyer
Danckwerts J. 1 W.L.R. **1157**

4. —— *Soldier's will—"In actual military "service"—Occupation force—Infant—Wills Act,* 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 11 *—Wills (Soldiers and Sailors) Act,* 1918 (7 *&* 8 *Geo.* 5, *c.* 58), *ss.* 1 *and* 3.

Military Law—"Active service."

* In the Estate of Colman, decd.
Karminski J. 1 W.L.R. **457**

TABLE OF CASES CITED

PAGE

Abbott, In re [1893] 1 Ch. 54; 62 L.J.Ch. 46; 67 L.T. 794; 41 W.R. 154; 3 R. 72 222
Abbott *v.* Sullivan [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; 96 S.J. 119; [1952] 1 All E.R. 226 . . . . . 778, 779, 780, 782
Abitibi Power and Paper Co. *v.* Montreal Trust Co. [1943] A.C. 536; 112 L.J.P.C. 49; 59 T.L.R. 348; 87 S.J. 353; [1943] 2 All E.R. 311, P.C. 556
Abrahams *v.* MacFisheries [1925] 2 K.B. 18; 94 L.J.K.B. 562; 133 L.T. 89 . 1079
Adam *v.* Newbigging (1888) 13 App.Cas. 308, H.L. 755
Addie (R.) & Sons (Collieries) *v.* Dumbreck [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com.Cas. 214, H.L. 349, 990
Agricultural Industries, In re [1952] W.N. 209; [1952] 1 All E.R. 1188, C.A. . 406
Alderwood *v.* Bank of Liverpool [1924] 1 K.B. 775 233
Alexander *v.* Mills (1870) L.R. 6 Ch. 124; 40 L.J.Ch. 73; 24 L.T. 206; 19 W.R. 310, L.JJ. 430, 431, 432
Alexander *v.* Rayson [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; 52 T.L.R. 131; 80 S.J. 15, C.A. 1091
Allen, In re [1953] Ch. 810; [1953] 3 W.L.R. 637; 97 S.J. 606; [1953] 2 All E.R. 898, C.A. 1159
Allen *v.* Allen [1951] W.N. 322; 115 J.P. 229; [1951] 1 All E.R. 724, C.A. 343, 487
Allen *v.* Hayward (1845) 7 Q.B. 960; 4 Ry. & Can.Cas. 104; 15 L.J.Q.B. 99; 5 L.T.O.S. 409; 10 Jur. 92; 115 E.R. 749 803
Allen *v.* Trehearne [1938] 2 K.B. 464; 107 L.J.K.B. 597; 159 L.T. 270; 54 T.L.R. 826; 82 S.J. 413; [1938] 2 All E.R. 698; 22 T.C. 15, C.A. 412
Allen (H.M. Inspector of Taxes) *v.* Farquharson Bros. & Co. (1932) 17 T.C. 59 298
Amata *v.* Modekwe (1954) 14 W.A.C.A. 580 154
Angel *v.* Jay [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809; 55 S.J. 140, D.C. 757, 758
Anglo-Cyprian Trade Agencies *v.* Paphos Wine Industries [1951] W.N. 205; 95 S.J. 336; [1951] 1 All E.R. 873 252
Anglo-Persian Oil Co. *v.* Dale [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 47 T.L.R. 487; 75 S.J. 408; 16 T.C. 253, C.A. 138
Anglo-Saxon Petroleum Co. *v.* Adamastos Shipping Co. [1957] 2 Q.B. 233; [1957] 2 W.L.R. 968; 101 S.J. 405; [1957] 2 All E.R. 311; [1957] 1 Lloyd's Rep. 271, C.A. 699
Anlaby *v.* Praetorius (1888) 20 Q.B.D. 764 1007
Appleby *v.* Myers (1867) L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Exch. 704
Apt (orse. Magnus) *v.* Apt [1948] P. 83; [1948] L.J.R. 539; 177 L.T. 620; 63 T.L.R. 618; [1947] 2 All E.R. 677; affirming [1947] P. 127 1282
Armstrong *v.* Jackson [1917] 2 K.B. 822; 86 L.J.K.B. 1375; 117 L.T. 479; 33 T.L.R. 444; 61 S.J. 631 755
Art Union of London Ltd. *v.* Overseers of the Savoy [1894] 2 Q.B. 609; 10 T.L.R. 576 101
Assaf *v.* Fuwa [1955] A.C. 215; [1954] 3 W.L.R. 552; 98 S.J. 733, P.C. . . . 154
Aster, In re [1955] 1 W.L.R. 465; 99 S.J. 276; sub nom. A., Re, (An Infant) [1955] 2 All E.R. 202, C.A. 198
Athenee, The (1922) 11 Ll.L.Rep. 6 . . . . . 160, 163
Atkinson *v.* Bettison [1955] 1 W.L.R. 1127; 99 S.J. 761; [1955] 3 All E.R. 340, C.A. 206, 207, 208, 209, 210
Attorney-General *v.* Great Eastern Railway Co. (1880) 5 App.Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L. 712
Attorney-General *v.* Oldham [1940] 1 K.B. 599 911
Attorney-General *v.* Parsons [1956] A.C. 421; [1956] 2 W.L.R. 153; 100 S.J. 51; [1956] 1 All E.R. 65, H.L. 734
Attorney-General *v.* Racecourse Betting Control Board [1935] Ch. 34; 104 L.J.Ch. 13; 152 L.T. 146; 51 T.L.R. 36; 78 S.J. 783, C.A. 710, 712
Attorney-General *v.* Wilts United Dairies (1922) 91 L.J.K.B. 897; 127 L.T. 822; 38 T.L.R. 781; 66 S.J. 630, H.L. 556
Attorney-General for Canada *v.* Hallet & Carey [1952] A.C. 427; [1952] 1 T.L.R. 1408; 96 S.J. 395, P.C. 558
Attorney-General to Prince of Wales *v.* St. Aubyn (1811) Wight. 167; 145 E.R. 1215 155
Austin *v.* Austin (1871) 41 L.J.P. & M. 8; 25 L.T. 856; 20 W.R. 128 . 865, 897, 898, 899
Avery *v.* London & North Eastern Railway Co. [1938] A.C. 606; 107 L.J.K.B. 546; 159 L.T. 241; 54 T.L.R. 794; 82 S.J. 582; [1938] 2 All E.R. 592; 31 B.W.C.C. 133, H.L. 930, 931

PAGE

B *v.* B. and G. [1937] P. 1; 105 L.J.P. 90; 155 L.T. 322; 52 T.L.R. 719; 80 S.J. 637; [1936] 2 All E.R. 1254 471
Badger, In re (1819) 2 B. & Ald. 691; 106 E.R. 517 274
Bagettes *v.* G. P. Estates Co. [1956] Ch. 290; [1956] 2 W.L.R. 773; 100 S.J. 226; [1956] 1 All E.R. 729, C.A.; affirming [1956] Ch. 75; [1955] 3 W.L.R. 602; 99 S.J. 780; [1955] 3 All E.R. 451 . . . . . 735, 1081
Baguley *v.* Baguley, The Times, Oct. 10, 1957, C.A. 483
Bailey *v.* Potteries Electrical Traction Co. [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 46 T.L.R. 601; 74 S.J. 504; 28 L.G.R. 550, C.A. 370, 963
Baker *v.* Baker (1945) App.D. 708 1290
Baker *v.* Barclays Bank [1955] 1 W.L.R. 822; 99 S.J. 491; [1955] 2 All E.R. 571 . 1221
Balgownie Trust Ltd. *v.* Inland Revenue Commissioners, 1929 S.C. 790; 14 T.C. 684 68
Ball, In re [1947] Ch. 228; [1947] L.J.R. 513; 176 L.T. 369; 63 T.L.R. 94; 91 S.J. 220; [1947] 1 All E.R. 458 1163
Banbury *v.* Bank of Montreal [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 34 T.L.R. 518; 62 S.J. 665, H.L. 1030
Banque Belge pour L'Etranger *v.* Hambrouck [1921] 1 K.B. 321; 90 L.J.K.B. 322; 37 T.L.R. 76; 65 S.J. 74; 26 Com.Cas. 72, C.A. 1225
Barkway *v.* South Wales Transport [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597; 114 J.P. 172; 94 S.J. 128; [1950] 1 All E.R. 392, H.L. . . 350, 809, 811, 814
Barnado *v.* McHugh [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 7 T.L.R. 726; 40 W.R. 97, H.L. 198
Barry *v.* Cordy (1946) 62 T.L.R. 614; 90 S.J. 528; [1946] 2 All E.R. 396; 28 T.C. 250; sub. nom. Cordy *v.* Barry, 176 L.T. 111, C.A. 68
Bartholomay Brewing Co. *v.* Wyatt, Nobel Dynamite Trust Co. *v.* Wyatt [1893] 2 Q.B. 499; 62 L.J.Q.B. 525; 69 L.T. 561; 58 J.P. 133; 9 T.L.R. 658; 37 S.J. 717; 5 R. 564; 3 T.C. 213, D.C. 1070
Bates *v.* Donaldson [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 12 T.L.R. 485; 60 J.P. 596; 44 W.R. 659, C.A. 1269
Bath *v.* British Transport Commission [1954] 1 W.L.R. 1013; 98 S.J. 472; [1954] 2 All E.R. 542; [1954] 1 Lloyd's Rep. 463, C.A. 42, 44
Baxendale *v.* Great Eastern Railway Co. (1869) L.R. 4 Q.B. 244; 10 B. & S. 212; 38 L.J.Q.B. 137; 17 W.R. 412, Exch. 735
Baxters and Midland Railway Co. (1906) 95 L.T. 20; 70 J.P. 445; 22 T.L.R. 616, C.A. 401, 402
Baylis, In re [1896] 2 Ch. 107; 65 L.J.Ch. 612; 74 L.T. 506; 12 T.L.R. 339; 44 W.R. 533 445
Beaman *v.* A.R.T.S. [1949] 1 K.B. 550; 65 T.L.R. 389; 93 S.J. 236, C.A.; reversing [1948] W.N. 224; 64 T.L.R. 285; [1948] 2 All E.R. 89 . . 572, 573, 574, 1222, 1223
Bean *v.* Doncaster Amalgamated Collieries (1944) 27 T.C. 296, H.L. 708
Bebro, In re [1900] 2 Q.B. 316; 69 L.J.Q.B. 618; 82 L.T. 773; 48 W.R. 561; 7 Mans. 284; sub nom. Re M. B., Ex p. G., 44 S.J. 501, C.A. 1273
Beeby *v.* Beeby (1799) 1 Hag. & Ecc. 789; 1 Hag.Con. 142n; 162 E.R. 755 . . 483
Beer *v.* Beer (Neilson cited) [1948] P. 10; [1948] L.J.R. 743; 63 T.L.R. 606; 112 J.P. 50; 92 S.J. 12; [1947] 2 All E.R. 711; 46 L.G.R. 47 . . 342, 483
Begg *v.* Cooper (1878) 40 L.T. 29 . . . . . 305, 306
Behrens *v.* Bertram Mills Circus, Ltd. [1957] 2 Q.B. 1; [1957] 2 W.L.R. 404; 101 S.J. 208; [1957] 1 All E.R. 583 . . . . . 889, 892
Bell *v.* Kennedy (1868) L.R. 1 Sc. & Div. 307, H.L. 1290
Bell *v.* Lever Bros. [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; 48 T.L.R. 133; 76 S.J. 50; 37 Com.Cas. 98, H.L. 756
Bender *v.* Owners of S.S. Zent [1909] 2 K.B. 41; 78 L.J.K.B. 533; 100 L.T. 639; 2 B.W.C.C. 22, C.A. 854
Benmax *v.* Austin Motor Co. [1955] A.C. 370; [1955] 2 W.L.R. 418; 99 S.J. 129; [1955] 1 All E.R. 326; 72 R.P.C. 39, H.L. 497
Bennett *v.* Ogston (1930) 15 T.C. 374 412
Benninga (Mitcham), Ltd. *v.* Bijstra [1946] K.B. 58; 115 L.J.K.B. 28; 173 L.T. 298; 61 T.L.R. 519; 90 S.J. 19; [1945] 2 All E.R. 433, C.A. 118
Bentleys, Stokes & Lowless *v.* Beeson [1952] W.N. 280; [1952] 1 T.L.R. 1529; 96 S.J. 345; [1952] 2 All E.R. 82; [1952] T.R. 239; 45 R. & I.T. 461; 33 T.C. 491 . . . . . 68, 131, 708
Bernstein *v.* Bernstein [1893] P. 292; 69 L.T. 513 485
Berry *v.* St. Marylebone Borough Council [1958] 1 Ch. 406; 56 L.G.R. 144; 2 R.R.C. 292; affirming [1957] 3 W.L.R. 1029; 112 J.P. 59; 101 S.J. 973; [1957] 3 All E.R. 677; 50 R. & I.T. 821, C.A. . . 99, 1139, 1150, 1175, 1261, 1264
Betty's Cafés *v.* Phillips Furnishing Stores [1957] 1 Ch. 67; [1956] 3 W.L.R. 1134; 100 S.J. 946; [1957] 1 All E.R. 1, C.A.; reversing [1956] 1 W.L.R. 678; 100 S.J. 435; [1956] 2 All E.R. 497 . . . . . 205, 880, 904
Bevan *v.* Webb [1901] 2 Ch. 59; 70 L.J.Ch. 536; 84 L.T. 609; 17 T.L.R. 436; 45 S.J. 465; 49 W.R. 548, C.A. 61

PAGE

Bevis *v.* Bevis [1935] P. 86; 104 L.J.P. 41; 152 L.T. 545; 51 T.L.R. 291; 79 S.J. 194, C.A. 471, 886
Bidie, In re [1949] Ch. 121; [1949] L.J.R. 386; 65 T.L.R. 25; 113 J.P. 22; 92 S.J. 705; [1948] 2 All E.R. 995; 47 L.G.R. 465, C.A. 735
Bilsbury *v.* Harrison, McGregory & Guest, Unreported, Manchester Assize, January 18, 1955 226
Birmingham Corporation *v.* I. R. C. (1929) 15 T.C. 172 708
Bishop & Baxter, Ltd. *v.* Anglo-Eastern Trading Co., Ltd. [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598 24
Blackett *v.* Royal Exchange Assurance Co. (1832) 2 C. & J. 244; 2 Tyr. 266; 1 L.J.Ex. 101; 149 E.R. 106 675
Blackwell *v.* Blackwell [1943] 2 All E.R. 579, C.A. 1120, 1122
Blaiberg, In re [1940] Ch. 385; 109 L.J.Ch. 166; 162 L.T. 418; 56 T.L.R. 487; 84 S.J. 287; [1940] 1 All E.R. 632 1158
Blakiston *v.* Cooper [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; 25 T.L.R. 164 . . . . . 837, 842
Blyth Shipbuilding and Dry Docks Co. [1926] Ch. 494; 95 L.J.Ch. 350; 134 L.T. 643, C.A. 1129
Board of Education *v.* Rice [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 S.J. 440; 9 L.G.R. 652, H.L. 556, 783
Bobbio *v.* Watney, Combe, Reid & Co., Unreported, C.A., July 13, 1955. . . 1081
Boks & Co. and Peters, Rushton & Co. [1919] 1 K.B. 491 399
Bolam *v.* Regent Oil Co. (1956) T.R. 403; 50 R. & I.T. 79; 37 T.C. 56; 35 A.T.C. 499 . . . . . 139, 708
Bolton *v.* Stone [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078; 50 L.G.R. 32; sub nom. Stone *v.* Bolton, 95 S.J. 333, H.L.; reversing sub nom. Stone *v.* Bolton [1950] 1 K.B. 201; 65 T.L.R. 683; 93 S.J. 710; [1949] 2 All E.R. 851; 48 L.G.R. 107, C.A. 803, 1206
Bonnington Castings *v.* Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; 100 S.J. 207; [1956] 1 All E.R. 615; 54 L.G.R. 153; sub nom. Wardlaw *v.* Bonnington Castings, 1956 S.C.(H.L.) 26; 1956 S.L.T. 135, H.L. 231, 233, 939
Booth *v.* Howell (1899) 53 J.P. 678; 5 T.L.R. 449, D.C. 1103
Bower *v.* Peate (1876) 1 Q.B.D. 321 701
Bowman, In re [1932] 2 K.B. 621; 101 L.J.K.B. 798; 147 L.T. 150; 96 J.P. 207; 48 T.L.R. 351; 76 S.J. 273; 30 L.G.R. 245 . . . . . 1153, 1156
Bowman *v.* Secular Society, Ltd. [1917] A.C. 406, 443; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 S.J. 478, H.L. 100
Bowring-Hanbury's Trustee *v.* Bowring-Hanbury [1943] Ch. 104; 112 L.J.Ch. 37; 168 L.T. 72; 59 T.L.R. 121; 87 S.J. 39; [1943] 1 All E.R. 48, C.A. . . 735
Bowskill *v.* Dawson (No. 2) [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; 98 S.J. 523; [1954] 2 All E.R. 649, C.A. 999
Bradshaw *v.* Air Council [1926] Ch. 329 252
Bragg *v.* Bragg [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 41 T.L.R. 8; 69 S.J. 73; 27 Cox C.C. 729, D.C. 512, 515
Brassey's Settlement, In re [1955], W.L.R. 192; 99 S.J. 149; [1955] 1 All E.R. 577 978
Brend *v.* Wood (1946) 175 L.T. 306; 110 J.P. 317; 62 T.L.R. 462; 90 S.J. 381; 44 L.G.R. 254, D.C. 527
Briddon *v.* George [1946] 1 All E.R. 609; 174 L.T. 380, C.A. 873
Bright *v.* Bright [1954] P. 270; [1953] 3 W.L.R. 659; 117 J.P. 529; 97 S.J. 729; [1953] 2 All E.R. 939 1276
Brighton College *v.* Marriott [1926] A.C. 192; 134 L.T. 417; 42 T.L.R. 228; 70 S.J. 245, H.L. 543, 708, 1139, 1263
British Dyestuffs Corporation (Blackley), Ltd. *v.* I. R. C. (1924) 12 T.C. 586 77, 83
British Electric Railway Co. *v.* Gentile [1914] A.C. 1034 735
British Foreign and Colonial Automatic Light Controlling Co., Ltd. *v.* Metropolitan Gas Meters, Ltd. [1912] 2 Ch. 82; 29 R.P.C. 571, C.A. 15
British Industrial Plastics, Ltd. *v.* Ferguson [1940] 1 All E.R. 479; 162 L.T. 313; 58 R.P.C. 1, H.L. 47
British Insulated and Helsby Cables *v.* Atherton [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187, H.L. 138
British Mutoscope and Biograph Co. *v.* Homer [1901] 1 Ch. 671; 70 L.J.Ch. 279; 84 L.T. 26; 17 T.L.R. 213; 49 W.R. 277; 18 R.P.C. 177 1036
British-Italian Corporation *v.* I. R. C. [1921] W.N. 220, C.A. 947
Brittain *v.* Brittain & Camp (1859) Sea. & Sm. 83; 23 J.P. 455 895
Brooker *v.* Jenkins Bros., Proprietors Ocean Steamships Co., Unreported, Liverpool Winter Assize, February 20, 1956 227
Brooks *v.* Mason [1902] 2 K.B. 743; 72 L.J.K.B. 19; 88 L.T. 24; 67 J.P. 47; 51 W.R. 224; 19 T.L.R. 4; 47 S.J. 13, 20 Cox C.C. 464, D.C. 527
Brownlie *v.* Campbell (1880) 5 App.Cas. 925, H.L. 756
Bryant *v.* Marx (1883) 48 T.L.R. 624 1107
Buccleuch (Duke of) *v.* Metropolitan Board of Works (1872) L.R. 5 H.L. 418, H.L. 274, 665

PAGE

Buchanan *v.* Motor Insurers' Bureau [1955] 1 W.L.R. 486; 119 J.P. 227; 99 S.J. 319; [1955] 1 All E.R. 607; [1954] 2 Lloyd's Rep. 519 1107
Buck, In re [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 40 S.J. 729; 45 W.R. 106 1177
Bugge *v.* Taylor [1941] 1 K.B. 198; 110 L.J.K.B. 710; 164 L.T. 312; 104 J.P. 467; 85 S.J. 82; 39 L.G.R. 100, D.C. 1107
Bulli Coal Mining Co. *v.* Osborne [1899] A.C. 351; 68 L.J.P.C. 49; 80 L.T. 430; 15 T.L.R. 257; 47 W.R. 545, P.C. 569
Bulmer *v.* Bulmer (1884) 25 Ch.D. 409; 53 L.J.Ch. 402; 32 W.R. 380 930
Burford *v.* Burford [1955] 1 W.L.R. 1242; 99 S.J. 834; [1955] 3 All E.R. 664, C.A. 465, 896
Burgess *v.* Florence Nightingale Hospital for Gentlewomen [1955] 1 Q.B. 349; [1955] 2 W.L.R. 533; 99 S.J. 170; [1955] 1 All E.R. 511 999
Burke, In re [1908] 2 Ch. 248; 77 L.J.Ch. 597; 99 L.T. 86 976
Burrows *v.* Southern Railway Co., 1933, November 8, Unreported 174
Burton *v.* Ogdens (Brighton) (1952) 23 D.R.A. 246 324
Butler *v.* Butler (1890) 15 P.D. 126, C.A. 147
Butterworth *v.* Page (1933) 150 L.T. 262 (C.A.); (1935) 153 L.T. 34 (H.L.) . . 77, 85, 86, 90
Byrne *v.* Beadle (1863) 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur.N.S. 1107; 12 W.R. 279; 159 E.R. 299 . . . . 803, 805, 809

C. *v.* C. (orse. H.) (1911) 27 T.L.R. 421 621
Californian Copper Syndicate, Ltd. *v.* Harris (1904) 6 F. 894; 5 T.C. 159 . . . 83
Calvert *v.* Wainwright [1947] K.B. 526; [1947] L.J.R. 1335; 177 L.T. 159; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475 833
Campbell *v.* Spottiswoode (1863) 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur.N.S. 1069; 11 W.R. 569; 122 E.R. 288 745
Campbell Coverings, In re [1953] Ch. 488; [1953] 2 W.L.R. 1135; 97 S.J. 372; [1953] 2 All E.R. 74, C.A. 1089
Campbell (Donald) & Co. *v.* Pollak [1927] A.C. 732; 96 L.J.K.B. 1093; 137 L.T. 656; 43 T.L.R. 495; 71 S.J. 450, H.L. 252, 535, 536, 537, 538
Canada Sugar Refining Co. *v.* The Queen [1898] A.C. 735 735
Canadian Pacific Railway Co. *v.* Lockhart [1942] A.C. 591; 111 L.J.P.C. 113; 167 L.T. 231; [1942] 2 All E.R. 464, P.C. 999
Canning's Will Trusts, In re [1936] Ch. 309; 105 L.J.Ch. 241; 154 L.T. 693 . . 224
Cap Blanco, The [1913] P. 130; 83 L.J.P. 23; 109 L.T. 672; 29 T.L.R. 557; 12 Asp.M.L.C. 399, C.A. 160
Cardiff Rating Authority *v.* Guest Keen Baldwin's Iron and Steel Co. [1949] 1 K.B. 385; [1949] L.J.R. 713; 65 T.L.R. 159; 113 J.P. 78; 93 S.J. 117; [1949] 1 All E.R. 27; 47 L.G.R. 159; 42 R. & I.T. 2, C.A. . . 327, 335, 336
Carlgarth, The [1927] P. 93 774
Carroll *v.* Andrew Barclay & Sons [1948] A.C. 477; [1948] L.J.R. 1490; 64 T.L.R. 384; 92 S.J. 555; [1948] 2 All E.R. 386; 1948 S.C. 100; 1948 S.L.T. 464, H.L. 416
Carson *v.* Cheyney's Executor [1957] 3 W.L.R. 768; 101 S.J. 868; [1957] 3 All E.R. 391; [1957] T.R. 261; 50 R. & I.T. 727; 36 A.T.C. 226; T.C. Leaflet No. 1846, C.A. 412
Carter *v.* Sharon, 80 S.J. 511; [1936] 1 All E.R. 720; 20 T.C. 230 1074
Cassidy *v.* Ministry of Health [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; 95 S.J. 253; [1951] 1 All E.R. 574, C.A. 803, 806
Cassidy & Co. *v.* M'Aloon (1893) L.R.Ir. 32 Q.B. & Ex. 368 1009
Caswell *v.* Powell Duffryn Associated Collieries [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 55 T.L.R. 1004; 83 S.J. 976; [1939] 3 All E.R. 722, H.L. 507
"Catalina" (Owners) *v.* "Norma" (Owners) (1938) 61 Ll.L.Rep. 360 . . . 278
Cavendish-Bentinck *v.* Cavendish-Bentinck [1949] P. 203; [1949] L.J.R. 272; 65 T.L.R. 37; 92 S.J. 441; [1948] 2 All E.R. 285, C.A. 886
Century Insurance Co. *v.* Northern Ireland Road Transport Board [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; [1942] 1 All E.R. 491, C.A. . . . 999
Challis *v.* London and South Western Railway Co. [1905] 2 K.B. 154; 74 L.J.K.B. 569; 93 L.T. 330; 21 T.L.R. 486; 49 S.J. 480; 53 W.R. 613; 7 W.C.C. 23, C.A. 853
Charles Rickards *v.* Oppenhaim [1950] 1 K.B. 616; 66 T.L.R. (Pt. 1) 435; 94 S.J. 161; [1950] 1 All E.R. 420, C.A. 1129
Chemists' Federation Agreement, In re, (1958) L.R. 1 R.P. 43 1201
Chester *v.* Bateson [1920] 1 K.B. 829 . . . . . 154, 556
Chilton *v.* Chilton (1952) P. 196; [1952] 1 T.L.R. 1316; 116 J.P. 313; 96 S.J. 378; [1952] 1 All E.R. 1322; 116 J.P.J. 516, D.C. 343
Chloride Electrical Storage Co. Ltd. *v.* Silvia Wireless Stores (1931) 48 R.P.C. 468 860
Christie *v.* Griggs (1809) 2 Camp. 79, N.P. 349

PAGE
Church Commissioners for England *v.* Ve-Ri-Best Manufacturing Co. [1957] 1 Q.B. 238; [1956] 3 W.L.R. 990; 100 S.J. 875; [1956] 3 All E.R. 777 . . 614
Clarapede & Co. *v.* Commercial Union Association (1884) 32 W.Rep. 262 . . 896, 1235
Clare *v.* Joseph [1907] 2 K.B. 369; 76 L.J.K.B. 724; 96 L.T. 770; 23 T.L.R. 498; 51 S.J. 467, C.A. 445
Clare Rural District Council *v.* Collen (1907) 72 J.P. 115, D.C. 982
Clayards *v.* Dethwick and Davis (1848) 12 Q.B. 439; 116 E.R. 932 624
Clayton *v.* Kearsey (1935) 79 S.J. 180 567
Clayton *v.* Ramsden [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 59 T.L.R. 75; 86 S.J. 384, H.L. 1159, 1160
Clear *v.* Clear [1958] 1 W.L.R. 467; 102 S.J. 306; [1958] 2 All E.R. 353, C.A. 896
Clegg *v.* Edmondson (1857) 8 De G.M. & G. 787 821
Cluert *v.* Cluert [1958] 1 W.L.R. 463; 102 S.J. 307; [1958] 1 All E.R. 417 . 470, 472
Coalville Urban District Council *v.* Boyce (1934) 18 T.C. 655 . . . . 130, 139, 708
Cockram *v.* Tropical Preservation Co. [1951] 2 K.B. 827; [1951] 2 T.L.R. 814; 115 J.P. 459; 95 S.J. 530; [1951] 2 All E.R. 520; 44 R. & I.T. 486, C.A. . 963
Cohen (Davis) & Sons *v.* Hall [1952] 1 All E.R. 157 . . . . . 967, 971
Cole, In re, Westminster Bank *v.* Morse [1958] 3 W.L.R. 447; 122 J.P. 433; 102 S.J. 618; [1958] 3 All E.R. 102, C.A. 1245, 1246
Cole (E. K.) Ltd., In re [1945] 1 All E.R. 521n. 1262
Coleman, In re [1936] Ch. 528; 105 L.J.Ch. 244; 155 L.T. 402; [1936] 2 All E.R. 225 223
Coliseum (Barrow), In re [1930] 2 Ch. 44; 99 L.J.Ch. 423; 143 L.T. 423; [1929–30] B. & C.R. 218 823
Collier (W.) *v.* Fielding [1958] 1 W.L.R. 323; 122 J.P. 222; 102 S.J. 215; [1958] 1 All E.R. 694; 56 L.G.R. 192; 51 R. & I.T. 202; 2 R.R.C. 378, C.A. . 334, 335
Collins *v.* Collins (1884) 9 App.Cas. 205; 32 W.R. 501, H.L. 483
Collins *v.* Firth-Brearley Stainless Steel Syndicate (1925) 133 L.T. 616; 69 S.J. 695; 9 T.C. 520, C.A. 708
Colonial Insurance Co. of New Zealand *v.* Adelaide Marine Insurance Co. (1886) 12 App.Cas. 128; 56 L.J.P.C. 19; 56 L.T. 173; 3 T.L.R. 252; 6 Asp.M.L.C. 94, P.C. 1130
Columbia Gramophone Co. Ltd. *v.* Murray (1922) 39 R.P.C. 239; (1924) 41 R.P.C. 295 . . . . . 660, 860–862, 1036
Commissioner of Valuation *v.* McAllister (1954) 47 R. & I.T. 635; [1954] N.I. 54, C.A. (N.I.) 967
Condliff *v.* Condliff (1874) 29 L.T. 831; 38 J.P. 151; 22 W.R. 325 932
Conway *v.* George Wimpey & Co. (No. 2) [1951] 2 K.B. 266; [1951] 1 T.L.R. 587; 95 S.J. 156; [1951] 1 All E.R. 363, C.A. 999
Cook *v.* Cook [1949] W.N. 61; [1949] L.J.R. 581; [1949] 65 T.L.R. 175; 113 J.P. 164; 93 S.J. 200; [1949] 1 All E.R. 384; 47 L.G.R. 450, D.C. 483
Cooper *v.* Cooper (No. 2) [1955] P. 168; [1954] 3 W.L.R. 923; 98 S.J. 854; [1954] 3 All E.R. 358, D.C. 1276
Cooper *v.* Crane [1891] P. 369; 61 L.J.P. 35; sub nom. Crane (orse. Cooper) *v.* Crane, 40 W.R. 127 1283
Cooper *v.* Joel (1859) 1 De G.F. & J. 240, C.A. 755
Cooper *v.* K. and L. Steel Founders and Engineers, unreported, April 12, 1951 . 226
Cooper *v.* Phibbs (1867) L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L. . 757
Cooper *v.* Whittingham (1880) 15 Ch.D. 501 252
Cooper *v.* Wilson [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; 53 T.L.R. 623; 81 S.J. 357; 35 L.G.R. 436; [1937] 2 All E.R. 726, C.A. 785
Corrick *v.* Wortham [1956] 1 W.L.R. 488; 100 S.J. 322; [1956] 2 All E.R. 174n. 927
Cotman *v.* Brougham [1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162; 62 S.J. 534; sub nom. Re Anglo-Cuban Oil, Bitumen and Asphalt Co. Ltd., Cotman *v.* Brougham, 34 T.L.R. 410, H.L. 1262
Cottle *v.* Cottle [1939] W.N. 205; 83 S.J. 501; [1939] 2 All E.R. 535 . . . 1306
Couchman *v.* Greener (1884) 1 R.P.C. 197, C.A. 47
County Laboratories Ltd. *v.* J. Mindel Ltd. [1957] Ch. 295; [1957] 2 W.L.R. 541, 746; 101 S.J. 286, 320; [1957] 1 All E.R. 806, 861 659, 660, 864, 865, 1026
County of Durham Electrical Power Distribution Co. *v.* I. R. C. [1909] 1 K.B. 737 946–948
Cowan *v.* Seymour [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 36 T.L.R. 155; 64 S.J. 259, C.A. 412
Cramp *v.* Cramp and Freeman [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 36 T.L.R. 333 . . . . . 485, 486, 490
Crewe *v.* Crewe (1800) 3 Hag. & Ecc. 123; 162 E.R. 1102 483
Crisp from the Fens *v.* Rutland County Council [1950] W.N. 72; 114 J.P. 105; 94 S.J. 177; 1 P. & C.R. 48; 48 L.G.R. 210, C.A. 1163
Crofter Hand Woven Harris Tweed Co *v.* Veitch [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 58 T.L.R. 165; [1942] 1 All E.R. 142, H.L. 776, 1059, 1062
Crookall *v.* Vickers-Armstrong [1955] 1 W.L.R. 659; 99 S.J. 401; [1955] 2 All E.R. 12; 53 L.G.R. 407 226
Cuff *v.* London and County Land and Building Co. [1912] 1 Ch. 440 . . 826

PAGE

Cumming *v.* Danson (1942) 112 L.J.K.B. 145; 59 T.L.R. 70; 87 S.J. 21; [1942] 2 All E.R. 653; sub nom. Cumming *v.* Dawson, 168 L.T. 35, C.A. . . 320
Cummings *v.* Richard Thomas & Baldwins [1953] 2 Q.B. 95; [1953] 2 W.L.R. 1104; 97 S.J. 370; [1953] 2 All E.R. 43; 51 L.G.R. 385, C.A. . . 507
Cundy *v.* Le Cocq (1884) 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C. 526
Czarnikow *v.* Rath, Schmidt & Co. [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; 38 T.L.R. 797; 28 Com.Cas. 29, C.A. 252, 274, 278

D'Aguilar *v.* D'Aguilar (1794) 1 Hag.Ecc. 773; 1 Hag.Con. 134n.; 162 E.R. 748 . 487
De Reneville *v.* De Reneville [1948] P. 100; [1948] L.J.R. 1761; 64 T.L.R. 82; [1948] 1 All E.R. 56, C.A.; affirming [1947] P. 186; 177 L.T. 408; 63 T.L.R. 490; 92 S.J. 83; [1947] 2 All E.R. 112. 1283
Dalton *v.* Angus (1881) 6 App.Cas. 740, H.L. 699
Dankbars (An Infant), In re [1954] Ch. 98; [1953] 3 W.L.R. 957; 97 S.J. 811; 51 L.G.R. 666; sub nom. D. (an infant), Re, 118 J.P. 25; [1953] 2 All E.R. 1318, C.A. 514
Darnell *v.* Millward [1950] W.N. 567; 66 T.L.R. (Pt. 2) 1100; 94 S.J. 822; sub nom. Darnell *v.* Millwood [1951] 1 All E.R. 88, C.A. 320
Davies *v.* Powell Duffryn Associated Collieries [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 58 T.L.R. 240; 86 S.J. 294; [1942] 1 All E.R. 657, H.L. . 999
Davis *v.* Carew-Pole [1956] 1 W.L.R. 833; 100 S.J. 510; [1956] 2 All E.R. 524 778, 783
Dearden *v.* Townsend (1865) L.R. 1 Q.B. 10; 6 B. & S. 861; 35 L.J.M.C. 50; 13 L.T. 323; 29 J.P. 821; 12 Jur.N.S. 120; 14 W.R. 53; 122 E.R. 1411 . 1163
Debtor, In re A [1936] Ch. 237 1036
Debtor (No. 3 of 1909), In re A, ex parte Goldstein [1917] 1 K.B. 558 . . 293
De Reneville *v.* De Reneville [1948] P. 100; [1948] L.J.R. 1761; 64 T.L.R. 82; [1948] 1 All E.R. 56, C.A.; affirming [1947] P. 186; 177 L.T. 408; 63 T.L.R. 490; 92 S.J. 83; [1947] 2 All E.R. 112 . . . 1014, 1015, 1283
Derbyshire Miners Welfare Committee *v.* Skegness U. D. C. (No. 2) [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; 122 J.P. 74; 101 S.J. 973; [1957] 3 All E.R. 692; 50 R. & I.T. 803; 56 L.G.R. 37, C.A.; affirming [1957] 1 W.L.R. 764; 121 J.P. 385; 101 S.J. 465; [1957] 2 All E.R. 405; 50 R. & I.T. 329; 1 R.R.C. 374, D.C.; reversing (1956) 49 R. & I.T. 778; [1956] C.L.Y. 7294 . . . . . 1139, 1177
Derrick *v.* Williams (1939) 55 T.L.R. 676; 160 L.T. 589; 83 S.J. 397; [1939] 2 All E.R. 559, C.A. 1236, 1237
Desoutter Brothers Ltd. *v.* J. E. Hangar & Co. Ltd. (1936) 80 S.J. 386; [1936] 1 All E.R. 535 68
Dickinson *v.* St. Aubyn [1944] K.B. 454; 113 L.J.K.B. 225; 170 L.T. 287; 60 T.L.R. 269, C.A. 851
Dickson *v.* Flack [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; 97 S.J. 586; [1953] 2 All E.R. 840; 51 L.G.R. 515; reversing [1953] 1 W.L.R. 196; 97 S.J. 66; [1953] 1 All E.R. 236, C.A. 416
Diplock, In re [1948] Ch. 465; [1948] L.J.R. 1670; 92 S.J. 484; [1948] 2 All E.R. 318, C.A. 1220, 1227
Dixon, In re [1892] P. 386; 56 J.P. 841; 8 T.L.R. 744 . . . . . 247, 248
Dixon *v.* Dixon [1953] P. 103; [1953] 2 W.L.R. 748; 97 S.J. 249; [1953] 1 All E.R. 910 1276
Dobson and Sutton *v.* Groves (1844) 6 Q.B. 637; 1 New Pract.Cas. 101; 14 L.J. Q.B. 17; 4 L.T.O.S. 155; 9 Jur. 86; 115 E.R. 239. 274
Dodd *v.* Dodd [1906] P. 189; 75 L.J.P. 49; 94 L.T. 709; 70 J.P. 163; 22 T.L.R. 484; 50 S.J. 528; 54 W.R. 541 510
Donaldson, In re (1884) 27 Ch.D. 544; 54 L.J.Ch. 151; 51 L.T. 622 . . . 13, 14
Donaldson (orse. Nichols) *v.* Donaldson [1949] P. 363; [1949] L.J.R. 762; 65 T.L.R. 233; 93 S.J. 220 1289
Donnithorne *v.* Donnithorne (1930) S.A.S.R. 182 488
Donoghue *v.* Stevenson [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 S.J. 396; 37 Com.Cas. 350, H.L. 999
Douglas *v.* Forrest (1828) 4 Bing. 686; 1 Moo. & P. 663; 6 L.J.O.S.C.P. 157; 130 E.R. 933 . . . . . 731, 735
Dow Hager Lawrence *v.* Norreys (Lord) (1890) 15 App.Cas. 210 567
Dracup *v.* Radcliffe (1946) 27 T.C. 188 411
Drummond *v.* British Building Cleaners [1954] 1 W.L.R. 1434; 98 S.J. 819; [1954] 3 All E.R. 507; 53 L.G.R. 29, C.A. 231
Duchesne *v.* Duchesne [1951] P. 101; 66 T.L.R. (Pt. 2) 639; 94 S.J. 612; [1950] 2 All E.R. 784 898
Ducker *v.* Rees Roturbo Development Syndicate Ltd. [1928] A.C. 132; 97 L.J.K.B. 317; 138 L.T. 598; 44 T.L.R. 307; 72 S.J. 171 83
Duffett *v.* McEvoy (1885) 10 App.Cas. 300, P.C. 445
Dunbar *v.* Dunbar [1909] 2 Ch. 639; 79 L.J.Ch. 70; 101 L.T. 553; 26 T.L.R. 21 . 260

PAGE

Duncan *v.* Cammell, Laird & Co. [1942] A.C. 624; 111 L.J.K.B. 406; 166 L.T. 366; 58 T.L.R. 242; 86 S.J. 287; [1942] 1 All E.R. 587 . 1307, 1308, 1309
Dunlop Pneumatic Tyre Co. *v.* Selfridge & Co. [1915] A.C. 847; 84 L.J.K.B. 1680; 47 W.R. 632; 16 R.P.C. 247 1036
Dunlop Pneumatic Tyre Co. *v.* Selfridge & Co. [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 31 T.L.R. 399; 59 S.J. 439, H.L. 860
Dunn *v.* Dunn (1888) 13 P.D. 91; 57 L.J.P. 58; 59 L.T. 385; 4 T.L.R. 399; 36 W.R. 539, C.A. 885, 886
Dupuis *v.* New Regina Trading Co. [1943] 4 Dom.L.R. 275 . . . . 999, 1004
Duranty's Case (1858) 26 Beav. 268; 28 L.J.Ch. 37; 32 L.T.O.S. 114; 4 Jur.N.S. 1068; 7 W.R. 70; 53 E.R. 901 755

E. E. & Brian Smith (1928) *v.* Wheatsheaf Mills [1939] 2 K.B. 302 274
Easson *v.* London and North Eastern Railway Co. [1944] 1 K.B. 421; 113 L.J.K.B. 449; 170 L.T. 234; 60 T.L.R. 280; 88 S.J. 143; [1944] 2 All E.R. 425, C.A. . 349
East Kent Packers *v.* Buncombe (1951) 45 R. & I.T. 151 967
Eastbourne Corpn. *v.* Fortes Ice Cream Parlour (1955) Ltd. [1958] 2 W.L.R. 886; 122 J.P. 324; 102 S.J. 365; [1958] 2 All E.R. 276; 56 L.G.R. 243; 9 P. & C.R. 313, D.C. 636
Eaves *v.* Eaves & Powell [1956] P. 154; [1955] 3 W.L.R. 984; 99 S.J. 891; [1955] 3 All E.R. 849 315
Ebbw Vale Steel, Iron and Coal Co *v.* Tew (1935) 79 S.J. 593, C.A. 28
Eckert *v.* Long Island Railroad Co. (1871) 43 N.Y. 502 999
Edevain *v.* Cohen (1889) 41 Ch.D. 563 1233
Edler *v.* Auerbach [1950] 1 K.B. 359; 65 T.L.R. 645; 93 S.J. 727; [1949] 2 All E.R. 692; 1 P. & C.R. 10 756
Edwards *v.* Summerton [1899] W.N. 120 23
Edwards (Inspector of Taxes) *v.* Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; 99 S.J. 558; [1955] 3 All E.R. 48; [1955] T.R. 209; 48 R. & I.T. 534; 36 T.C. 207; 34 A.T.C. 198; T.C. Leaflet No. 1742, H.L. . 77, 83, 131, 324, 338, 708, 1071
Ellesmere *v.* I. R. C. [1918] 2 K.B. 735; 88 L.J.K.B. 337; 119 L.T. 568; 34 T.L.R. 560 252
Elliott *v.* Elliott [1956] P. 160; [1956] 2 W.L.R. 219; 100 S.J. 52; [1956] 1 All E.R. 122, C.A. 483
Ellis *v.* Home Office [1953] 2 Q.B. 135; [1953] 3 W.L.R. 105; 97 S.J. 436; [1953] 2 All E.R. 149, C.A. 1308, 1309
Ellis *v.* Manchester Carriage Co. (1876) 2 C.P.D. 13; 35 L.T. 476; 25 W.R. 229 . 1234
Elwes *v.* Elwes (1794) 1 Hag.Con. 269; 161 E.R. 549 483
Emanuel *v.* Emanuel [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 61 T.L.R. 538; [1945] 2 All E.R. 494 896
Errington *v.* Minister of Health [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 S.J. 754 . . . . . 664, 677
Eshelby *v.* Federated European Bank Ltd. [1932] 1 K.B. 423; affirming [1932] 1 K.B. 254 22
Esso Petroleum Co. *v.* Southport Corporation [1956] A.C. 218; [1956] 2 W.L.R. 81; 120 J.P. 54; 100 S.J. 32; [1955] 3 All E.R. 864; 54 L.G.R. 91; [1955] 2 Lloyd's Rep. 655, H.L. 1236
Evans *v.* Bartlam [1937] A.C. 473; 106 L.J.K.B. 568; 53 T.L.R. 689; 81 S.J. 549 160, 532
Evans *v.* Horner [1925] Ch. 177; 94 L.J.Ch. 220; 132 L.T. 730; 69 S.J. 161 . . 119
Everett *v.* Griffiths [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 85 J.P. 149; 37 T.L.R. 481; 65 S.J. 395; 19 L.G.R. 283, H.L. 556
Everitt *v.* Everitt [1948] W.N. 237; 65 T.L.R. 121; 92 S.J. 586; [1948] 2 All E.R. 545, C.A. 1049
Everitt *v.* Everitt [1949] P. 374; 113 J.P. 279; 93 S.J. 286; [1949] 1 All E.R. 908; 47 L.G.R. 377, C.A. 483
Exchange Telegraph Co. Ltd. *v.* Gregory & Co. [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 12 T.L.R. 18, C.A. 68

F. *v.* P. (orse. F.) (1911) 27 T.L.R. 429 621
F. P. H. Finance Trust *v.* I. R. C. [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 61 T.L.R. 320; 89 S.J. 175; [1945] 1 All E.R. 492; 28 T.C. 209, H.L. 214, 218
Faithfull *v.* Kesteven (1910) 103 L.T. 56, C.A. 567
Fane *v.* Fane (1879) 13 Ch.D. 228; 49 L.J.Ch. 200; 41 L.T. 551; 28 W.R. 348 . 532
Fearn *v.* Fearn [1948] P. 241; [1948] L.J.R. 1043; 64 T.L.R. 218; 92 S.J. 140; [1948] 1 All E.R. 459, C.A. 483
Fearon & Flinn, In re (1869) L.R. 5 C.P. 34 253

PAGE

Federal Commissioner of Taxation *v.* United Aircraft Corporation (1943) 68 C.L.R. 525 68
Ferrier *v.* Scottish Milk Marketing Board [1937] A.C. 126; 105 L.J.P.C. 135; 155 L.T. 425; 80 S.J. 718; [1936] 2 All E.R. 1131, H.L. 918
Finch *v.* Telegraph Construction and Maintenance Co. [1949] W.N. 57; 65 T.L.R. 153; 93 S.J. 219; [1949] 1 All E.R. 452; 47 L.G.R. 710 226
Finlayson *v.* M'Leod (1818) 1 B. & Ald. 663; 106 E.R. 243 252
Finney *v.* Finney (1868) L.R. 1 P.D. 483; 37 L.J.P. & M. 43; 18 L.T. 489 . . 1276
Fisher *v.* Taylors Furnishing Stores [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; 100 S.J. 316; [1956] 2 All E.R. 78, C.A. 207, 208, 209, 902
Fisk *v.* Fisk (1920) 122 L.T. 803; 36 T.L.R. 248 342
Fitton *v.* Wood (1875) 32 L.T. 554; 39 J.P. 646 1079
Fleet Electrics Ltd. *v.* Jacey Investments Ltd. [1956] 1 W.L.R. 1027; 100 S.J. 586; [1956] 3 All E.R. 99, C.A. 902
Florence Land and Public Works Co., In re (1883) 29 Ch.D. 421 911
Flower *v.* Ebbw Vale Steel, Iron and Coal Co. [1936] A.C. 206, H.L. . . . 502
Flower *v.* Lloyd (1879) 10 Ch.D. 327, C.A. 3
Foley *v.* Classique Coaches Ltd. [1934] 2 K.B. 1; 103 L.J.K.B. 550; 151 L.T. 242, C.A. 24
Forbes *v.* Forbes [1954] 1 W.L.R. 1526; 119 J.P. 30; 98 S.J. 887; [1954] 3 All E.R. 461 483
Forbes *v.* Forbes (No. 2) [1956] P. 16; [1955] 1 W.L.R. 531; 119 J.P. 403; 99 S.J. 321; [1955] 2 All E.R. 311 . . . . . 695, 697
Forbes *v.* Scottish Widows Fund and Life Assurance (1895) 3 T.C. 443 . . 1070
Ford *v.* Langford [1949] W.N. 87; [1949] L.J.R. 586; 65 T.L.R. 138; 93 S.J. 102; [1949] 1 All E.R. 483, C.A. 238
Ford *v.* London and South Western Railway Co. (1862) 2 F. & F. 730, N.P. 350, 356
Ford *v.* Stier [1896] P. 1; sub nom. Clarke *v.* Clarke, 65 L.J.P. 13; sub nom. Clarke (falsely called Stier) *v.* Stier, 73 L.T. 632; sub nom. Stier (orse. Clarke) *v.* Stier, 11 R. 668 1282
Foster *v.* Great Western Railway Co. (1882) 8 Q.B.D. 515; 51 L.J.Q.B. 233; 46 L.T. 74; 30 W.R. 398; 4 Ry. & Can.Tr.Cas. 58, C.A. 253
Foster *v.* Robinson [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; 94 S.J. 474; [1950] 2 All E.R. 342, C.A. 244, 583
Foulsham *v.* Pickles [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; 41 T.L.R. 323; 69 S.J. 411 1074
Fowler *v.* Fowler [1952] 2 T.L.R. 143, C.A. 694, 695
Francis *v.* Francis and Dickerson [1956] P. 87; [1955] 3 W.L.R. 973; 99 S.J. 891; [1955] 3 All E.R. 836 315
Frape, In re, ex parte Perrett [1893] 2 Ch. 284; 62 L.J.Ch. 473; 68 L.T. 558; 37 S.J. 373; 41 W.R. 417; 2 R. 411, C.A. 451, 452
French Government *v.* Owners of S.S. Tsurushima Maru (1921) 37 T.L.R. 961 . 252
Fribance *v.* Fribance (No. 2) [1957] 1 W.L.R. 384; 101 S.J. 188; [1957] 1 All E.R. 357, C.A. 264, 1120
Friend *v.* Solley (1847) 10 B. 329 315
Fritz *v.* Hobson (1880) 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 24 S.J. 366; 28 W.R. 459 22
Frost *v.* London, Brighton & South Coast Railway Co. (1870) 39 L.J.N.S.Ex. 54 . 315
Fuerst Bros. & Co. and R. S. Stephenson, In re [1951] 1 Lloyd's Rep. 429 . 252, 274, 279
Fullers *v.* Squire [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 45 S.J. 539; 49 W.R. 683, D.C. 965, 971
Fulwood's Case (1638) Cro.Car. 482 1284

G. *v.* G. (1871) L.R. 2 P. & D. 287; 40 L.J.P. & M. 83; 25 L.T. 510; 20 W.R. 103 622
Gape, In re [1952] Ch. 743; [1952] 2 T.L.R. 477; 96 S.J. 595; sub nom. Re Gape's Will Trusts, Verey *v.* Gape [1952] 2 All E.R. 579, C.A. . . 1163
Gascoigne *v.* Gascoigne [1918] 1 K.B. 223; 87 L.J.K.B. 333; 118 L.T. 347; 34 T.L.R. 168, D.C. 260
Gavazzi *v.* Mace (1926) 135 L.T. 634 68
Gee *v.* Metropolitan Railway Co. (1873) L.R. 8 Q.B. 161; 42 L.J.Q.B. 105; 28 L.T. 282; 21 W.R. 584, Ex.Ch. 624
General Medical Council *v.* Spackman [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 59 T.L.R. 412; 87 S.J. 298; [1943] 2 All E.R. 337, H.L. . . 775
General Nursing Council for England and Wales *v.* St. Marylebone Borough Council [1958] Ch. 421; [1957] 3 W.L.R. 1039; 122 J.P. 67; 101 S.J. 973; [1957] 3 All E.R. 685; 50 R. & I.T. 818; 56 L.G.R. 43, C.A. . 100, 107, 179, 1139, 1178
Geologists' Association *v.* Commissioners of Inland Revenue (1928) 14 T.C. 271 . 105
Gibbs & Houlder Bros. & Co. Ltd.'s Lease, In re [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487; 69 S.J. 541, C.A. 1269

PAGE
Giblin *v.* McMullen (1868) L.R. 2 C.P. 317; 5 Moo.P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C. 1032
Gibson *v.* South American Stores (Gath & Chaves) [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; 93 S.J. 822; [1949] 2 All E.R. 985, C.A. 1175
Gilbert *v.* Gilbert (Adams intervening) [1958] 2 W.L.R. 8; 102 S.J. 15; [1957] 3 All E.R 604 1092
Gillet *v.* Gillet [1952] W.N. 266; [1952] 1 All E.R. 1399, C.A. 895
Ginn *v.* Robey [1911] W.N. 28 316
Glasgow Corporation *v.* Central Land Board [1956] J.P.L. 442; 1956 S.C.(H.L.) 1; S.L.T. 41, H.L.; affirming 1955 S.C. 64; 1955 S.L.T. 155 1303
Glasgow Corporation *v.* Muir [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T 53; 107 J.P. 140; 59 T.L.R. 266; 87 S.J. 182; 41 L.G.R. 173, H.L. 1206
Glasgow Corporation *v.* Taylor [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 38 T.L.R. 102; 20 L.G.R. 205, H.L. 354
Glasgow Iron and Steel Co. *v.* Dickson [1925] A.C. 790; 95 L.J.P.C. 1; 133 L.T. 771; 41 T.L.R. 644; 69 S.J. 743, 794; 18 B.W.C.C. 411, H.L. . . 118
Gleahill *v.* Liverpool Abattoir Utility Co. [1957] 1 W.L.R. 1028; 101 S.J. 797; [1957] 3 All E.R. 117; 55 L.G.R. 311, C.A. 367, 370
Glenister *v.* Glenister [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 43 L.G.R. 250; [1945] 1 All E.R. 513 . . . . 343, 345, 346, 484, 486
Glynn *v.* Margetson & Co. [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 1 Asp.M.L.C. 366; 1 R. 193, H.L. 699
Goodyear Tyre and Rubber Co. (Great Britain) *v.* Lancashire Batteries [1958] 1 W.L.R. 857; 102 S.J. 581; [1958] 3 All E.R. 7; L.R. 1 R.P. 22; reversing [1958] 1 W.L.R. 655 1036
Gray *v.* Ashburton [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; 61 S.J. 129, H.L. 254
Great Kruger Gold Mining Co., In re [1892] 3 Ch. 307 293
Great Western Railway Co. *v.* Bater [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 38 T.L.R. 448; 66 S.J. 365; 8 T.C. 231, H.L. 68
Green *v.* Weatherill [1929] 2 Ch. 213; 98 L.J.Ch. 369; 142 L.T. 216; 45 T.L.R. 494 289
Greene *v.* Greene [1916] P. 188; 85 L.J.P. 224; 115 L.T. 127; 32 T.L.R. 520; 60 S.J. 620 343
Greenhalgh *v.* Mallard [1947] 2 All E.R. 255, C.A. . . . 288, 291, 295, 296
Greer *v.* Downs Supply Co. [1927] 2 K.B. 28; 96 L.J.K.B. 534; 137 L.T. 174, C.A. 865
Gresham Life Assurance Society *v.* Bishop [1901] 1 K.B. 153, C.A. . . . 1070
Gresham's Settlement, In re [1956] 1 W.L.R. 573; 100 S.J. 380; [1956] 2 All E.R. 193 222
Grey, In the estate of [1922] P. 140; 91 L.J.P. 111; 126 L.T. 799; 38 T.L.R. 401 460
Griffith *v.* Pelton [1958] Ch. 205; [1957] 3 W.L.R. 522; 101 S.J. 663; [1957] 3 All E.R. 75, C.A. 65
Grote *v.* Chester and Holyhead Railway Co. (1848) 2 Ex. 251; 5 Ry. & Can.Cas. 649; 154 E.R. 485 351
Grove *v.* Lloyds British Testing Co. [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279, H.L. 962
Guinness Trust (London Fund) *v.* Green [1955] 1 W.L.R. 872; 99 S.J. 509; [1955] 2 All E.R. 871, C.A. 643

H. *v.* H. [1954] P. 258; [1953] 3 W.L.R. 849; 97 S.J. 782; [1953] 2 All E.R. 1229 1282
Hadley *v.* Baxendale (1854) 9 Exch.Rep. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145 625
Haigh's Trustees *v.* Inland Revenue Commissioners, 1939 S.C. 676; 22 T.C. 725 78, 85
Halifax Sugar Refining Co., In re (1891) 7 T.L.R. 293 567
Hall *v.* Hall (1908) 24 T.L.R. 736 1282
Hall *v.* Hall & Richardson (1879) 48 L.J.P. 57; 40 L.T. 525; 27 W.R. 664 . 1277
Hall *v.* Marians (No. 2) (1935) 18 T.C. 148 1070
Harding *v.* Price [1948] 1 K.B. 695; [1948] L.J.R. 1624; 64 T.L.R. 111; 112 J.P. 189; 92 S.J. 112; [1948] 1 All E.R. 283; 46 L.G.R. 142, D.C. . . . 527
Harewood Hotels *v.* Harris [1958] 1 W.L.R. 108; 102 S.J. 67; [1958] 1 All E.R. 104, C.A. 1079
Harris *v.* Corporation of Irvine [1900] 2 F. 1080; 4 T.C. 221 134
Harrison *v.* Hill, 1932 S.C.(J.) 13 1108
Harrison *v.* Metropolitan-Vickers Electrical Company Ltd. [1954] 1 W.L.R. 324; 98 S.J. 108; [1954] 1 All E.R. 404; 52 L.G.R. 174, C.A. 42
Harrison (T. & J.) *v.* Knowles & Foster [1918] 1 K.B. 608; 87 L.J.K.B. 680; 118 L.T. 566; 23 Com.Cas. 282; 14 Asp.M.L.C. 249, C.A. 756
Hartley *v.* Hartley [1955] 1 W.L.R. 384; 119 J.P. 248; 99 S.J. 239; [1955] 1 All E.R. 625, D.C. 483
Haseldine *v.* C. A. Daw & Son [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A. 349

PAGE

Haswell *v.* Haswell and Sanderson (1859) 1 Sw. & Tr. 502; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832 . 345
Haynes *v.* Harwood [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 51 T.L.R. 100; 78 S.J. 801, C.A. 999, 1000, 1003
Haynes *v.* Qualcast (Wolverhampton) Ltd. [1958] 1 W.L.R. 225; 102 S.J. 138; [1958] 1 All E.R. 441, C.A. 491, 940
Healey *v.* Minister of Health [1955] 1 Q.B. 221; [1954] 3 W.L.R. 815; 119 J.P. 242; 98 S.J. 819; [1954] 3 All E.R. 449, C.A.; affirming [1954] 2 Q.B. 221; [1954] 3 W.L.R. 222; 118 J.P. 400; 98 S.J. 473; [1954] 2 All E.R. 580 . 154
Heasman *v.* Jordan [1954] Ch. 744; [1954] 3 W.L.R. 432; 98 S.J. 575; [1954] 3 All E.R. 101; [1954] T.R. 313; 47 R. & I.T. 558; 35 T.C. 518; 33 A.T.C. 324 412
Heath *v.* Pearson [1957] Crim.L.R. 195, D.C. 1107, 1108
Heatley *v.* Steel Co. of Wales [1953] 1 W.L.R. 405; 97 S.J. 149; [1953] 1 All E.R. 489, C.A. 999
Heaven & Kesterton *v.* Etablissements François Albiac et Cie [1956] 2 Lloyd's Rep. 316 252
Heaven & Kesterton *v.* Sven Widaeus A/B [1958] 1 W.L.R. 248; 102 S.J. 161; [1958] 1 All E.R. 420; [1958] 1 Lloyd's Rep. 101 719
Hedley *v.* Bates (1880) 13 Ch.D. 498; 49 L.J.Ch. 170; 42 L.T. 41; 28 W.R. 365 . 154
Henderson *v.* Henderson (1843) 3 Hare 100 . . . . . 289, 291
Henderson *v.* Henderson and Crellin [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 60 T.L.R. 113; 88 S.J. 24; [1944] 1 All E.R. 44, H.L. 485, 486
Hennessy *v.* Wright (1888) 21 Q.B.D. 509; 57 L.J.Q.B. 530; 59 L.T. 323; 53 J.P. 52; 4 T.L.R. 597, D.C. 1307
Henshall *v.* Porter [1923] 2 K.B. 193; 92 L.J.K.B. 866; 129 L.T. 443; 39 T.L.R. 409; 67 S.J. 537 1036
Herbert *v.* McQuade [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 18 T.L.R. 728; 4 T.C. 489, C.A. 836, 837
Herbert Morris Ltd. *v.* Saxelby [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 S.J. 305, H.L. 89
Heydon's Case (1584) 3 Co.Rep. 7a; Moore K.B. 128; 76 E.R. 637 735
Heyman *v.* Darwins [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 58 T.L.R. 169, H.L. 160
Heyworth's Contingent Reversionary Interest, In re [1956] Ch. 364; [1956] 2 W.L.R. 1044; 100 S.J. 342 167
Hichens *v.* Hichens [1945] P. 23; 114 L.J.P. 65; 172 L.T. 331; 61 T.L.R. 302; [1945] 1 All E.R. 451, C.A. 1120
Hickman *v.* Kent or Romney Marsh Sheep-Breeders' Association [1915] 1 Ch. 881; 84 L.J.Ch. 688; 113 L.T. 159; 59 S.J. 478 214
Hickman *v.* Maisey [1900] 1 Q.B. 752; 69 L.J.Q.B. 511; 82 L.T. 321; 44 S.J. 326; 48 W.R. 385 774
Higgins *v.* Willis (1828) 3 M. & R.K.B. 382 401
Highett and Bird's Contract, In re [1903] 1 Ch. 287; 72 L.J.Ch. 220; 87 L.T. 697; 47 S.J. 204; 51 W.R. 227, C.A. 854
Hill, In re [1914] W.N. 132 977
Hill *v.* Booth [1930] 1 K.B. 381; 99 L.J.K.B. 49; 142 L.T. 80; 46 T.L.R. 50; 73 S.J. 782, C.A. 238
Hillas & Co. Ltd. *v.* Arcos Ltd. (1932) 147 L.T. 503 . . . . . 24, 699
Hills (Patents) *v.* University College Hospital Board of Governors [1956] 1 Q.B. 90; [1955] 3 W.L.R. 523; 99 S.J. 760; [1955] 3 All E.R. 365, C.A. . . 1079
Hines *v.* Eastern Counties Farmers Co-operative Association [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279 962, 964, 967, 969
Hip Foong Hong *v.* H. Neatia & Co. [1918] A.C. 888 4
Hitchcock *v.* W. B. & F. E. B. [1952] 2 Q.B. 561; [1952] 1 T.L.R. 1550; 116 J.P. 401; 96 S.J. 448; [1952] 2 All E.R. 119; 50 L.G.R. 606 . . 199, 200, 201, 202
Hoare *v.* Robert Green [1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724; 71 J.P. 341; 23 T.L.R. 483, D.C. 370, 961
Hobbs *v.* Winchester Corporation [1910] 2 K.B. 471; 79 L.J.K.B. 1123; 102 L.T. 841; 74 J.P. 413; 26 T.L.R. 557; 8 L.G.R. 1072, C.A. 526
Hoenig *v.* Isaacs [1952] 1 T.L.R. 1360; [1952] 2 All E.R. 176, C.A. . . . 1129
Holden *v.* Premier Waterproof and Rubber Co. (1931) 47 T.L.R. 169 . . . 854
Hole *v.* Chard Union [1894] 1 Ch. 293; 63 L.J.Ch. 469; 70 L.T. 52; 38 S.J. 113; 7 R. 84, C.A. 25, 26
Hong *v.* Brown (A. & R.) [1948] 1 K.B. 515; [1948] L.J.R. 1816; 92 S.J. 124; [1948] 1 All E.R. 185; sub nom. Hong *v.* Brown and Runcimans, 64 T.L.R. 132, C.A. 534, 535, 536, 538
Hood *v.* Anchor Line (Henderson) Bros. [1918] A.C. 837; 87 L.J.P.C. 156; 119 L.T. 684; 34 T.L.R. 550; 62 S.J. 680, H.L. 860, 1036

PAGE
Hookway (F. E.) & Co. *v.* Alfred Isaacs & Sons [1954] 1 Lloyd's Rep. 491 . . 664
Hopper, In re (1867) L.R. 2 Q.B.D. 367; 8 B. & S. 100; 36 L.J.Q.B. 97; 15 W.R. 443 274
Hosking *v.* De Havilland Aircraft Co. Ltd. [1949] 1 All E.R. 540; 83 Ll.L.Rep. 11 42
Ho Tung *v.* Man On Insurance Co. [1902] A.C. 232; 71 L.J.P.C. 46; 85 L.T. 617; 18 T.L.R. 118; 9 Mans. 171, P.C. 1114
Howard de Walden *v.* I. R. C. [1942] 1 K.B. 389; 111 L.J.K.B. 273; 25 T.C. 121; [1942] 1 All E.R. 287, C.A. 591
Howson *v.* Monsell [1950] W.N. 544; 66 T.L.R. (Pt. 2) 916; 94 S.J. 742; [1950] 2 All E.R. 1239n.; [1950] T.R. 333; 31 T.C. 529 68
Hoystead *v.* Commissioner of Taxation [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; 42 T.L.R. 207, P.C. 1276
Hudson *v.* Hudson [1948] P. 292; [1948] L.J.R. 907; 64 T.L.R. 258; [1948] 1 All E.R. 773 . . . . . 515, 1276
Hudsons *v.* De Halpert (1913) 108 L.T. 416 . . . . . 533, 534, 538
Hughes *v.* Waite [1957] 1 W.L.R. 713; 101 S.J. 405; [1957] 1 All E.R. 603 . 238
Humfrey *v.* Dale (1857) 7 E. & B. 266 . . . . . 675, 677
Humphries *v.* Connor (1864) 17 Ir.C.L.R. 1 1185
Hunt *v.* Star Newspaper [1908] 2 K.B. 309; 77 L.J.K.B. 732; 98 L.T. 629; 24 T.L.R. 452; 52 S.J. 376, C.A. 745
Huntley *v.* Thornton [1957] 1 W.L.R. 321; 101 S.J. 171; [1957] 1 All E.R. 234 . 774
Hussein (orse. Blitz) *v.* Hussein [1938] P. 159; 107 L.J.P. 105; 54 T.L.R. 632; 82 S.J. 336; [1938] 2 All E.R. 344 1282
Hutchinson *v.* London and North Eastern Railway Co. [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 58 T.L.R. 174; [1942] 1 All E.R. 330, C.A. . 507
Hutton *v.* Warren (1836) 1 M. & W. 466; 2 Gale 71; Tyr. & G. 646; 5 L.J.Ex. 231; 150 E.R. 517 . . . . . 274, 282, 671, 672, 674
Huxley *v.* West London Extension Railway Co. (1889) 14 App.Cas. 26 . . . 532
Hyett *v.* Great Western Railway Co. [1948] 1 K.B. 345; [1947] L.J.R. 1243; 177 L.T. 178; 63 T.L.R. 411; 91 S.J. 434; [1947] 2 All E.R. 264, C.A. . 999

Ibrahim *v.* The King [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 30 T.L.R. 383; 24 Cox.C.C. 174, P.C. 1053
Incandescent Gas Light Co. *v.* Brogden (1899) 16 R.P.C. 179 1037
Income Tax Commissioners *v.* Pemsel [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 T.C. 53, H.L. 1175
Inderwick, In re (1883) 25 Ch.D. 279; 54 L.J.Ch. 72; 50 L.T. 221; 32 W.R. 541, C.A. 445
Ingram *v.* Ingram [1956] P. 390; [1956] 2 W.L.R. 782; 100 S.J. 227; [1956] 1 All E.R. 785 694
Inland Revenue *v.* Maclachlans, 1930 S.C. 449 963
Inland Revenue *v.* Strang (1878) 15 Sc.L.R. 704 836
Inland Revenue Commissioners *v.* Alexander von Glehn & Co. [1920] 2 K.B. 553 298
Inland Revenue Commissioners *v.* Assessor for Edinburgh, 1930 S.C. 429 . . 363
Inland Revenue Commissioners *v.* Bew Estates [1956] Ch. 407; [1956] 3 W.L.R. 139; 100 S.J. 419; [1956] 2 All E.R. 210; [1956] T.R. 97; 49 R. & I.T. 353; 36 T.C. 476; 35 A.T.C. 104 412
Inland Revenue Commissioners *v.* British Salmson Aero Engines Ltd. [1938] 2 K.B. 482; 107 L.J.K.B. 648; 159 L.T. 147; 54 T.L.R. 904; 82 S.J. 433; 22 T.C. 29; [1938] 3 All E.R. 283, C.A. 68
Inland Revenue Commissioners *v.* Clay, Inland Revenue Commissioners *v.* Buchanan [1914] 3 K.B. 466; 83 L.J.K.B. 1425; 111 L.T. 484; 30 T.L.R. 573; 58 S.J. 610, C.A. 1297
Inland Revenue Commissioners *v.* Dalgety & Co. [1930] A.C. 527; 99 L.J.K.B. 342; 143 L.T. 191; 46 T.L.R. 349; 15 T.C. 216, H.L. 590
Inland Revenue Commissioners *v.* Forrest (1890) 15 App.Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 6 T.L.R. 456; 3 T.C. 117; 39 W.R. 33, H.L. 103
Inland Revenue Commissioners *v.* Fred's Securities Co. [1939] 2 K.B. 734; [1939] 3 All E.R. 241 214
Inland Revenue Commissioners *v.* Gordon [1952] A.C. 552; [1952] 1 T.L.R. 913; 96 S.J. 280; [1952] 1 All E.R. 866; [1952] T.R. 149; 45 R. & I.T. 285; 33 T.C. 226; 31 A.T.C. 165; 1952 S.C.(H.L.) 64, H.L. . . . 1070, 1074
Inland Revenue Commissioners *v.* John Donaldson & Co. 1930 S.C. 348 . . 961
Inland Revenue Commissioners *v.* Patrick Thomson [1956] T.R. 471; 50 R. & I.T. 95; (1956) 37 T.C. 145; 35 A.T.C. 487; 1957 S.L.T. 235 . . . 708
Inland Revenue Commissioners *v.* Reinhold [1953] T.R. 11; 46 R. & I.T. 108; 34 T.C. 389; 32 A.T.C. 10; 153 S.C. 49; 1953 S.L.T. 94 68
Inland Revenue Commissioners *v.* Stonehaven Recreation Ground Trustees (1929) 15 T.C. 419 . . . . . 134, 708
Inland Revenue Commissioners *v.* Wood Brothers (Birkenhead) Ltd. [1957] 3 W.L.R. 713; 101 S.J. 849; [1957] 3 All E.R. 314; [1957] T.R. 253; 50 R. & I.T. 743; 36 A.T.C. 259; T.C. Leaflet No. 1845, C.A. 65

PAGE

Inland Revenue Commissioners *v.* Yorkshire Agricultural Society [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 44 T.L.R. 59; 72 S.J. 68; 13 T.C. 58, C.A. 104, 105
Innes *v.* Newman [1894] 2 Q.B. 292; 63 L.J.M.C. 198; 70 L.T. 689; 58 J.P. 543; 10 T.L.R. 479; 38 S.J. 492; 10 R. 348; 42 W.R. 573, D.C. . . . 1103
Institute of Civil Engineers *v.* I. R. C. [1932] 1 K.B. 149; 47 T.L.R. 466; 16 T.C. 158 . . . . . 103, 104
Inverclyde (orse. Tripp) *v.* Inverclyde [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; 47 T.L.R. 140; 74 S.J. 863; 29 L.G.R. 353 1014

J.—P.C. *v.* J.—A.F. [1955] P. 215; [1955] 3 W.L.R. 72; 90 S.J. 399; [1955] 2 All E.R. 617; [1955] T.R. 193; 48 R. & I.T. 644 . . . . . 830, 831
Jacobs *v.* Booth's Distillery Co. (1901) 85 L.T. 262 307
Jacobs *v.* London, Brighton & South Coast Railway Co. (1870) 22 L.T. 651 . . 315
Jagger *v.* Jagger [1926] P. 93; 95 L.J.P. 83; 135 L.T. 1; 42 T.L.R. 413; 70 S.J. 503, C.A. 928
James *v.* Bowkett [1952] W.N. 341; [1952] 2 T.L.R. 100; 116 J.P. 445; 96 S.J. 448; [1952] 2 All E.R. 320, D.C. 844, 845
James A. Jobling & Co. *v.* Sunderland County Borough Assessment Committee [1944] W.N. 126; 60 T.L.R. 330; [1944] 1 All E.R. 500, C.A. . . . 967
Jameson *v.* Jameson [1952] A.C. 525; [1952] 1 T.L.R. 833; 116 J.P. 226; [1952] 1 All E.R. 875; 1952 S.C.(H.L.) 44; 1952 S.L.T. 257, H.L. 694
Jay *v.* Jay [1924] 1 K.B. 826; 93 L.J.K.B. 280; 130 L.T. 667, D.C. 735
Jayne *v.* Jayne & Prothero (1869) 21 L.T. 401; 18 W.R. 53 . . . 865, 897, 898
Jervis *v.* Tomkinson (1856) 1 H. & N. 195; 26 L.J.Ex. 41; 27 L.T.O.S. 205; 156 E.R. 1174 32
John *v.* Heath, The Times, April 24, 1958 1103
Johnson *v.* Clarke [1928] Ch. 847; 97 L.J.Ch. 337; 139 L.T. 552; 72 S.J. 556 . 432
Johnson *v.* Johnson [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 16 T.L.R. 26, D.C. 37
Jones *v.* Bellgrove Properties [1949] 2 K.B. 700; 65 T.L.R. 451; sub nom. Jones *v.* Bellegrove Properties, 93 S.J. 512; [1949] 2 All E.R. 198, C.A. . . 825
Jones *v.* Boyce (1816) 1 Stark. 493, N.P. 626, 630
Jones *v.* I. R. C. [1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763; 11 T.L.R. 78; 39 S.J. 97; 43 W.R. 318; 15 R. 136, D.C. 946, 947
Jones *v.* Jones (1872) L.R. 2 P. & D. 333; 41 L.J.P. & M. 53; 26 L.T. 106; 20 W.R. 449 886
Jones *v.* Jones [1953] 1 W.L.R. 867; 117 J.P. 348; 97 S.J. 456; [1953] 2 All E.R. 345, D.C. 342, 484
Jones *v.* Jones [1954] 1 W.L.R. 1474; 118 J.P. 563; 98 S.J. 853; [1954] 3 All E.R. 476n., D.C. 343
Jones *v.* Leeming [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; 46 T.L.R. 296; 74 S.J. 247; sub nom. Leeming *v.* Jones 15 T.C. 333, H.L. . . . 88
Jones (R. E.) *v.* Waring & Gillow [1926] A.C. 670 1221
Jonesco *v.* Beard [1930] A.C. 298 4

K., In re [1953] 1 Q.B. 117, sub nom. Kuzmicz (An Infant), Re [1952] 2 T.L.R. 745; 96 S.J. 764; sub nom. K. (An Infant), Re, Rogers *v.* Kuzmicz, 117 J.P. 9; [1952] 2 All E.R. 877; 51 L.G.R. 1, C.A. 198
Kaslefsky *v.* Kaslefsky [1951] P. 38; 66 T.L.R.(Pt. 2) 616; 114 J.P. 404; 94 S.J. 519; [1950] 2 All E.R. 398; 48 L.G.R. 520, C.A. 694
Kates *v.* Jeffery [1914] 3 K.B. 160; 83 L.J.K.B. 1760; 111 L.T. 459; 78 J.P. 310; 12 L.G.R. 974; 24 Cox.C.C. 324, D.C. 88
Kay (John) *v.* Kay [1952] 2 Q.B. 258; [1952] 1 T.L.R. 766; 96 S.J. 212; [1952] 1 All E.R. 813, C.A. 109
Kaye *v.* Burrows [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; (1926–31) 2 B.R.A. 886, H.L. . . 962, 964
Keats *v.* Keats and Montezuma (1859) 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur.N.S. 176; 7 W.R. 377; 164 E.R. 754 485
Keech *v.* Sandford (1726) Sel.Cas. 61 818
Keith *v.* Twentieth Century Club (1904) 73 L.J.Ch. 545; 90 L.T. 775; 20 T.L.R. 462; 48 S.J. 458; 52 W.R. 554 614
Kelly *v.* Batchelar (1893) 10 R.P.C. 289 1036
Kelly (orse. Hyams) *v.* Kelly (1932) 148 L.T. 143; 49 T.L.R. 99; 76 S.J. 832 . . 1282
Kemshead *v.* British Transport Commission [1958] 1 W.L.R. 173n; 102 S.J. 122; [1958] 1 All E.R. 119n., C.A. 172
Kemsley *v.* Foot [1952] A.C. 345; [1952] 1 T.L.R. 532; 96 S.J. 165; [1952] 1 All E.R. 501, H.L. 745
Kenward *v.* Kenward [1951] P. 124; 66 T.L.R. (Pt. 2) 157; 94 S.J. 383; [1950] 2 All E.R. 297, C.A.; reversing sub nom. Way *v.* Way, Rowley *v.* Rowley, Kenward *v.* Kenward, Whitehead *v.* Whitehead [1950] P. 71; 65 T.L.R. 707; 94 S.J. 50; [1949] 2 All E.R. 959 1282

PAGE

Keren Kayemeth Le Jisroel Ltd. *v.* Inland Revenue Commissioners [1932] A.C. 650, H.L.; affirming [1932] 2 K.B. 465; 100 L.J.K.B. 596; 145 L.T. 320; 47 T.L.R. 461, C.A. 1261
Kidston *v.* Deutsche Luft Hansa Akt. (1930) 38 Ll.L.Rep. 1 160
Kilgollan *v.* William Cooke & Co. [1956] 1 W.L.R. 527; 100 S.J. 359; [1956] 2 All E.R. 294, C.A. 416
King *v.* King [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584, H.L. 695
King-Emperor *v.* Sibrath Banerji (1945) L.R. 72 I.A. 241 556
Kingston Cotton Mill (No. 2), In re [1896] 1 Ch. 331; 65 L.J.Ch. 290; 73 L.T. 745; 40 S.J. 144; 12 T.L.R. 123; Affd. [1896] 2 Ch. 279, 288, C.A. . 51, 61
Kinneil Cannel & Coking Coal Co. *v.* Waddell [1931] A.C. 575; 100 L.J.P.C. 113; 145 L.T. 289; 47 T.L.R. 386; 75 S.J. 295; 24 B.W.C.C. 181, H.L. 931
Kiril Mischeff *v.* Constant Smith & Co. [1950] 2 K.B. 616; 66 T.L.R. (Pt. 1) 742; [1950] 1 All E.R. 890; 83 Ll.L.Rep. 496 399
Kirkham *v.* Boughey [1957] 3 W.L.R. 626; 101 S.J. 780; [1957] 3 All E.R. 153 889, 892
Kirkwood *v.* Lord Advocate 1939 S.C.(J.) 36 479
Kite, The [1933] P. 154; 102 L.J.P. 101; 149 L.T. 498; 49 T.L.R. 525; 18 Asp. M.L.C. 43 803
Knight *v.* Great Western Railway Co. [1943] 1 K.B. 105; 112 L.J.K.B. 321; 167 L.T. 71; 58 T.L.R. 352; 86 S.J. 331; [1942] 2 All E.R. 286 . . . 174
Knatt *v.* Knatt [1955] P. 249; [1955] 3 W.L.R. 162; 99 S.J. 453; [1955] 2 All E.R. 305 694
Korner *v.* H. Korner & Co. Ltd. [1951] Ch. 10; 66 T.L.R. (Pt. 2) 469; [1950] 2 All E.R. 451, C.A. 15
Kreen *v.* Martin [1935] 1 K.B. 499 1070
Kruse *v.* Johnson [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 78 L.T. 647; 62 J.P. 469; 14 T.L.R. 416; 42 S.J. 509; 19 Cox.C.C. 103, D.C. 1163
Kwame Asante (Chief) *v.* Kwame Tawia (Chief) [1949] W.N. 40; 65 T.L.R. 105; 93 S.J. 180, P.C. 154

"L" Hotel Co. and Langham Hotel Co., In re 115 L.J.Ch. 129; 174 L.T. 302; 62 T.L.R. 128; 90 S.J. 68; [1946] 1 All E.R. 319 1047
Lagos *v.* Grunwaldt [1910] 1 K.B. 41 306
Laing (John) & Son *v.* Kingswood Assessment Committee [1949] 1 K.B. 344; 65 T.L.R. 80; 113 J.P. 111; 93 S.J. 26; [1949] 1 All E.R. 224; 47 L.G.R. 64; 42 R. & I. T. 15, C.A. 543
Lake *v.* Lake [1955] P. 336; [1955] 3 W.L.R. 145; 99 S.J. 432; [1955] 2 All E.R. 538, C.A. 1276
Lance *v.* Lance & Gardiner [1958] P. 134n.; [1958] 2 W.L.R. 316n.; 102 S.J. 126; [1958] 1 All E.R. 388n. 1092
Lang *v.* Lang [1955] A.C. 402; [1954] 3 W.L.R. 762; 98 S.J. 803; [1954] 3 All E.R. 571, P.C. 694
Lapford (Devon) Parish Church, In re [1955] P. 205; [1954] 3 W.L.R. 748; 98 S.J. 806; sub nom. Re Lapford [1954] 3 All E.R. 484, C.A. . 1185, 1188, 1189, 1191
Last *v.* London Assurance Corporation, 10 App.Cas. 438; 55 L.J.Q.B. 92; 53 L.T. 634; 50 J.P. 116; 1 T.L.R. 617; 34 W.R. 233; 2 T.C. 100, H.L. . . . 708
Latimer *v.* A. E. C. [1953] A.C. 643; [1953] 3 W.L.R. 259; 117 J.P. 387; 97 S.J. 486; [1953] 2 All E.R. 449; 51 L.G.R. 457, H.L. 497
Law *v.* Graham [1901] 2 K.B. 327; 70 L.J.K.B. 608; 84 L.T. 599; 65 J.P. 501; 17 T.L.R. 474; 45 S.J. 485; 49 W.R. 622; 3 W.C.C. 131; 19 Cox C.C. 709, D.C. 370, 962
Lax *v.* Darlington Corpn. (1879) L.R. 5 Ex.D. 28; 49 L.J.Q.B. 105; 41 L.T. 489; 44 J.P. 312; 28 W.R. 221, C.A. 624
Leaf *v.* International Galleries [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693, C.A. 756, 757, 758, 760
Leckhampton Quarries Co. *v.* Ballinger and Cheltenham Rural District Council (1905) 93 L.T. 93, C.A. 252
Ledingham *v.* Bermejo Estancia Co. [1947] 1 All E.R. 749 824
Le Lievre *v.* Gould [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 37 S.J. 267; 41 W.R. 468; 4 R. 274 1030
Le Witt *v.* Brookes [1956] 1 W.L.R. 1438; 100 S.J. 836; [1956] 3 All E.R. 676. C.A. 114
Lee *v.* Nursery Furnishings Ltd. [1945] 1 All E.R. 387; 172 L.T. 285; 61 T.L.R 263, C.A. 937
Lennox *v.* Bell, 1957, Unreported 904
L'Estrange *v.* F. Grancob [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164 . 757
Lever Bros. *v.* Bell [1931] 1 K.B. 557, C.A. 757
Lewis *v.* Haverfordwest Rural District Council [1953] 1 W.L.R. 1486; 97 S.J. 877; [1953] 2 All E.R. 1599; 52 L.G.R. 44 . . . . . 254, 256, 718
Lewis *v.* Lewis [1956] P. 205n.; [1955] 3 W.L.R. 862n.; 120 J.P. 21; 99 S.J. 873; [1955] 3 All E.R. 598, D.C. 343

PAGE

Leyton U. D. C. *v.* Chew [1907] 2 K.B. 283; 76 L.J.K.B. 781; 96 L.T. 727; 71 J.P. 355; 5 L.G.R. 837, D.C. 1163
Lindley, In the estate of, decd. [1953] P. 203; [1953] 3 W.L.R. 168; 97 S.J. 439; [1953] 2 All E.R. 319 . . . . . 584, 585
L'Industrie Verrière, In re [1914] W.N. 222 . . . . . 521, 522
Lipman *v.* Pulman (George) & Sons (1904) 91 L.T. 132 252
Lipton *v.* Burton [1932] 1 K.B. 204; 100 L.J.K.B. 529; 145 L.T. 476; 95 J.P. 211; 47 T.L.R. 565; 29 L.G.R. 642, C.A. 961
Lissenden *v.* Bosch Ltd. [1940] A.C. 412; 109 L.J.K.B. 350; 162 L.T. 195; 56 T.L.R. 347; 84 S.J. 357; [1940] 1 All E.R. 425, H.L. 887
Liversidge *v.* Anderson [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 58 T.L.R. 35; 85 S.J. 439; [1941] 3 All E.R. 338, H.L. 556
Llanover *v.* Homfray [1884] W.N. 134 315
Lloyd *v.* Grace, Smith & Co. [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 S.J. 723, H.L. 999
Lloyd del Pacifico *v.* Board of Trade (1930) 46 T.L.R. 476 252
Lloyd's Bank *v.* Railway Executive [1952] W.N. 215; [1952] 1 T.L.R. 1207; 96 S.J. 313; [1952] 1 All E.R. 1248, C.A. 172, 176
Local Government Board *v.* Arlidge [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H.L. 556
Lockhart *v.* Moldacot Pocket Sewing Machine Co. (1889) 5 T.L.R. 307 . . . 412
Lomax *v.* Peter Dixon & Son [1943] 1 K.B. 671; 112 L.J.K.B. 593; 169 L.T. 145; 59 T.L.R. 376; 67 S.J. 354; 25 T.C. 353, C.A. 68
London and General Bank (No. 2), In re [1895] 2 Ch. 673; 64 L.J.Ch. 866; 73 L.T. 304; 11 T.L.R. 573; 39 S.J. 706; 2 Mans. 555; 12 R. 520, C.A. . 47
London and Globe Finance Corpn., In re [1903] 1 Ch. 728; 92 L.J.Ch. 368; 88 L.T. 194; 19 T.L.R. 314; 10 Mans. 198; 51 W.R. 651 642
London County Council *v.* Bermondsey Bioscope Co. [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C. 1163
London County Council *v.* Cattermoles (Garages) [1953] 1 W.L.R. 997; 97 S.J. 505; [1953] 2 All E.R. 582, C.A. 999
London County Council *v.* Farren [1956] 1 W.L.R. 1297; 120 J.P. 542; 100 S.J. 748; [1956] 3 All E.R. 401; 54 L.G.R. 579, C.A. 88
Lopes, In re [1931] 2 Ch. 130; 100 L.J.Ch. 295; 146 L.T. 8; 46 T.L.R. 577; 74 S.J. 581 1263
Lord Sanchar's Case (1612) 9 Coke 117a 1052
Lord Strathcona Steamship Co. Ltd. *v.* Dominion Coal Co. Ltd. [1926] A.C. 8, 108; 42 T.L.R. 86, P.C. 860
Loveden *v.* Loveden (1810) 1 Phill. 208 885
Low *v.* Bouverie [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 7 T.L.R. 582; 40 W.R. 50, C.A. 1030
Lowther *v.* Bentinck (1874) L.R. 19 Eq. 166; 44 L.J.Ch. 197; 31 L.T. 719; 23 W.R. 156 167
Lowther *v.* Heaver (1889) 41 Ch.D. 248; 58 L.J.Ch. 482; 60 L.T. 310; 37 W.R. 465, C.A. 1232
Lowther *v.* Lowther, Feb. 5, 1945, Unreported 485

M., In re [1955] 2 Q.B. 479; [1955] 3 W.L.R. 320; 119 J.P. 535; 99 S.J. 539; [1955] 2 All E.R. 911; 53 L.G.R. 497, C.A. 200
M. *v.* M. [1928] P. 123; 97 L.J.P. 101; 138 L.T. 648; 44 T.L.R. 299; 72 S.J. 155 884, 885, 886
Macaura *v.* Northern Assurance Co. Ltd. [1925] A.C. 619; 94 L.J.P.C. 154; 133 L.T. 152; 41 T.L.R. 447; 69 S.J. 777, H.L. 681
McCallum, In re [1901] 1 Ch. 143; 70 L.J.Ch. 206; 83 L.T. 717; 17 T.L.R. 112; 45 S.J. 98; 49 W.R. 129, C.A. 567
MacDonald *v.* MacDonald [1957] 2 All E.R. 690 1120
McKean *v.* Raynor Brothers [1942] 2 All E.R. 650; 167 L.T. 369; 86 S.J. 376 . 999
M'Kie *v.* Western Scottish Motor Traction Co., 1952 S.C. 206 1302
Mackenzie *v.* Royal Bank of Canada [1934] A.C. 468; 103 L.J.P.C. 81; 151 L.T. 486; 78 S.J. 471, P.C. 757
Mackrell *v.* Mackrell [1948] 2 All E.R. 858; 47 L.G.R. 347, C.A. 489
Maclay *v.* Dixon (1944) 170 L.T. 49; [1944] 1 All E.R. 22, C.A. 244
Maclean *v.* The Workers' Union [1929] 1 Ch. 603 774
McNaught *v.* McNaught (1909) 54 S.J. 135 260
McQuire *v.* Western Morning News [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 19 T.L.R. 471; 51 W.R. 689, C.A. 745
Magrath *v.* Hardy (1838) 4 Bing N.C. 782; 6 Scott 627; 1 Ain. 352; 7 L.J.P.C. 299; 2 Jur. 594; 132 E.R. 990 154
Manchester Trust *v.* Furness [1895] 2 Q.B. 539; 73 L.T. 110; 44 W.R. 178; 8 Asp.M.L.C. 57; 1 Com.Cas. 39; 14 R. 739 . . . . . 660, 865

PAGE
Marczuk *v.* Marczuk [1956] P. 217; [1956] 2 W.L.R. 849; 120 J.P. 75; 100 S.J. 263; [1956] 1 All E.R. 657, C.A. 483
Margerison *v.* Tyresoles Ltd. (1942) 25 T.C. 59 68
Marjoram *v.* Marjoram [1955] 1 W.L.R. 520; 119 J.P. 291; 99 S.J. 320; [1955] 2 All E.R. 1, D.C. 342
Markham *v.* Markham [1947] W.N. 27; 176 L.T. 19; 63 T.L.R. 91; 111 J.P. 29; 90 S.J. 645; [1946] 2 All E.R. 737, D.C. 514
Marks *v.* Beyfus (1890) 25 Q.B.D. 494; 59 L.J.Q.B. 479; 63 L.T. 733; 6 T.L.R. 406; 55 J.P. 182; 17 Cox C.C. 196; 38 W.R. 705, C.A. 1302
Marshal *v.* Crutwell (1875) L.R. 20 Eq. 328; 44 L.J.Ch. 504; 39 J.P. 775. . . 260
Marshall Richards Machine Co. *v.* Jewitt [1956] T.R. 135; 49 R. & I.T. 414; 36 T.C. 511; 35 A.T.C. 186 131
Martin *v.* Watson and Egan [1919] 2 I.R. 534 118
Martin-Smith *v.* Smale [1954] 1 W.L.R. 247; 98 S.J. 92; [1954] 1 All E.R. 237; 52 L.G.R. 136, C.A. 437
Mason *v.* Mason (orse. Pennington) [1944] N.I. 134 1014
Matalon *v.* Matalon [1952] P. 233; [1952] 1 T.L.R. 1467; [1952] 1 All E.R. 1025, C.A. 178
Maugham, In re (1888) 21 Q.B.D. 21; 57 L.J.Q.B. 487, D.C. 1273
Maund, In re, ex parte [1895] 1 Q.B. 194; 64 L.J.Q.B. 183; 72 L.T. 58; 11 T.L.R. 126; 39 S.J. 136; 1 Mans. 514; 15 R. 159; 43 W.R. 207, D.C. . . 1273
Maundy Gregory, In re [1935] Ch. 65; 78 S.J. 550 293
Maxwell *v.* British Thomson-Houston Co. (1902) 18 T.L.R. 278, C.A. . . 803, 805
May *v.* Chidley [1894] 1 Q.B. 451; 63 L.J.Q.B. 355; 38 S.J. 82; 10 R. 423, D.C. 302
May and Butcher *v.* The King [1934] 2 K.B. 17n.; 103 L.J.K.B. 556n.; 151 L.T. 246n. 24, 699
Mediana, The [1900] A.C. 113, H.L. 1133, 1135
Mediterranean and Eastern Export Co. *v.* Fortress Fabrics (Manchester) [1948] W.N. 244; [1948] L.J.R. 1536; 64 T.L.R. 337; 92 S.J. 362; [1948] 2 All E.R. 186 . . . . . 274, 280
Mehta (orse. Kohn) *v.* Mehta [1945] 2 All E.R. 690 1282
Mellody, In re, Brandwood *v.* Haden [1918] 1 Ch. 228; 87 L.J.Ch. 185; 118 L.T. 155; 82 J.P. 128; 62 S.J. 121; sub nom. Re Melody, Brandwood *v.* Haden, 34 T.L.R. 122 1261
Merchant Prince, The [1892] P. 179; 67 L.T. 251; 8 T.L.R. 430; 7 Asp.M.L.C. 208, C.A. 803
Mersey Docks *v.* Lucas (1883) 8 App.Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 T.C. 25, H.L. 134, 135, 708
Mersey Docks and Harbour Board *v.* Procter [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 39 T.L.R. 275; 67 S.J. 400; 16 Asp.M.L.C. 123, H.L. . . 990
Metropolitan Asylum District *v.* Hill (1880) 5 App.Cas. 582 532
Metropolitan Bank, In re (1880) 15 Ch.D. 139; 49 L.J.Ch. 651; 43 L.T. 299, C.A. 293
Metzner *v.* Bolton (1854) 9 Ex. 518, 521; 23 L.J.Ex. 130; 2 W.R. 302; 2 C.L.R. 685; 156 E.R. 221 673
Middlesex County Valuation Committee *v.* West Middlesex Assessment Area Committee [1937] Ch. 361; 106 L.J.Ch. 215; 156 L.T. 252; 101 J.P. 203; 53 T.L.R. 365; 81 S.J. 157; [1937] 1 All E.R. 403; 35 L.G.R. 211, C.A. . . 274
Mill's Declaration of Trust, In re [1950] W.N. 331; [1950] 2 All E.R. 292, C.A. . 222
Mills *v.* Cannon Brewery Co. Ltd. [1920] 2 Ch. 38; 89 L.J.Ch. 354; 123 L.T. 324; 36 T.L.R. 513; 84 J.P. 148; 64 S.J. 447 1269
Mills *v.* Duckworth [1938] 1 All E.R. 321 887
Mint *v.* Good [1951] 1 K.B. 517; 94 S.J. 822; [1950] 2 All E.R. 1159; 49 L.G.R. 495, C.A. 806
Moate *v.* Moate (1948) 92 S.J. 484; [1948] 2 All E.R. 486 265
Monarch S.S. Co. *v.* A/B Karlshamns Oljefabriker [1949] A.C. 196; [1949] L.J.R. 772; 65 T.L.R. 217; 93 S.J. 117; [1949] 1 All E.R. 1 624
Montgomery Jones & Co. *v.* Liebenthal & Co. (1898) 78 L.T. 406, C.A. . 401, 402
Moore *v.* R. Fox & Sons [1956] 1 Q.B. 596; [1956] 2 W.L.R. 342; [1956] 1 All E.R. 182; [1956] 1 Lloyd's Rep. 129, C.A. 803, 805, 811, 813
Moore *v.* Hewitt [1947] K.B. 831; [1947] L.J.R. 1276; 177 L.T. 576; 63 T.L.R. 476; 111 J.P 483; [1947] 2 All E.R. 270, D.C. 1017
Moorhouse *v.* Dooland [1956] Ch. 284; [1955] 2 W.L.R. 96; 99 S.J. 60; [1955] 1 All E.R. 93; [1954] T.R. 393; 48 R. & I.T. 29; 36 T.C. 1; 33 A.T.C. 410, C.A. 597, 838
Morelle Ltd. *v.* Wakeling [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; 99 S.J. 218; [1955] 1 All E.R. 708, C.A. 122, 735
Morgan *v.* Tate & Lyle [1955] A.C. 21; [1954] 3 W.L.R. 85; 98 S.J. 422; [1954] 2 All E.R. 413, H.L. 131, 708
Morris *v.* Tolman [1923] 1 K.B. 166; 92 L.J.K.B. 215; 128 L.T. 118; 86 J.P. 221; 39 T.L.R. 39; 67 S.J. 169; 20 L.G.R. 803; 27 Cox C.C. 345, D.C. . 1052
Mosalewa Thomas *v.* Preston Holder (1946) 12 W.A.C.A. 78 155
Moule *v.* Garrett (1872) L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 20 W.R. 416, Ex.Ch. 613

PAGE

Mousell Bros. *v.* London and North Western Railway [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 15 L.G.R. 706, D.C. . . . 527
Mudd *v.* Collins (1925) 133 L.T. 186; 41 T.L.R. 358; 69 S.J. 490; 9 T.C. 297 . . 412
Murray *v.* East India Co. (1821) 5 B. & Ad. 204; 106 E.R. 1167 735
Murugiah *v.* Jainudeen [1955] A.C. 145; [1954] 3 W.L.R. 682; 98 S.J. 784, P.C. . 734
Myers *v.* Sarl (1860) 3 E. & E. 306; 30 L.J.Q.B. 9; 7 Jur.N.S. 97; 9 W.R. 96; 121 E.R. 457 673

N. *v.* N. (1928) 44 T.L.R. 324 830
Nash *v.* Hollinshead [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 17 T.L.R. 352; 49 W.R. 424; 3 W.C.C. 125, C.A. . . . 366, 369
National Deposit Friendly Society Trustees *v.* Skegness U. D. C. [1958] 3 W.L.R. 172; 122 J.P. 399; 102 S.J. 526; [1958] 2 All E.R. 601; 56 L.G.R. 313; 51 R. & I.T. 474, H.L.; affirming [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; 121 J.P. 567; 101 S.J. 664; [1957] 3 All E.R. 199; 55 L.G.R. 477; 50 R. & I.T. 574; 2 R.P.C. 107, C.A. . 544, 545, 1139, 1143, 1144, 1148, 1149, 1175–1178, 1180, 1182, 1261, 1264
National Phonograph Co. of Australia *v.* Menck [1911] A.C. 336; 80 L.J.P.C. 105; 104 L.T. 5; 27 T.L.R. 239; 28 R.P.C. 229, P.C. . . . 861, 1037
National Telephone Co. v. I. R. C. [1899] 1 Q.B. 250 . . . 946, 947, 948
Naumann (W.) *v.* Edward Nathan & Co. (1930) 37 Ll.L.Rep. 249 . . 274, 281, 664
Naylor Benzon Mining Co., In re [1950] 1 Ch. 567; [1950] 1 All E.R. 518; 1 P. & C.R. 69 1201
Nelson *v.* Larholt [1948] 1 K.B. 339; [1948] L.J.R. 340; 64 T.L.R. 1; [1947] 2 All E.R. 751 . . . . . 1220, 1227, 1229, 1237, 1241
Nelson *v.* William Chalmers & Co., 1913 S.C. 441 . . . . . 1129, 1130
Newgrosh *v.* Newgrosh, June 28, 1950, Unreported 265
Newsom *v.* Robertson [1953] Ch. 7; [1952] 2 T.L.R. 636; 96 S.J. 696; [1952] 2 All E.R. 728; [1952] T.R. 401; 45 R. & I.T. 679; 33 T.C. 452; 31 A.T.C. 429, C.A. 131
Nicholls *v.* F. Austin (Leyton) [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 62 T.L.R. 320; 90 S.J. 628; [1946] 2 All E.R. 92; 44 L.G.R. 287, H.L. 419, 420, 422
Nichols *v.* Hall (1873) L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 21 W.R. 579 527
Nichols *v.* Walters [1954] 1 W.L.R. 1; 98 S.J. 10; [1953] 2 All E.R. 1516, C.A. . 120
Nichols' and Von Joel's Contract, In re [1910] 1 Ch. 43; 79 L.J.Ch. 32; 101 L.T. 839, C.A. 428, 429, 431, 432, 433
Nnamene Anjohn *v.* Ivube Nwa Namani (1953) 14 W.A.C.A. 357 158
Nocton *v.* Ld. Ashburton [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 30 T.L.R. 602, H.L. 567
Nokes *v.* Doncaster Amalgamated Collieries [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 56 T.L.R. 988; 85 S.J. 45; [1940] 3 All E.R. 549, H.L. . 1047
North Australian Territory Co., In re (1890) 45 Ch.D. 87; 59 L.J.Ch. 654; 63 L.T. 77; 6 T.L.R. 348; 38 W.R. 561; 2 Meg. 239, C.A. 292
North Eastern Railway Co. *v.* York Union [1900] 1 Q.B. 733; 69 L.J.Q.B. 376; 82 L.T. 201; 64 J.P. 437; Ryde & K.Rat.App. 230 449
Norwich Union Fire Insurance Co. *v.* Magee (1896) 73 L.T. 733; 12 T.L.R. 137; 40 S.J. 227; 3 T.C. 457; 44 W.R. 384, D.C. 1070

O'Connell *v.* Reg. (1844) 11 Cl. & F. 155; 3 L.T.O.S. 429; 9 Jur. 25; 1 Cox C.C. 413; 8 E.R. 1061 . . . . . 373, 375, 377, 1053
O'Connor *v.* Hume [1954] 1 W.L.R. 824; 98 S.J. 370; [1954] 2 All E.R. 301, C.A. 244
Odhams Press *v.* Cook (1940) 56 T.L.R. 704; 84 S.J. 595; [1940] 3 All E.R. 15; 23 T.C. 233, H.L. 131
Okon Owon *v.* Eto Ndon (1946) 12 W.A.C.A. 71 155
Omanhene Kobina Foli *v.* Chief Oberg Akesse [1934] A.C. 340 154
O'Neil *v.* S. J. Smith & Co. [1912] A.C. 716 999
Oppenheim *v.* Tobacco Securities Trust Co. [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L. 1181
Orient, The (1869) 3 Mar.L.C. 321 792
O'Rourke *v.* Darbishire [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 36 T.L.R. 350; 64 S.J. 322, H.L.; affirming S.C. sub nom. Re Whitworth, O'Rourke *v.* Darbishire [1919] 1 Ch. 320, C.A. 1308
Osenton (Charles) & Co. *v.* Johnston [1942] A.C. 130; 110 L.J.K.B. 420; 165 L.T. 235; 57 T.L.R. 515; [1941] 2 All E.R. 245, H.L. 160
Osnaburgh Street (Nos. 52/56), In re; In re 23/43 Longford Street, N.W.1, 66 T.L.R. (Pt. 1) 414; [1950] 1 All E.R. 353 109
O'Sullivan *v.* Thurmer [1955] S.A.S.R. 76 1053
Ottway *v.* Jones [1955] 1 W.L.R. 706; 99 S.J. 432; [1955] 2 All E.R. 585, C.A. . 532

PAGE

Ounsworth *v.* Vickers [1915] 3 K.B. 267; 84 L.J.K.B. 2036; 113 L.T. 865; 31 T.L.R. 530; 6 T.C. 671 708
Ousey *v.* Ousey and Atkinson (1874) L.R. 3 P. & D. 223; 43 L.J.P. & M. 35; 30 L.T. 911; 22 W.R. 556 343
Ovat Ebenyam *v.* Ayigo (1941) 16 Nig.L.R. 30 155
Oxford Group *v.* I. R. C. [1949] W.N. 343; 93 S.J. 525; [1949] 2 All E.R. 537; [1949] T.R. 281; 42 R. & I.T. 438; 31 T.C. 221, C.A.; affirming [1949] T.R. 1 1261

Padbury *v.* Holliday & Greenwood (1912) 28 T.L.R. 494, C.A. 803
Paget *v.* I. R. C. [1938] 2 K.B. 25; 107 L.J.K.B. 657; 158 L.T. 187; 54 T.L.R. 404; 82 S.J. 172; [1938] 1 All E.R. 392; 21 T.C. 677, C.A. . . . 1072, 1073
Palgrave, Brown & Son Ltd. *v.* Owners of S.S. Turid [1922] 1 A.C. 397; 91 L.J.P. 81; 127 L.T. 42; 38 T.L.R. 423; 66 S.J. 349; 15 Asp.M.L.C. 538; 27 Com. Cas. 216, H.L. 674
Palmer, In re (1890) 45 Ch.D. 291 . . . . . 450, 451, 452
Palser *v.* Grinling [1948] A.C. 291; [1948] L.J.R. 600; 64 T.L.R. 2; [1948] 1 All E.R. 1 848
Paquin *v.* Beauclerk [1906] A.C. 148; 75 L.J.K.B. 395; 94 L.T. 350; 22 T.L.R. 395; 50 S.J. 358; 54 W.R. 521 1007
Pardy *v.* Pardy [1939] P. 288; 161 L.T. 210; 55 T.L.R. 1037; 83 S.J. 714; [1938] 3 All E.R. 770 . . . . . 648, 650
Paris *v.* Stepney Borough Council [1951] A.C. 367; [1951] 1 T.L.R. 25; 115 J.P. 22; 94 S.J. 837; [1951] 1 All E.R. 42; 49 L.G.R. 293; 84 Ll.L.Rep. 525, H.L. 230, 349, 500
Parkins *v.* Warwick (1943) 25 T.C. 419 412
Partington *v.* Attorney-General [1956] 1 W.L.R. 784; [1956] 2 All E.R. 706 . 91
Pasmore *v.* Oswaldtwistle Urban District Council [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L. 154
Paterson *v.* Hunt (1909) 101 L.T. 571; 73 J.P. 496, D.C. 961
Pathé Frères Cinema *v.* United Electric Theatres [1914] 3 K.B. 1253 . . . 302
Payne *v.* Schmidt [1949] 2 All E.R. 741, C.A. 315, 317
Peacock *v.* Peacock (1858) 1 Sw. & Tr. 183; 27 L.J.P. & M. 71; 31 L.T.O.S. 302; 6 W.R. 866; 164 E.R. 684 483
Pearson *v.* Coleman Bros. [1948] 2 K.B. 359; [1948] L.J.R. 1781; 92 S.J. 392; [1948] 2 All E.R. 274, C.A. 991
Peebles *v.* Crosthwaite (1897) 13 T.L.R. 198, C.A. 1079
Peel *v.* London & North Western Railway Co. (No. 2) [1907] 1 Ch. 611 . . . 315
Pegler *v.* Craven [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; 96 S.J. 196; [1952] 1 All E.R. 685, C.A. 1083
Penny *v.* Wimbledon U. D. C. [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 63 J.P. 406; 15 T.L.R. 348; 43 S.J. 476; 47 W.R. 565, C.A. . 803, 804, 805, 809
Peter Walker & Son *v.* Hodgson [1909] 1 K.B. 239; 78 L.J.K.B. 193; 99 L.T. 902; 53 S.J. 81, C.A. 745
Peters *v.* Batchelor (1950) Blundell's Rent Restrictions Cases, No. 793 . . . 756
Pettey *v.* Parsons [1914] 2 Ch. 653; 84 L.J.Ch. 81; 111 L.T. 1011; 58 S.J. 721; 30 T.L.R. 655, C.A. 252
Peverett, In the Goods of [1902] P. 205; 71 L.J.P. 114; 87 L.T. 143 . . . 463
Phipps *v.* Rochester Corporation [1955] 1 Q.B. 450; [1955] 2 W.L.R. 23; 119 J.P. 92; 99 S.J. 45; [1955] 1 All E.R. 129; 53 L.G.R. 80 . . . . 353, 354
Pickard *v.* Smith (1861) 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535 . . . 803, 809
Pickin *v.* Langborough Assessment Committee and Robert Cheyne & Co. [1931] 1 K.B. 386, 505; 100 L.J.K.B. 1; 143 L.T. 650; 46 T.L.R. 601; 74 S.J. 629; (1926–31) 2 B.R.A. 742, C.A. 966
Pitkin *v.* Sanders and Forster (1923) 128 L.T. 789; 16 B.W.C.C. 5, C.A. . . . 252
Pool Shipping Co. Ltd., In re [1920] 1 Ch. 251; 89 L.J.Ch. 111; 122 L.T. 338; 36 T.L.R. 53; 64 S.J. 115 911
Port Line Ltd. *v.* Ben Line Steamers Ltd. [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; 102 S.J. 232; [1958] 1 All E.R. 787; [1958] 1 Ll.L.Rep. 290 . . . 860
Postill *v.* East Riding County Council [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; 120 J.P. 376; 100 S.J. 490; [1956] 2 All E.R. 685; 54 L.G.R. 415; 6 P. & C.R. 400, D.C. 637
Potter *v.* Great Western Colliery Co. (1894) 10 T.L.R. 380, C.A. 981
Potts (W. T.), In re [1935] Ch. 334; 104 L.J.Ch. 49; 152 L.T. 456; [1934] B. & C.R. 142 316
Powell *v.* Great Western Railway Co. (1940) 162 L.T. 35; 56 T.L.R. 264; 84 S.J. 78; [1940] 1 All E.R. 87; 32 B.W.C.C. 293, C.A. 853, 854
Powles, In re [1954] 1 W.L.R. 336; 98 S.J. 111; [1954] 1 All E.R. 516 . . . 167
Powszechny Bank Zwiazkowy W Polsce *v.* Paros [1932] 2 K.B. 353; 101 L.J.K.B. 671; 147 L.T. 377, C.A. 302
Practice Direction [1957] 1 W.L.R. 183; 101 S.J. 111; [1957] 1 All E.R. 219 . 1295
Practice Direction [1957] 1 W.L.R. 558; 101 S.J. 339; [1957] 2 All E.R. 97 . . 1295

PAGE

Pratt *v.* British Medical Association [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 S.J. 84 774
Pratt *v.* Pratt (1927) 96 L.J.P. 123; 137 L.T. 491; 43 T.L.R. 523; 71 S.J. 433; 28 Cox C.C. 413 . . . . . 514, 515, 516
Prescott *v.* Birmingham Corporation [1955] Ch. 210; [1954] 3 W.L.R. 990; 119 J.P. 48; 98 S.J. 886; [1954] 3 All E.R. 698; 53 L.G.R. 68, C.A. . 915, 916, 918
Preston-Jones *v.* Preston-Jones [1951] A.C. 391; [1951] 1 T.L.R. 8; 95 S.J. 13; [1951] 1 All E.R. 124; 49 L.G.R. 417, H.L. 483
Price *v.* Price [1951] P. 413; 115 J.P. 468n.; 95 S.J. 560; [1951] 2 All E.R. 580n., C.A. 343
Price *v.* Price, The Times, February 12, 1954, C.A. 981
Price *v.* Rhondda U. D. C. [1923] 2 Ch. 372; 93 L.J.Ch. 1; 88 J.P. 69; 155 L.T.J. 387; 67 S.J. 536; 21 L.G.R. 753 193
Proctor *v.* Bayley (1889) 42 Ch.D. 390; 59 L.J.Ch. 12; 61 L.T. 752; 38 W.R. 100; 6 R.P.C. 538, C.A. 1036
Produce Brokers Co. *v.* Olympia Oil and Cake Co. [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 32 T.L.R. 115; 60 S.J. 74; 21 Com.Cas. 320, H.L. . 274, 282, 671, 673, 674
Property Holding Co. *v.* Clark [1948] 1 K.B. 630; [1948] L.J.R. 1066; 64 T.L.R. 76; [1948] 1 All E.R. 165, C.A. 238
Pyx Granite Co. *v.* Ministry of Housing and Local Government [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; 122 J.P. 182; 102 S.J. 175; [1958] 1 All E.R. 625; 56 L.G.R. 171; 9 P. & C.R. 204, C.A. 1166, 1167

Quality Dairies (York) *v.* Pedley [1952] 1 K.B. 275; [1952] 1 T.L.R. 376; 116 J.P. 123; 96 S.J. 151; [1952] 1 All E.R. 380; 50 L.G.R. 244, D.C. . 527
Quilter *v.* Mapleson (1882) 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A. 1036
Quinn *v.* Leathem [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 17 T.L.R. 749; 50 W.R. 139, H.L. 774

R. *v.* Agricultural Land Tribunal for Eastern Province of England, Ex parte Grant [1956] 1 W.L.R. 1240; 100 S.J. 650; [1956] 3 All E.R. 321; 54 L.G.R. 567, C.A. 439, 443
R. *v.* Ashmal (1840) 9 C. & P. 236. 1052
R. *v.* Barry (Glamorgan) JJ., Ex parte Kashim [1953] 1 W.L.R. 1320; 97 S.J. 742; [1953] 2 All E.R. 1005 . . . . . 274, 664
R. *v.* Bassey (1931) 22 Cr.App.R. 160 642
R. *v.* Bishop (1880) 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox C.C. 404, C.C.R. 527
R. *v.* Browes [1949] W.N. 343; 113 J.P. 454; 93 S.J. 617; [1949] 2 All E.R. 449; 33 Cr.App.R. 164; 47 L.G.R. 614, C.C.A. 1112
R. *v.* Bullock [1955] 1 W.L.R. 1; 119 J.P. 65; 99 S.J. 29; [1955] 1 All E.R. 15; 38 Cr.App.R. 151, C.C.A. 787
R. *v.* Chapman (1910) 74 J.P. 360; 4 Cr.App.R. 276, C.C.A. 641
R. *v.* Comptroller-General of Patents, Ex parte Bayer Products [1941] 2 K.B. 306; 111 L.J.K.B. 117; 165 L.T. 278; 58 R.P.C. 251; [1941] 2 All E.R. 677, C.A. 556
R. *v.* Cooke (1826) 5 B. & C. 538; 7 Dow. & Ry.K.B. 673; 3 Dow. & Ry.M.C. 510; 108 E.R. 201, C.C.R. 1053
R. *v.* Doherty (1874) 13 Cox C.C. 23, 24 141
R. *v.* Flaherty, The Times, June 24, 1958 . . . . . 935, 1266
R. *v.* Gee (1860) 1 E. & E. 1068; 28 L.J.Q.B. 298; 33 L.T.O.S. 183; 23 J.P. 374; 5 Jur. 1348; 7 W.R. 528; 120 E.R. 1211 32
R. *v.* Grant [1951] 1 K.B. 500; 94 S.J. 840; [1951] 1 All E.R. 28; 34 Cr.App.R. 230; 49 L.G.R. 146, C.C.A. 1112
R. *v.* Grubb (1945) 30 Cr.App.R. 148 . . . . . 373, 376
R. *v.* Halliday, Ex parte Zadig [1917] A.C. 260; 86 L.J.K.B. 1119; 116 L.T. 417; 81 J.P. 237; 33 T.L.R. 336; 61 S.J. 443; 25 Cox C.C. 650, H.L. . 556
R. *v.* Hodgson [1954] Crim.L.R. 379 1256
R. *v.* Hughes (1860) Bell C.C. 242; 29 L.J.M.C. 71; 1 L.T. 450; 24 J.P. 101; 6 Jur.N.S. 177; 8 W.R. 195; 8 Cox C.C. 278, C.C.R. . . . 1054, 1055
R. *v.* Hutchings (1881) 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A. 154
R. *v.* Income Tax Special Purposes Commissioners (1888) 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776 437
R. *v.* James (1909) 2 Cr.App.R. 319, C.C.A. 141
R. *v.* Jura [1954] 1 Q.B. 503; [1954] 2 W.L.R. 516; 118 J.P. 260; 98 S.J. 198; [1954] 1 All E.R. 696; 38 Cr.App.R. 53, C.C.A. 1256
R. *v.* Kilham (1870) L.R. 1 C.C.R. 261; 39 L.J.M.C. 109; 22 L.T. 625; 34 J.P. 533; 18 W.R. 957; 11 Cox C.C. 561, C.C.R. 641
R. *v.* McCartan [1958] 1 W.L.R. 933; 102 S.J. 621; 122 J.P. 465; [1958] 3 All E.R. 140; 42 Cr.App.R. 262, C.C.A. 1265

PAGE
R. *v.* M'Cue (1831) Jebb's Criminal and Presentment Cases, 120 1053
R. *v.* Manning (1883) 12 Q.B.D. 241; 53 L.J.M.C. 85; 51 L.T. 121; 48 J.P. 536; 32 W.R. 720, D.C. 1052
R. *v.* Medical Appeal Tribunal, Ex parte Gilmore [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; 101 S.J. 248; sub nom. Re Gilmore's Application [1957] 1 All E.R. 796, C.A. 437, 519
R. *v.* Melvin [1953] 1 Q.B. 481; [1953] 2 W.L.R. 274; 117 J.P. 95; 97 S.J. 99; [1953] 1 All E.R. 294; 37 Cr.App.R. 1, C.C.A. 787, 790
R. *v.* Moore (1892) 61 L.J.M.C. 80; 66 L.T. 125; 56 J.P. 345; 8 T.L.R. 287; 36 S.J. 233; 17 Cox C.C. 458; 40 W.R. 304, C.C.R. 144
R. *v.* Nat Bell Liquors [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 38 T.L.R. 541, P.C. 441
R. *v.* Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; 116 J.P. 54; 96 S.J. 29; [1952] 1 All E.R. 122; 2 P. & C.R. 361; 50 L.G.R. 193, C.A. 440, 443
R. *v.* Plummer [1902] 2 K.B. 339; 71 L.J.K.B. 805; 86 L.T. 836; 66 J.P. 647; 18 T.L.R. 659; 46 S.J. 587; 20 Cox C.C. 269; 51 W.R. 137, C.C.R. . . 1052
R. *v.* Prince (1875) L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 24 W.R. 76; 13 Cox C.C. 138, C.C.R. 527
R. *v.* Reason (1872) 12 Cox C.C. 228 141
R. *v.* Rivett (1950) 34 Cr.App.R. 87, C.C.A. 476
R. *v.* Rowley (1948) 32 Cr.App.R. 147 . . . . . 1054, 1055
R. *v.* Rue (1876) 34 L.T. 400; 13 Cox C.C. 209 141
R. *v.* Russell, Unreported, December 2, 1905 747
R. *v.* Saddlers' Co. (1863) 10 H.L.Cas. 404; 32 L.J.Q.B. 337; 9 L.T. 60; 28 J.P. 36; 9 Jur.N.S. 1081; 11 W.R. 1004; 11 E.R. 1083, H.L. 1163
R. *v.* St. George's Union (1871) L.R. 7 Q.B. 90; 41 L.J.M.C. 30; 36 J.P. 550; 20 W.R. 179 449
R. *v.* Salisbury and Amesbury Justices, Ex parte Greatbatch [1954] 2 Q.B. 142; [1954] 3 W.L.R. 29; 118 J.P. 392; 98 S.J. 392; [1954] 2 All E.R. 326, D.C. 845
R. *v.* Seymour [1954] 1 W.L.R. 678; 118 J.P. 311; 98 S.J. 288; [1954] 1 All E.R. 1006; 38 Cr.App.R. 68, C.C.A. 787
R. *v.* Smith (1923) 17 Cr.App.R. 133 790
R. *v.* Spriggs [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; 102 S.J. 89; [1958] 1 All E.R. 300; 42 Cr.App.R. 69, C.C.A. 476
R. *v.* Sussex JJ., Ex parte McCarthy [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; 68 S.J. 253; 22 L.G.R. 46 274
R. *v.* Thomas (1834) 6 C. & P. 353 141
R. *v.* The Steward, etc., of Havering Atte Bower (1822) 5 B. & Ald. 691 . . 154
R. *v.* Thompson (1851) 16 Q.B. 832; 20 L.J.M.C. 183; 17 L.T.O.S. 72; 15 J.P. 484; 15 Jur. 654; 5 Cox C.C. 166; 117 E.R. 1100, C.C.R. 1053
R. *v.* Thompson [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 9 T.L.R. 435; 37 S.J. 457; 17 Cox C.C. 641; 41 W.R. 525; 5 R. 392, C.C.R. 141
R. *v.* Tolson (1889) 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 5 T.L.R. 465; 37 W.R. 716; 16 Cox C.C. 629, C.C.R. 527
R. *v.* Whitmarsh (1850) 15 Q.B. 600 543
R. *v.* Williams (1932) 32 N.S.W.S.R. 504 1052
R. B. Policies at Lloyd's *v.* Butler [1950] K.B. 76; 65 T.L.R. 436; 93 S.J. 553; [1949] 2 All E.R. 226; 82 Ll.L.Rep. 841 567
Racecourse Betting Control Board *v.* Secretary for Air [1944] Ch. 114; 113 L.J.Ch. 129; 170 L.T. 29; 60 T.L.R. 147; 88 S.J. 58; [1944] 1 All E.R. 60, C.A. 160, 163, 164
Rahimtoola *v.* Nizam of Hyderabad [1958] A.C. 379; [1957] 3 W.L.R. 884; 101 S.J. 901; [1957] 3 All E.R. 441, H.L.; reversing sub nom. Nizam of Hyderabad and State of Hyderabad *v.* Jung [1957] 1 All E.R. 257; [1956] C.L.Y. 6980, C.A.; restoring [1956] 3 W.L.R. 667; 100 S.J. 651; [1956] 3 All E.R. 311 1225
Raja Uyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer Vizagapatam [1939] A.C. 302 1297
Ramsey-Fairfax (orse. Scott-Gibson) *v.* Ramsey-Fairfax [1956] P. 115; [1955] 3 W.L.R. 849; 99 S.J. 870; [1955] 3 All E.R. 695, C.A.; affirming [1955] 3 W.L.R. 188; 99 S.J. 474; [1955] 2 All E.R. 709 1282
Randall *v.* Randall [1939] P. 131; 108 L.J.P. 49; 160 L.T. 133; 55 T.L.R. 224; 82 S.J. 1052; [1938] 4 All E.R. 696 1251
Ray *v.* Newton [1913] 1 K.B. 249; 82 L.J.K.B. 125; 108 L.T. 313; 57 S.J. 130, C.A. 452
Read *v.* Wotton [1893] 2 Ch. 171; 62 L.J. 481; 68 L.T. 209; 37 S.J. 285; 41 W.R. 556; 3 R. 374 22
Redfern *v.* Redfern [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 7 T.L.R. 157; 39 W.R. 212, C.A. 178
Redgrave *v.* Hurd (1881) 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A. 755
Reedie *v.* London and North Western Railway Co. (1849) 4 Ex. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201 803
Rees, In re [1954] Ch. 202; [1954] 2 W.L.R. 59; 98 S.J. 28; [1954] 1 All E.R. 7 160

PAGE

Reference re Chemical Regulations [1943] S.C.R. 1 558
Regal (Hastings) *v.* Gulliver [1942] 1 All E.R. 378, H.L. 819, 820
Regor Estates *v.* Wright [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; 115 J.P. 61; 95 S.J. 106; [1951] 1 All E.R. 219; 49 L.G.R. 241, C.A. 239
Reid *v.* Macbeth & Gray [1904] A.C. 223; 73 L.J.P.C. 57; 90 L.T. 422; 20 T.L.R. 316, H.L. 1129
Reynolds *v.* G. A. Austin & Sons [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; 115 J.P. 192; 95 S.J. 173; [1951] 1 All E.R. 606; 49 L.G.R. 377, D.C. . . 527
Rhodes *v.* Smethurst (1840) 6 M. & W. 351; 9 L.J.Ex 330; 4 Jur. 702; 151 E.R. 447, Ex.Ch. 735
Richards *v.* Highway Iron Founders (West Bromwich) [1957] 1 W.L.R. 781; 101 S.J. 464; [1957] 2 All E.R. 162; [1957] 1 Lloyd's Rep. 289 . . 226
Richardson & Son *v.* Middlesbrough Borough Assessment Committee and Another [1947] K.B. 958; 177 L.T. 103; 63 T.L.R. 413; 111 J.P. 357; 91 S.J. 265; [1947] 1 All E.R. 884, D.C. 967
Ridsdel, In re [1947] Ch. 597; [1947] L.J.R. 1486; 91 S.J. 483; [1947] 2 All E.R. 312 61
Rimmer *v* Rimmer [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; 96 S.J. 801; [1952] 2 All E.R. 863, C.A. 261, 262, 264, 265, 1120, 1121
Rippington *v.* Hicks & Son (Oxford) (1949) 65 T.L.R. 243; 113 J.P. 121; [1949] 1 All E.R. 239; 47 L.G.R. 265, D.C. 1018
Ritter *v.* Godfrey [1920] 2 K.B. 47 535
Roberts *v.* Dorman Long & Co. [1953] 1 W.L.R. 942; 97 S.J. 487; [1953] 2 All E.R. 428; 51 L.G.R. 476, C.A. 231, 233, 937
Roberts *v.* Hopwood [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 41 T.L.R. 436; 69 S.J. 475; 23 L.G.R. 337, H.L. 61, 556
Roberts *v.* Roberts and Temple (1917) 117 L.T. 157; 33 T.L.R. 333; 61 S.J. 492 . 483
Robinson *v.* Minister of Town and Country Planning [1947] K.B. 702; [1947] L.J.R. 1285; 177 L.T. 375; 63 T.L.R. 374; 111 J.P. 378; 91 S.J. 294; [1947] 1 All E.R. 851, C.A. 556
Robson *v.* North Eastern Railway Co. (1876) 2 Q.B.D. 85; 46 L.J.Q.B. 50; 35 L.T. 535; 41 J.P. 294; 25 W.R. 418, C.A. 630
Roe *v.* Minister of Health [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; 98 S.J. 319; [1954] 2 All E.R. 131, C.A. 803
Rogers' Question, In re [1948] 1 All E.R. 328, C.A. 1120
Ropner's Settlement Trusts, In re [1956] 1 W.L.R. 902; 100 S.J. 530; [1956] 3 All E.R. 332n. 167
Rose *v.* Ford [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; 53 T.L.R. 873; 81 S.J. 683; [1937] 3 All E.R. 359, H.L. 735
Rose (Frederick E.) (London) *v.* Pim (Wm. H.) Junr. & Co. [1953] 2 Q.B. 450; [1953] 3 W.L.R. 497; 97 S.J. 556; [1953] 2 All E.R. 739; 70 R.P.C. 238, C.A. 756
Roughead *v.* Railway Executive [1949] W.N. 280; 65 T.L.R. 435; 93 S.J. 514 . . 999
Royal College of Surgeons *v.* National Provincial Bank Ltd. [1952] A.C. 631; [1952] 1 T.L.R. 978; 96 S.J. 280; [1952] 1 All E.R. 984; 45 R. & I.T. 615, H.L. 104, 106
Royal Commission on Sugar Supply *v.* Trading Society Kwik-Hoo-Tong (1922) 38 T.L.R. 684 . . . . . 274, 280
Rush *v.* Matthews [1926] 1 K.B. 492; 95 L.J.K.B. 409; 134 L.T. 571; 42 T.L.R. 287; 70 S.J. 425; 24 L.G.R. 201, C.A. 238
Russell *v.* Norfolk (Duke of) (1948) 65 T.L.R. 225; 93 S.J. 132; [1949] 1 All E.R. 109, C.A. 781, 784
Russell *v.* Russell [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 S.J. 660, H.L. 694
Russo-Asiatic Bank, In re [1934] Ch. 720; 103 L.J.Ch. 336; 152 L.T. 142; 78 S.J. 647; [1934] B. & C.R. 71 735
Rustproof Metal Window Co. Ltd. *v.* I. R. C. [1947] L.J.R. 1479; 177 L.T. 657; [1947] 2 All E.R. 454; 29 T.C. 243, C.A. 68
Rutherford *v.* R. E. Glanville & Sons (Bovey Tracy) [1958] 1 W.L.R. 415; 102 S.J. 269; [1958] 1 All E.R. 532; 56 L.G.R. 211, C.A. 491
Rutherford *v.* Richardson [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 39 T.L.R. 42; 67 S.J. 78, H.L. 1052

S—— (falsely called E——) *v.* E—— (1863) 3 Sw. & Tr. 240 621
Sage *v.* Sage; Stockbridge *v.* Stockbridge [1947] P. 71; [1948] L.J.R. 124; 176 L.T. 420; 63 T.L.R. 252; [1947] 1 All E.R. 492 469
St. Luke Parish *v.* St. Leonard Parish (1779) 1 Bro.C.C. 40; 28 E.R. 972 . . 155
St. Mary Magdalene, Altofts, In re [1958] P. 172n. 1185, 1191
St. Mary, Tyne Dock, In re [1954] P. 369; [1954] 2 W.L.R. 1129; 98 S.J. 374; [1954] 2 All E.R. 339 . . . . . 1188, 1189
Salinas of Mexico, In re [1919] W.N. 311 691
Salisbury-Jones, In re, Hammond *v.* Salisbury-Jones, 159 L.T. 469; 82 S.J. 728; [1938] 3 All E.R. 459 260

PAGE
Salmon, In re (1889) 42 Ch.D. 351; 62 L.T. 270; 5 T.L.R. 583; 38 W.R. 150, C.A. 718
Salmon *v.* Salmon, Unreported, Barnard J., Birmingham Assizes, March 20, 21, 1958 1092
Saloon Packet Co., In re (1868) 37 L.J.Ch. 49; 17 L.T. 136; 16 W.R. 75 . . 911
Samuel, In re [1942] Ch. 1; [1941] 3 All E.R. 196 1158
Samuel *v.* Salmon & Gluckstein [1946] Ch. 8; 115 L.J.Ch. 103; 173 L.T. 358; 62 T.L.R. 28; 89 S.J. 508; [1945] 2 All E.R. 520 238
Sayer, In re [1957] Ch. 423; [1957] 2 W.L.R. 261; sub nom. Re, Sayer Trust, MacGregor *v.* Sayer, 101 S.J. 130; [1956] 3 All E.R. 600 1163
Scammell & Nephew *v.* Ouston [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 57 T.L.R. 280; 85 S.J. 224; 46 Com.Cas. 190; [1941] 1 All E.R. 14, H.L. . 702
Schroeder *v.* Mendl (1877) 37 L.T. 452, C.A. 755
Scott *v.* London and St. Katherine Docks Co. (1863) 3 H. & C. 596 808
Scott *v.* Scott [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 29 T.L.R. 520; 57 S.J. 498, H.L. 406
Scott *v.* Scott [1951] P. 245; [1951] 1 All E.R. 216 828
Scott *v.* Sebright (1886) 12 P.D. 21; 56 L.J.P. 11; 57 L.T. 421; 35 W.R. 258; sub nom. Sebright (orse. Scott) *v.* Sebright, 3 T.L.R. 79 1287
Scottish Mortgage Co. of New Mexico *v.* McKelvie (1886) 2 T.C. 165 . . . 1075
Scottish Widows' Fund Life Assurance Society *v.* Farmer (1909) 5 T.C. 502 . . 1070
Seddon *v.* North Eastern Salt Co. [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 21 T.L.R. 118; 49 S.J. 119; 53 W.R. 232 . . . . 756, 757. 758, 761
Sedgwick *v.* Watney Combe, Reid & Co. [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279, H.L. . . . 961, 972
Sellars *v.* Best [1954] 1 W.L.R. 913; 118 J.P. 326; 98 S.J. 424; [1954] 2 All E.R. 389 567
Seymour *v.* Reed [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 43 T.L.R. 584; 71 S.J. 488; 11 T.C. 625, H.L. 837, 838, 839–841
Shaw *v.* Shaw [1954] 2 Q.B. 429; [1954] 3 W.L.R. 265; 98 S.J. 509; [1954] 2 All E.R. 638, C.A. 567
Shephard *v.* Cartwright [1955] A.C. 431; [1954] 3 W.L.R. 967; 98 S.J. 868; [1954] 3 All E.R. 649, H.L. 567
Sherras *v.* De Rutzen [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 11 T.L.R. 369; 39 S.J. 451; 18 Cox C.C. 157; 43 W.R. 526; 15 R. 388, D.C. 526
Shipway *v.* Skidmore (1932) 16 T.C. 748 412
Short *v.* Poole Corporation [1926] Ch. 66; 95 L.J.Ch. 110; 134 L.T. 110; 90 J.P. 25; 42 T.L.R. 107; 70 S.J. 245; 24 L.G.R. 14, C.A. 193
Sifton *v.* Sifton [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; 54 T.L.R. 969; 82 S.J. 680; [1938] 3 All E.R. 435, P.C. 1163
Silver (orse. Kraft) *v.* Silver [1955] 1 W.L.R. 728; 99 S.J. 438; [1955] 2 All E.R. 614 1282
Silver *v.* Silver [1958] 1 W.L.R. 259; 102 S.J. 174; [1958] 1 All E.R. 523, C.A. . 1120, 1121, 1124
Simmons & Politzer, In re [1954] 2 Q.B. 296; [1954] 3 W.L.R. 423; 98 S.J. 573; [1954] 2 All E.R. 811, C.A. 445
Simpson's Estate, In re [1936] P. 40 735
Sir James Laing & Sons *v.* Barclay, Curle & Co. [1908] A.C. 35; 77 L.J.P.C. 33; 97 L.T. 816; 10 Asp.M.L.C. 583, H.L. 1129
Six Carpenters Case (1610) 8 Co.Rep. 146a; 77 E.R. 695 774
Slim *v.* Croucher (1860) 1 De G.F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 103; 6 Jur.N.S. 437; 8 W.R. 347; 45 E.R. 462, L.C. & C.JJ. 755
Smeaton Hanscomb & Co. *v.* Sassoon I. Setty, Son & Co. (No. 2) [1953] 1 W.L.R. 1481; 97 S.J. 876; [1953] 2 All E.R. 1588; [1953] 2 Lloyd's Rep. 580 . . . . . 253, 254, 718
Smith *v.* Baker & Sons [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 7 T.L.R. 679; 40 W.R. 392, H.L. 232, 505, 941
Smith *v.* Colbourne [1914] 2 Ch. 533; 84 L.J.Ch. 112; 111 L.T. 927; 58 S.J. 783, C.A. 429, 430, 431, 432
Smith *v.* Lion Brewery Co. (1909) 5 T.C. 568; [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 27 T.L.R. 261; 55 S.J. 269; 5 T.C. 568; 75 J.P.J. 87, H.L. 708
Smith *v.* London, Midland & Scottish Railway Co., 1948 S.C. 125; 1948 S.L.T. 235 . . . . . 172, 176
Smith *v.* Morris Motors and Harris [1950] 1 K.B. 194; 65 T.L.R. 642; 113 J.P. 521; 93 S.J. 694; [1949] 2 All E.R. 715; 47 L.G.R. 722, D.C. . . . 416
Smith Hogg *v.* Black Sea & Baltic General Insurance [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; 56 T.L.R. 893; 84 S.J. 681; 46 Com.Cas. 44; 19 Asp. M.L.C. 382, H.L. 160
Smith's Potato Estates *v.* Bolland [1948] A.C. 508; [1948] L.J.R. 1557; 64 T.L.R. 430; 92 S.J. 527; [1948] 2 All E.R. 367, H.L. 135, 298
Sneddon *v.* Lord Advocate [1954] A.C. 257; [1954] 2 W.L.R. 211; 98 S.J. 105; [1954] 1 All E.R. 255; 47 R. & I.T. 109 911
Snell (E. S.) & Sons, The Times, Dec. 20, 1911 521

PAGE

Solle *v.* Butcher [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107, C.A. 756, 757
Somerset *v.* Wade [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 10 T.L.R. 313; 42 W.R. 399; 10 R. 105, D.C. 524
Sonn, In re, Unreported, October 16, 1958 1160
Sorrell *v.* Smith [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 41 T.L.R. 529 . 774, 1060
Sotheby *v.* Grundy [1947] 2 All E.R. 761 848
Spence *v.* Eastern Counties Railway Co. (1839) 7 Dowl. 697 274
Squire *v.* Squire [1949] P. 51; [1948] L.J.R. 1345; 64 T.L.R. 371; 112 J.P. 319; 92 S.J. 323; [1948] 2 All E.R. 51; 46 L.G.R. 289, C.A. 694, 695
Stainer's Executors *v.* Purchase [1952] A.C. 280; [1951] T.R. 353; 30 A.T.C. 291; sub nom. Gospel *v.* Purchase [1951] 2 T.L.R. 1112; 95 S.J. 801; [1951] 2 All E.R. 1071; 45 R. & I.T. 14, H.L. 410, 411, 412
Stanford *v.* Roberts [1901] 1 Ch. 440; 83 L.T. 756 . . . . . 1201, 1206
Stanga *v.* Stanga [1954] P. 10; [1953] 3 W.L.R. 609; 97 S.J. 607; [1954] 2 All E.R. 16, D.C. 178
Starkie *v.* Starkie (No. 2) [1954] 1 W.L.R. 98; 118 J.P. 59; 98 S.J. 46; [1953] 2 All E.R. 1519, D.C. 513
Staveley Iron & Chemical Co. *v.* Jones [1956] A.C. 627; [1956] 2 W.L.R. 479; 100 S.J. 130; [1956] 1 All E.R. 403; sub nom. Jones *v.* Staveley Iron and Chemical Co. [1956] 1 Lloyd's Rep. 65, H.L. 507, 999
Stening *v.* Abrahams [1931] 1 Ch. 470; 100 L.J.Ch. 278; 145 L.T. 18 . . . 1079
Stern *v.* Friedman [1953] 1 W.L.R. 969; 97 S.J. 507; [1953] 2 All E.R. 565 . . 3
Stevens *v.* Woodward (1881) 6 Q.B.D. 318; 50 L.J.Q.B. 231; 44 L.T. 153; 45 J.P. 603; 29 W.R. 506, D.C. 999
Stimpson *v.* Standard Telephones and Cables [1940] 1 K.B. 342; 109 L.J.K.B. 315; 56 T.L.R. 90; 83 S.J. 941; 32 B.W.C.C. 253 507
Stotesbury *v.* Turner [1943] K.B. 370; 112 L.J.K.B. 365; 168 L.T. 355 . . . 252
Street *v.* British Electricity Authority [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; 96 S.J. 260; [1952] 1 All E.R. 679; 51 L.G.R. 199, C.A. 42
Strong & Co. of Romsey *v.* Woodifield [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 22 T.L.R. 754; 50 S.J. 666; 5 T.C. 215, H.L. 135, 298
Sullivan *v.* Sullivan [1956] 1 W.L.R. 277n.; 120 J.P. 161; 100 S.J. 210; [1956] 1 All E.R. 611n., D.C. 343
Summers *v.* Salford Corpn. [1943] A.C. 283; 112 L.J.K.B. 65; 168 L.T. 97; 107 J.P. 35; 59 T.L.R. 78; 86 S.J. 391; 41 L.G.R. 1; [1943] 1 All E.R. 68, H.L. 624
Surrey Revenue Officer *v.* Clarkson [1931] 2 English Derating Appeals 53 . . . 362
Sutherland *v.* Stopes [1925] A.C. 47; 94 L.J.K.B. 166; 132 L.T. 550; 41 T.L.R. 106; 69 S.J. 138, H.L. 745, 747
Sutro (L.) & Co. *v.* Heilbut Symons & Co. [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 33 T.L.R. 359; 14 Asp.M.L.C. 34; 23 Com.Cas. 21, C.A. 274, 282, 671, 673
Sydenham *v.* Sydenham and Illingworth [1949] 2 All E.R. 196; sub nom. Practice Note [1949] W.N. 287, C.A. 472

Taddy *v.* Co. *v.* Sterious & Co. [1904] 1 Ch. 354; 93 L.J.Ch. 191; 89 L.T. 628; 20 T.L.R. 102; 48 S.J. 117; 52 W.R. 152 860
Tarry *v.* Ashton (1876) 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439 803, 806
Taylor *v.* John Summers & Sons [1957] 1 W.L.R. 1182; 101 S.J. 902; [1957] 3 All E.R. 541, C.A. 491
Taylor *v.* National Assistance Board [1957] P. 101; [1957] 2 W.L.R. 189; 101 S.J. 110; [1957] 1 All E.R. 183 188
Taylor *v.* St. Helen's Corporation (1877) L.R. 6 Ch.D. 264; 46 L.J.Ch. 857; 37 L.T. 253; 25 W.R. 885, C.A. 851
Taylor (David) & Son *v.* Barnett Trading Co. [1953] 1 W.L.R. 562; 97 S.J. 226; [1953] 1 All E.R. 843; [1953] 1 Lloyd's Rep. 181, C.A. 274, 278
Temple *v.* National Mutual Life Association of Australia [1955] 2 Q.B. 461; [1955] 3 W.L.R. 264; 99 S.J. 489; [1955] 2 All E.R. 758, C.A. . . 118, 449, 451
Terry's Motors *v.* Rinder [1948] S.A.S.R.(Aus.) 167 848
Thexton *v.* Edmonston (1868) L.R. 5 Eq. 373 610
Thomas *v.* British Thomson-Houston Co. [1953] 1 W.L.R. 67; 97 S.J. 11; [1953] 1 All E.R. 29; 51 L.G.R. 152 860
Thomas *v.* Dando [1951] 2 K.B. 620; [1951] 1 T.L.R. 1067; 115 J.P. 344; [1951] 1 All E.R. 1010; 49 L.G.R. 793, D.C. 1107
Thompson *v.* London, Midland and Scottish Railway Co. [1930] 1 K.B. 41; 98 L.J.K.B. 615; 141 L.T. 382, C.A. 862, 866
Thompson *v.* Thompson [1957] P. 19; [1957] 2 W.L.R. 138; 101 S.J. 87; [1957] 1 All E.R. 161, C.A. 515, 1276, 1277
Thomson (D. C.) & Co. *v.* Deakin [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361, C.A. 774

PAGE

Thorne *v.* Motor Trade Association [1937] A.C. 797; 106 L.J.K.B. 495; 157 L.T. 399; 53 T.L.R. 810; 81 S.J. 476; [1937] 3 All E.R. 157; 26 Cr.App.R. 51, H.L. 860
Thorneloe and Clarkson Ltd. *v.* Board of Trade (1950) 66 T.L.R. (Pt. 1) 1117; [1950] 2 All E.R. 245; 1 P. & C.R. 139 848
Thornley *v.* Thornley [1893] 2 Ch. 229; 62 L.J.Ch. 370; 68 L.T. 199; 9 T.L.R. 254; 41 W.R. 541; 3 R. 311 260
Tildesley *v.* Harper (1876) 10 Ch.D. 393 . . . . . 896, 1234, 1239, 1240
Timpson's Executors *v.* Yerbury [1936] 1 K.B. 645; 105 L.J.K.B. 749; 154 L.T. 283; 80 S.J. 184; [1936] 1 All E.R. 186; 20 T.C. 155, C.A. 1070
Tool Metal Manufacturing Co. *v.* Tungsten Electric Co. [1955] 1 W.L.R. 761; 99 S.J. 470; [1955] 2 All E.R. 657; 72 R.P.C. 209, H.L. 1201
Townsend *v.* Haworth (1879) 12 Ch.D. 831n.; 48 L.J.Ch. 770n., C.A. . . . 1036
Trathan *v.* Trathan [1955] 1 W.L.R. 805; 99 S.J. 492; [1955] 2 All E.R. 701, D.C. 511, 513
Trego *v.* Hunt [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 12 T.L.R. 80; 44 W.R. 225, H.L. 90
Trevivan *v.* Lawrance (1704) Holt K.B. 282; 2 Ld.Raym. 1036; 6 Mod.Rep. 256; 1 Salk. 276; 3 Salk. 151; 87 E.R. 1003 154
Trinidad Lake Asphalt Operating Co. *v.* Income Tax Commissioners for Trinidad and Tobago [1945] A.C. 1; 114 L.J.P.C. 10; 171 L.T. 328; 61 T.L.R. 30; 88 S.J. 415 1070
Trznadel *v.* British Transport Commission [1957] 1 W.L.R. 1002; 101 S.J. 779; [1957] 3 All E.R. 196n., C.A. 991
Tucker *v.* Linger (1883) 8 App.Cas. 508, 511, H.L. 673, 677
Twine *v.* Bean's Express (1946) 175 L.T. 131; 62 T.L.R. 458, C.A. . . . 999

Underground Electric Railways Co. of London and Glyn, Mills, Currie & Co. *v.* I. R. C. [1914] 3 K.B. 210 . . . . . 949, 952, 954
United Grand Lodge of Ancient Free and Accepted Masons of England *v.* Holborn Borough Council [1957] 1 W.L.R. 1080; 121 J.P. 595; 101 S.J. 851; [1957] 3 All E.R. 281; 50 R. & I.T. 709; 56 L.G.R. 68; 2 R.R.C. 190, C.A. . 1175
United Ports Co., In re (1872) L.R. 13 Eq. 474; 41 L.J.Ch. 270; 26 L.T. 124; 20 W.R. 356 911
Usher's Wiltshire Brewery *v.* Bruce [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; (1914) 6 T.C. 399, H.L. 708

V. G. M. Holdings Ltd., In re [1942] 1 Ch. 235; 111 L.J.Ch. 148; 58 T.L.R. 131; 86 S.J. 63; [1942] 1 All E.R. 224, C.A. 911
Vanderpuye *v.* Botchway [1956] A.C. 501; [1956] 2 W.L.R. 1080; 100 S.J. 358, P.C. 154
Venn *v.* Tedesco [1926] 2 K.B. 227; 95 L.J.K.B. 866; 135 L.T. 108; 90 J.P. 185; 42 T.L.R. 478; 70 S.J. 709; 24 L.G.R. 496 735
Vestey's Executors *v.* Inland Revenue Commissioners [1949] W.N. 233; [1949] 1 All E.R. 1108; [1949] T.R. 149; 42 R. & I.T. 314; 31 T.C. 1, H.L. . 68
Vestey's Settlement, In re [1951] Ch. 209; [1950] 2 All E.R. 891, C.A. . . 167
Vexatious Actions Act, In re. In re Boaler [1915] 1 K.B. 21; 83 L.J.K.B. 1629; 111 L.T. 497; 30 T.L.R. 580; 58 S.J. 634; 24 Cox C.C. 335; 78 J.P. 280, C.A. 556
Vigers Brothers *v.* Sanderson Brothers [1901] 1 Q.B. 608; 70 L.J.K.B. 383; 84 L.T. 464; 17 T.L.R. 316; 45 S.J. 328; 49 W.R. 411; 6 Com.Cas. 99 . 1129
Vine *v.* National Dock Labour Board [1957] 2 W.L.R. 106; 101 S.J. 86; [1956] 3 All E.R. 939; [1956] 2 Lloyd's Rep. 567, H.L. 195, 196

Wagner *v.* International Railway Co. (1921) 232 N.Y. 176 999
Wake *v.* Conyers (1759) 1 Eden 331; 2 Cox Eq.Cas. 360; 28 E.R. 712 . . 155
Walker *v.* Frobisher (1801) 6 Ves. 70; 31 E.R. 943 . . . . . 274, 280
Walker *v.* Walker (1937) 57 C.L.R.(Aus.) 630 681
Walker and Beckenham, Kent, Local Board (1884) 50 L.T. 207; 48 J.P. 264, D.C. 399
Wallace *v.* Fogarty [1926] 1 I.R. 255 120
Ware and De Freville *v.* Motor Trade Association [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213 775
Warren, In re [1939] Ch. 684; 108 L.J.Ch. 311; 161 L.T. 32; 55 T.L.R. 796; 83 S.J. 455; [1939] 2 All E.R. 599 976
Warren, In re, ex parte Wheeler *v.* Trustee in Bankruptcy [1938] Ch. 725; 107 L.J.Ch. 409; 159 L.T. 17; 54 T.L.R. 680; 82 S.J. 394; [1938] 2 All E.R. 331; [1938–39] B. & C.R. 1, D.C. 607
Waters *v.* Waters [1956] P. 344; [1956] 2 W.L.R. 661; 120 J.P. 105; 100 S.J. 172; [1956] 1 All E.R. 432, D.C. 694
Way *v.* Way [1950]. See Kenward *v.* Kenward.
Weatherhead *v.* Bradford Assessment Committee and Laycock, Son & Co. [1931] 1 K.B. 386; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 46 T.L.R. 601; 74 S.J. 628; 28 L.G.R. 550 966

PAGE

Webb *v.* Smith, Bingley & Evans, unreported, Birmingham Assizes, December 18, 1956 227
Weightman *v.* Weightman (1906) 94 L.T. 620; 70 J.P. 120; 22 T.L.R. 362, D.C. 37, 38
Weinbaum *v.* Klein [1950] W.N. 67; 66 T.L.R. (Pt. 1) 414; 94 S.J. 178; [1950] 1 All E.R. 353, C.A. 109
Weinberger *v.* Inglis [1919] A.C. 606, H.L. 774, 783
Weinbergs Weatherproofs Ltd. *v.* Radcliffe Paper Mill Co. Ltd. [1958] 1 Ch. 437; [1958] 2 W.L.R. 1; 102 S.J. 15 873
Wells *v.* Wells [1954] 1 W.L.R. 1390; 98 S.J. 804; [1954] 3 All E.R. 491, C.A. . 483
Wenlock (Baroness) *v.* River Dee Co. (1884) 10 App.Cas. 354, H.L. 712
West, In re, King *v.* Adams, Ex parte Clough [1892] 2 Q.B. 102 445
West *v.* West [1954] P. 444; [1954] 3 W.L.R. 163; 98 S.J. 454; [1954] 2 All E.R. 505, C.A. 343
Westby, In re [1932] Ir.R. 444 977
Wheeler *v.* Fradd (1898) 14 T.L.R. 440 315
Wheeler *v.* Keeble (1914) Ltd. [1920] 1 Ch. 57; 88 L.J.Ch. 554; 63 S.J. 724 . . 23
White, In re [1928] P. 75; 135 L.T. 381; 42 T.L.R. 545; 70 S.J. 671 584
Whitehead *v.* Greetham (1825) 2 Bing. 464; M'Cl. & Y. 205; 10 Moore C.P. 183; 130 E.R. 385, Ex.Ch. 1032
Whitehouse, In re [1951] 1 K.B. 673; [1951] 1 T.L.R. 405; 95 S.J. 138; [1951] 1 All E.R. 353; 49 L.G.R. 203 1111
Whurr *v.* Devenish (1904) 20 T.L.R. 385 756
Wild *v.* King Smith (1941) 24 T.C. 86 1070
Wilde *v.* Gibson (1848) 1 H.L.Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L. . 756, 757, 758
Wilkinson *v.* Rea [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; [1941] 2 All E.R. 50, C.A. 349
Williams *v.* Jones (Stanley) & Co. [1926] 2 K.B. 37; 95 L.J.K.B. 471; 134 L.T. 652; 70 S.J. 463, C.A. 252
Williams *v.* Quebrada Railway, Land and Copper Co. [1895] 2 Ch. 751; 65 L.J. Ch. 68; 73 L.T. 397; 44 W.R. 76 1302
Williams *v.* Williams (1943) 113 L.J.P. 18; 169 L.T. 375; 88 S.J. 25; [1943] 2 All E.R. 746, C.A. 343
Wilmot *v.* Wilmot and Martin [1948] W.N. 193; [1948] L.J.R. 1336; 64 T.L.R. 460; [1948] 2 All E.R. 123 483
Wilson *v.* Wilson, Bobbin & Co. (1911) 28 R.P.C. 741 315
Wingham, decd., In re [1949] P. 187; [1949] L.J.R. 695; 64 T.L.R. 594; 92 S.J. 660; [1948] 2 All E.R. 908, C.A. 459, 460, 461
Withers *v.* Nethersole [1948] W.N. 105; [1948] L.J.R. 805; 64 T.L.R. 157; 92 S.J. 193; [1948] 1 All E.R. 400; [1948] T.R. 31; 41 R. & I.T. 159 . . 84, 85
Wohlenberg *v.* Lageman (1815) 6 Taunt. 251; 128 E.R. 1031 . . . . . 401, 402
Wolffe, In re [1953] 1 W.L.R. 1211; 97 S.J. 539; sub nom. Re Wolfe's Will Trusts [1953] 2 All E.R. 697 1160
Wood *v.* Jones (1889) 61 L.J. 551 569
Wood *v.* L. C. C. [1941] 2 K.B. 232; 110 L.J.K.B. 641; 165 L.T. 131; 105 J.P. 299; 57 T.L.R. 499; 39 L.G.R. 289; [1941] 2 All E.R. 230, C.A. . . 366, 369
Wood *v.* Wood [1947] P. 103; [1948] L.J.R. 784; 63 T.L.R. 450; 111 J.P. 428; [1947] 2 All E.R. 95, D.C. 484
Wood *v.* Wood [1957] P. 254; [1957] 2 W.L.R. 826; 121 J.P. 302; 101 S.J. 356; [1957] 2 All E.R. 14, C.A. 512
Woods *v.* Duncan: The Thetis [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 62 T.L.R. 283; [1946] 1 All E.R. 420n., H.L. . . . 349, 803, 811, 813
Woods *v.* Wise [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; 119 J.P. 254; 99 S.J. 234; [1955] 1 All E.R. 767, C.A. 239, 243, 244
Woodward *v.* Dudley (Earl) [1954] Ch. 283; [1954] 1 W.L.R. 476; 98 S.J. 162; [1954] 1 All E.R. 559; 52 L.G.R. 269 582
Woolwich Revenue Officer *v.* Royal Arsenal Co-operative Society [1931] 2 English Derating Appeals 53 362
Woolworth (F. W.) & Co. Ltd. *v.* Lambert [1937] Ch. 37; [1936] 2 All E.R. 1523; 106 L.J.Ch. 15; 155 L.T. 236; 52 T.L.R. 732; 80 S.J. 703, C.A. . . . 1269
Wootton *v.* Central Land Board [1957] 1 W.L.R. 424; 121 J.P. 137; 101 S.J. 188; [1957] 1 All E.R. 441; 8 P. & C.R. 121; 55 L.G.R. 84, C.A. 252
Woozley *v.* Woodall Smith [1950] 1 K.B. 325; 66 T.L.R. (Pt. 1) 99; 94 S.J. 13; [1949] 2 All E.R. 1055, C.A. 118
Worsley *v.* Worsley & Worsley (1904) 20 T.L.R. 171 799

Yates *v.* Pym (1816) 6 Taunt. 446; 128 E.R. 1107 675
Yelland *v.* Taylor [1957] 1 W.L.R. 459; 101 S.J. 228; [1957] 1 All E.R. 627, C.A. . 532
Young *v.* Canadian Northern Railway Co. [1931] A.C. 83; 100 L.J.P.C. 51; 144 L.T. 255, P.C. 23
Young Sid, The [1929] P. 190; 98 L.J.P. 97; 141 L.T. 234; 45 T.L.R. 389; 18 Asp.M.L.C. 22, C.A. 536

Zinovieff *v.* British Transport Commission (1954), The Times, April 1, 1954 . . 999

STATUTES, ETC., JUDICIALLY CONSIDERED

Public General Statutes

Page

1361 Justices of the Peace Act (34 Edw. 3, c. 1) 1264
1601 Charitable Gifts Act (43 Eliz. 1, c. 4) 1243
1836 Marriage Act (6 & 7 Will 4, c. 85), s. 23 1252
1837 Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 11 457
1861 Accessories and Abettors Act (24 & 25 Vict. c. 94), ss. 1, 2 1050
1882 Married Women's Property Act (45 & 46 Vict. c. 75), s. 17 259, 1116
1888 Oaths Act (51 & 52 Vict. c. 46), s. 1 143
1890 Lunacy Act (53 & 54 Vict. c. 5), s. 20 1248
1891 Stamp Act (54 & 55 Vict. c. 39), Sch. 1 943
1895 Summary Jurisdiction (Married Women) Act (58 & 59 Vict. c. 39)—
s. 7 35
s. 11 1
1901 Factory and Workshop Act (1 Edw. 7, c. 22), s. 149 .. 357, 955
1907 Criminal Appeal Act (7 Edw. 7, c. 23), s. 5 (2) 786
1908 Fatal Accidents (Damages) Act (8 Edw. 7, c. 7), s. 1 993
1911 Perjury Act (1 & 2 Geo. 5, c. 6), ss. 1 (1), 15 143
1913 Forgery Act (3 & 4 Geo. 5, c. 27), s. 1 638
Mental Deficiency Act (3 & 4 Geo. 5, c. 28), ss. 1 (1) (2), 8 (1) 387
1914 Bankruptcy Act (4 & 5 Geo. 5, c. 59)—
s. 25 ..... 283, 405
s. 111 1272
s. 157 (1) (*a*) (*b*) 287
1916 Larceny Act (6 & 7 Geo. 5, c. 50), s. 32 (1) 638
1918 Wills (Soldiers and Sailors) Act (7 & 8 Geo. 5, c. 58), ss. 1, 3 457
Income Tax Act (8 & 9 Geo. 5, c. 40)—
Case I 842
Sch. 1, Sch. D, Case VI .. 585
Sch. D, 1 (*a*) (i), Cases IV and V 1063
1920 Increase of Rent and Mortgage Interest (Restrictions) Act (10 & 11 Geo. 5, c. 17)—
ss. 7, 12 (5) 116
s. 12 (7) 235
1922 Finance Act (12 & 13 Geo. 5, c. 17), s. 21, Sch. 1, paras. 8, 10 213
1923 Mines (Working Facilities and Support) Act (13 & 14 Geo. 5, c. 20), s. 1 599

Page

1925 Trustee Act (15 & 16 Geo. 5, c. 19)—
s. 1 (1) 974
s. 32 165
s. 69 (2) 974
Law of Property Act (15 & 16 Geo. 5, c. 20), s. 146 611
Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. 5, c. 49)—
ss. 31 (1), 50 (1) 529
s. 163 583
Criminal Justice Act (15 & 16 Geo. 5, c. 86)—
s. 13 (3) 312
s. 35 (1) 638
Rating and Valuation Act (15 & 16 Geo. 5, c. 90)—
s. 9 (2) (*d*) (*e*) 920
s. 24 ..... 323, 331
Law of Property Act (15 & 16 Geo. 5, c. 20), s. 56 (1) .. 1267
1926 Legitimacy Act (16 & 17 Geo. 5, c. 60), s. 1 (1) (2) 606
1928 Racecourse Betting Act (18 & 19 Geo. 5, c. 41), s. 3 .... 123, 705
Rating and Valuation (Apportionment) Act (18 & 19 Geo. 5, c. 44)—
ss. 1, 3 357
s. 3 (1) 955
1930 Road Traffic Act (20 & 21 Geo. 5, c. 43), ss. 4 (1), 121 1106
1933 Rent and Mortgage Interest Restrictions (Amendment) Act (23 & 24 Geo. 5, c. 32), s. 3 (1), Sch. 1, para. (*h*) 318
1934 Law Reform (Miscellaneous Provisions) Act (24 & 25 Geo. 5, c. 41), s. 1 (1) (3) 729
Betting and Lotteries Act (24 & 25 Geo. 5, c. 58), s. 18 (5) 123, 705
1936 Housing Act (26 Geo. 1 & Edw. 8, c. 51) 1296
1937 Factories Act (1 Edw. 8 & 1 Geo. 6, c. 67)—
ss. 14, 16 415
s. 22 (3) 378
s. 25 (3) 39
s. 49 936
1938 Leasehold Property (Repairs) Act (1 & 2 Geo. 6, c. 34), s. 1 611
Inheritance (Family Provision) Act (1 & 2 Geo. 6, c. 45) .. 604
1939 Limitation Act (2 & 3 Geo. 6, c. 21)—
s. 2 729
s. 19 1216
ss. 23, 24 822
s. 26 1216
(1) (*b*) 563
s. 32 729

PAGE

1939 Rent and Mortgage Interest Restrictions Act (2 & 3 Geo. 6, c. 71), s. 7 116
1940 Finance Act (3 & 4 Geo. 6, c. 29), s. 43 (1) 905
1943 War Damage Act (6 & 7 Geo. 6, c. 21), ss. 36, 66, 79 .. 842
1946 National Insurance (Industrial Injuries) Act (9 & 10 Geo. 6, c. 62), s. 7 (4) 851
National Health Service Act (9 & 10 Geo. 6, c. 81), ss. 6 (2), 14 (1), 68 (1) 181
1947 Agriculture Act (10 & 11 Geo. 6, c. 48), ss. 47, 66 202
Town and Country Planning Act (10 & 11 Geo. 6, c. 51)—
s. 12 634
s. 14 (1) 1161
s. 19, proviso (*b*) (2) (2A) .. 1093
s. 23 634
s. 36 1161
ss. 69, 70 1296
1948 Local Government Act (11 & 12 Geo. 6, c. 26), ss. 54, 120 920
Companies Act (11 & 12 Geo. 6, c. 38)—
ss. 61, 66, 67, 69 688
s. 162 (1) 822
ss. 206, 208 1043
s. 219 683
ss. 256 (1) (2), 307 (1) (2) .. 1087
Criminal Justice Act (11 & 12 Geo. 6, c. 58)—
s. 3 933
s. 29 (3) 1110
s. 41 (3) 750
Agricultural Holdings Act (11 & 12 Geo. 6, c. 63)—
s. 24 (2) (*g*) 580
s. 25 (1) (*a*), (5) 434
1949 Railway and Canal Commission (Abolition) Act (12, 13 & 14 Geo. 6, c. 11), s. 1 (1) (*a*) 599
Marriage Act (12, 13 & 14 Geo. 6, c. 76), s. 61 1252
Patents Act (12, 13 & 14 Geo. 6, c. 87), s. 59 (1) 1033
1950 Matrimonial Causes Act (14 Geo. 6, c. 25)—
s. 1 (2) 1248
s. 3 (2) 146
s. 8 (1) (*b*) 1041
s. 14 (1) 146
s. 20 (1) 882
s. 23 827
Adoption Act (14 Geo. 6, c. 26), ss. 2 (4) (*e*), 3 197
Arbitration Act (14 Geo. 6, c. 27)—
s. 4 159
s. 26 398

PAGE

1952 Income Tax Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 10)—
s. 123 ..... 66, 406
s. 137 (*a*) (*f*) (*g*) 123
s. 139 (*a*) (*f*) (*g*) 705
s. 156 ..... 593, 832
ss. 412 (2) (4) (5), 413 (1) .. 585
Sch. D, Case I 66
Sch. E, paras. 1, 2, Sch. 9 .. 593, 832
Magistrates' Courts Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 18 (1) (2) 843
Intestates' Estates Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 64), s. 2 (1A) (*b*) (*e*) .. 604
1953 Prevention of Crime Act (1 & 2 Eliz. 2, c. 14), s. 1 (4) .. 1255
Town and Country Planning Act (1 & 2 Eliz. 2, c. 16), s. 1 (1) 1296
1954 Landlord and Tenant Act (2 & 3 Eliz. 2, c. 56)—
ss. 23 (1), 24 (1) 1076
s. 30 (1) (*a*) 869
(*f*) 202
(*g*) 900
s. 34 108
Town and Country Planning Act (2 & 3 Eliz. 2, c. 72), s. 70 1093
1955 Public Service Vehicles (Travel Concessions) Act (3 & 4 Eliz. 2, c. 26), s. 1 (4) .. 913
Rating and Valuation (Miscellaneous Provisions) Act (4 & 5 Eliz. 2, c. 9)—
s. 8 ..... 95, 1171
(1) (*a*) 541, 1135, 1258
(2) 30, 920
(3) (4) (5) 920
1956 Administration of Justice Act (4 & 5 Eliz. 2, c. 46), s. 31 (4) 1033
Restrictive Trade Practices Act (4 & 5 Eliz. 2, c. 68)—
ss. 20 (1) (3), 21 (1) (*a*) (*b*) . 1192
s. 25 ..... 655, 857
(1) 1033
1957 Homicide Act (5 & 6 Eliz. 2, c. 11), s. 2 ..... 413, 474
Solicitors Act (5 & 6 Eliz. 2, c. 27), s. 57 (1) 444
Maintenance Agreements Act (5 & 6 Eliz. 2, c. 35), s. 2 (1) 258
Housing Act (5 & 6 Eliz. 2, c. 56), ss. 42 (1), 43 (1) (2) 1151
1958 Divorce (Insanity and Desertion) Act (6 & 7 Eliz. 2, c. 54), s. 1 1248

OTHER STATUTES

British Guiana—1930 Laws of British Guiana, c. 18, ss. 24, 25 1050
Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 to (No. 1), 1955, regs. 3, 5 (1) (2) 546
Cyprus Emergency Powers Order in Council, 1939, s. 6 (1) 546
Nigeria—Inter-Tribal Boundaries Ordinance (No. 49 of 1933) (Laws of Nigeria, 1948, c. 95), ss. 3, 4, 5 151

Rules and Orders

PAGE

County Court (Amendment) Rules, 1957 (S.I. 1957, No. 174 (L. 1)), Ord. 11, r. 1 (1) . . . 266
County Court Rules, 1936 (S.R. & O. 1936, No. 626)—
Ord. 16, r. 1 (1) . . . 980
Appendix D . . . 266
Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956, No. 180), art. 1 . . . 522
Judicial Committee Rules, 1925 . . . 1214
1957 . . . 1214
Live Poultry (Movement Records) Order, 1954 (S.I. 1954, No. 122), art. 2 (1) . 92
Magistrates' Courts Rules, 1952 (S.I. 1952, No. 290), r. 63 . . . 1016
Matrimonial Causes Rules (S.I. 1957, No. 619 (L. 4))—
r. 36 (1) . . . 1
r. 66 (9) . . . 1015
r. 73 (2) . . . 1
r. 82 . . . 894
National Health Service (Transfer of Officers and Compensation) Regulations, 1948 (S.I. 1948, No. 1475), reg. 4 . . . 181
National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948, No. 1372), reg. 2 (5) . . . 517
Non-Contentious Probate Rules, 1954 (S.I. 1954, No. 796), r. 33 . . . 791
Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927, No. 480), Sch., Class 4 . . . 323, 331
Prevention of Accidents Rules, 1902 (S.R. & O. 1902, No. 616), para. 5 . . 493
Protection of Eyes Regulations (S.R. & O. 1938, No. 654), reg. 1, Sch. . . . 936
Public Trustee Rules, 1912 (S.R. & O. 1912, No. 348 (L. 9)), r. 30 . . . 1043
Restrictive Practices Court Rules, 1957 (S.I. 1957, No. 603), r. 49 . . . 1299
Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189), Sch. . . . 1296
R.S.C., Ord. 3, r. 6 . . . 1006
Ord. 14, r. 1 . . . 300, 1006
r. 2 . . . 300
Ord. 19, r. 4 . . . 1006
Ord. 22, r. 14 (1) (9) . . . 927, 1011
Ord. 28, r. 1 . . . 894, 1216
Ord. 36, r. 29 (6) . . . 539
r. 58 . . . 16
Ord. 54 . . . 599
Ord. 55, r. 2 (1) . . . 856
Ord. 58, r. 3 (2) . . . 1216
r. 4 . . . 338
r. 4 (1) . . . 792
r. 5 . . . 338
r. 10 . . . 797
r. 14 . . . 761
r. 15 . . . 338
Ord. 59, r. 33 . . . 1016
Ord. 64, r. 7 . . . 761
Ord. 65, r. 1 . . . 529
r. 27 (39) (40) . . . 6
r. 27 (41) . . . 6, 314

THE
WEEKLY LAW REPORTS
Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[PROBATE, ETC., DIVISION.]

* BYATT *v.* BYATT.

1957
Oct. 31;
Nov. 1.

Lord Merriman P., and Stevenson J.

Husband and Wife — Justices — Appeal to Divisional Court — Fraud alleged—Procedure—Appeal by notice of motion—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 11 *—Matrimonial Causes Rules,* 1957 (*S.I.* 1957, *No.* 619 (*L.*4)), *rr.* 36 (1), 73 (2).

In September, 1956, certain justices made a separation order on the ground that the wife had committed adultery. The wife did not attend the hearing, at which two letters in which she admitted adultery, one to the court and one to the husband, had been produced. She was given leave to appeal out of time, and alleged in an affidavit in support of her appeal, which was by notice of motion, that she had been forced by her husband to write the letters and that he had, in effect, put them forward in circumstances in which he knew them to contain false statements.

The preliminary point was taken at the hearing of the appeal that as the appellant was seeking to impeach the decision of the justices on the ground of fraud the correct procedure was by action, and not by notice of motion: —

Held, that the procedure adopted by the appellant, which was consistent with that laid down in rule 73 (2) of the Matrimonial Causes Rules, 1957, and which was analogous to that in applications for a rehearing under rule 36 (1), was a proper procedure, and that the preliminary point must accordingly fail.

Hip Foong Hong v. *H. Neotia & Co.* [1918] A.C. 888 and *Jonesco* v. *Beard* [1930] A.C. 298 considered.

APPEAL by wife to the Divisional Court from an order of the justices of the petty sessional division of Edmonton sitting at Tottenham.

The parties were married in 1947 and separated in June, 1956, when the wife was pregnant of her fourth child, the husband being the one to leave the home. A summons was issued upon the complaint of the husband whereby it was alleged that the wife had committed adultery with a person unknown at a place unknown, and on September 6, 1956, the justices found the

1957

BYATT
v.
BYATT.

adultery proved and made an order that the husband be no longer bound to cohabit with the wife.

The wife did not attend the hearing, and reliance was placed by the husband upon two letters which the wife had written. In one, written to the husband, she said that she had wanted him to get out before the end of June because she was expecting a baby by another man, and that as she could not tell him then, she thought that she would write and let him know. "I expect "this will mean court, but do as you want, I will not stop you." In the other letter the wife wrote to the court to say that she would not be attending the hearing, and that she did not wish to contest the case as what she had written to her husband was the truth.

The wife on her appeal applied for leave to appeal out of time (which was granted) and alleged grounds for her appeal:

"(1) That two letters produced before the justices by the "contents whereof the justices adjudged the charge of adultery "to have been proved and service of the summons to have been "acknowledged by the appellant, were written by the appellant "under fear and duress and at the dictation of you, the respon-"dent, in or about the month of June, 1956.

"(2) That the contents of the said letters, at least in so far "as they constitute an admission of adultery, were as you, the "respondent, well knew untrue.

"(3) That the appellant has never committed adultery.

"(4) That you, the respondent, are the father of a child, Peter "Alexander, who was born on February 22, 1957, and with which "the appellant was pregnant in or about the month of June, "1956, aforesaid.

"(5) That the said order was induced by the fraud of you, the "respondent.

"(6) That the failure of the appellant to attend before the said "justices on the aforesaid date was due to her acute fear of you, "the respondent, her poor condition of health engendered there-"by and by her pregnancy, and of her great fear of telling the "truth concerning the said letters.

"(7) That the evidence of the appellant concerning, inter alia, "the said letters would have materially and conclusively affected "the aforesaid finding of the said justices as to the appellant's "alleged adultery."

The wife filed an affidavit in support of her contentions in which she alleged a course of ill-treatment, and said that she had lived throughout the marriage " in awe and acute physical fear " of her husband, and that she had been afraid to go to the court or reveal his fraud. The husband denied her allegations.

The appeal was by notice of motion, and the preliminary point was taken on behalf of the husband that since the wife appellant was alleging fraud the correct procedure was by action and not by notice of motion.

The case is reported only upon the preliminary point.

J. N. Dunlop for the appellant wife.
Paul Curtis-Bennett for the respondent husband.

Flower v. *Lloyd* [1] and *Stern* v. *Friedman* [2] were cited in argument in addition to the cases cited in the judgment.

Counsel for the wife was not called on upon the preliminary point.

LORD MERRIMAN P. A preliminary point has been taken, which is based upon rule 73, sub-rule 2, of the Matrimonial Causes Rules, 1957, whereby an appeal from justices under section 11 of the Summary Jurisdiction (Married Women) Act, 1895, "shall be by "notice of motion stating the grounds of appeal and whether the "whole or a part only of the order is complained of."

This is an attempt by a wife to appeal out of time (and we have extended the time) against a finding of adultery on which, on the complaint of the husband, the justices have made a separation order. The wife has filed an affidavit the substance of which, without going into detail, is that, at the demand of her husband, she wrote a letter, some time before there were any proceedings in the magistrates' court, admitting adultery, and when the proceedings were started by the husband's complaint she wrote a further letter to the court in which she confirmed her admission of adultery.

The wife did not attend the court—that is the point—and the case proceeded in her absence. The husband gave evidence which was, in effect, limited to producing these letters.

The wife has filed an affidavit in which she says, rightly or wrongly, that the whole thing is false, that she was afraid of her husband, and that, in effect, she was forced to write these letters. The word "duress" has been used. It may or may not be the proper term in the circumstances.

In my opinion, the substance of the matter is this: that it is alleged that the husband put forward these letters in circumstances in which he knew them to contain false statements. That is ultimately the sum and substance of the matter—in a word, that this separation order was obtained contrary to the justice of the case.

Like other orders of justices it has, of course, not merely the immediate effect of condemning the wife as an adulteress in any proceedings in a magistrates' court (for it plainly would, I think, prevent her from bringing any claim in a magistrates' court for maintenance, since she would be confronted, as long as this order stands, with an order of a court of competent jurisdiction which would be conclusive against her). But it has, of course, wider implications than that, because under section 7 (2) of the Matrimonial Causes Act, 1950, this separation order

[1] (1879) 10 Ch.D. 327.

[2] [1953] 1 W.L.R. 969; [1953] 2 All E.R. 565.

1957

BYATT
v.
BYATT.

Lord
Merriman P.

could be produced, with the following effect: "On any such "petition for divorce, the court may treat the decree of judicial "separation or the said order"—(that is, an order which has the effect of a decree of judicial separation, which is what a separation order by justices is, by Act of Parliament)—"as "sufficient proof of the adultery," and then, leaving out immaterial words, "but the court shall not pronounce a decree of "divorce without receiving evidence from the petitioner." It has, therefore, a potential bearing of very great importance on the status of the parties.

I mentioned that appeals, the right to bring which is derived from section 11 of the Summary Jurisdiction (Married Women) Act, 1895, are to be by motion to this court. We have been confronted with the preliminary point that this is wholly improper. It is not put as high as to say that there is no right to bring the motion, but there has been cited the judgment of Lord Buckmaster in *Jonesco* v. *Beard*[1]: "Viewed simply as a "matter of procedure the course taken was irregular. It has "long been the settled practice of the court that the proper "method of impeaching a completed judgment on the ground of "fraud is by action in which, as in every other action based on "fraud, the particulars of the fraud must be exactly given and "the allegation established by the strict proof such a charge "requires." I need not continue the citation beyond saying that Lord Buckmaster later states[2]: "That, however, there is "jurisdiction in special cases to set aside a judgment for fraud on "a motion for a new trial may be accepted," and he then cites the case of *Hip Foong Hong* v. *H. Neotia & Co.* in the Privy Council,[3] in which, after saying that the trial had been held below and dealt with on the merits, Lord Buckmaster had added[4]: "They [their Lordships] have only to add that, where a "new trial is sought upon the ground of fraud, procedure by "motion and affidavit is not the most satisfactory and con-"venient method of determining the dispute. The fraud must be "both alleged and proved; and the better course in such a case is "to take independent proceedings to set aside the judgment upon "the ground of fraud, when the whole issue can be properly "defined, fought out, and determined, though a motion for a new "trial is also an available weapon and in some cases may be "more convenient."

It will be observed that in both those cases, the appeal in the House of Lords and the appeal in the Privy Council, the whole merits were gone into in spite of the cautionary note that it was better not to proceed by notice of motion, but to proceed by action. Both cases recognized that there may be occasions on which it is convenient to proceed in the way now before the court, and, in my opinion, the class of civil action of which Lord Buckmaster was speaking is very far removed from the sort of thing

[1] [1930] A.C. 298, 300.
[2] Ibid. 298, 301.
[3] [1918] A.C. 888.
[4] Ibid. 888, 894.

that we are dealing with here. Indeed, I go further. It seems to me that a very close analogy is provided by another aspect of our jurisdiction. I refer to the cases under rule 36 of the Matrimonial Causes Rules, 1957, under which this court can entertain applications for the rehearing of cases in which a decree nisi has been pronounced where no error of the judge at the trial is alleged. So far, let me say, the case is strictly analogous to this, for it is conceded, and it could not be otherwise than conceded, that the evidence placed before the justices, these two separate written confessions, one addressed to the husband and the other addressed to the clerk of the court, could properly be accepted by the justices, with the husband's own evidence, as proving the charge which he brought. I do not go into the question whether it would have been better to secure the attendance of the wife before acting solely on her written confession; I content myself with saying that they were entitled to act on it. So that no error at the trial can be alleged.

It is true that in cases under rule 36 it is not necessary by any means that there should be fraud as the ground of the application. Speaking generally, the ground is usually that for some reason or another, and it may even be deliberate abstention by the party bringing the application, a party who really wishes to defend has not had an opportunity of defending. As I say, fraud is not necessarily involved, but it sometimes is, and I can recall many cases where there has been some deliberate trick to avoid the respondent having, for example, notice of the date of the trial, or where there has been an affidavit of service imposed upon the court which was in fact false, and so forth; but it has never been suggested, in my experience, that, merely because it is necessary to move this court to set aside the decree nisi and order a rehearing before another judge, the fact that fraud is alleged is a bar to proceedings by motion.

I think, myself, that merely as a matter of convenience, though it is not a complete analogy, the procedure under rule 36, which is, in effect, the procedure adopted in this case of supporting the motion with an affidavit of the circumstances upon which the application is based, is a very close analogy. In my opinion this preliminary point is quite hopeless and ought to be disallowed, as we have disallowed it.

There remains, then, the question, how to deal with this matter? As the matter stands at present the wife alone has filed an affidavit; the husband so far has not, possibly because of the supposed validity of this preliminary point or for some other reason, chosen to answer it, although when it came to the point we were told that there is actually in court a completed draft of the affidavit which it is now desired to file. However, we are not shutting the husband out because of his delay. After all, the wife is out of time, and we have extended the time for her, and we are prepared to deal with the husband by the same measure. We have given leave to the husband to file an affidavit. If it is

1957

BYATT v. BYATT.

Lord Merriman P.

felt to be right, as it may very well be, that this matter should not stand simply on cross-affidavits, we have given leave for either side to give notice to cross-examine the other. That, as far as one can see, looking ahead, should enable us on oral evidence to decide the essential question whether the husband has put forward these letters knowing them to be false. If so there would, of course, be the question whether there is any other evidence of adultery, and it would be possible to suggest this to the wife in cross-examination on her affidavit, in which she says that she never has committed adultery.

However that may be, we think that all that aspect of the matter should be left until it arises in practice, but we do think that it is desirable that the question—Aye or No, has this husband put forward evidence which he knew to be false?—should be dealt with by oral evidence rather than be dependent on conflicting affidavits. So, having given leave to either party to give notice to cross-examine the other, we simply give leave to apply to fix a suitable day, when we are prepared to hear the evidence.

STEVENSON J. I agree.

[NOTE. November 12, 13, 14, 1957: After judgment had been given on the preliminary point oral evidence was given by the wife and the husband, and by witnesses on their behalf. After hearing such evidence the court allowed the appeal and discharged the order of the justices. The court found that, although some pressure had been put upon the wife by the husband to write the letters, such pressure did not amount to duress. The letters had, however, been written with the knowledge of, and dictation by, the husband, who did not believe that his wife had committed adultery or was pregnant by anyone but himself. The court also found that both parties were determined to end the marriage and that the wife had had great difficulty in obtaining money from the husband who had ill-treated her.]

Preliminary point rejected; leave to appeal refused.

Solicitors: *S. Beach & Co.; J. C. Martin.*

J. B. G.

[CHANCERY DIVISION.]

1957
Dec. 4.

Roxburgh J.

* *In re* FRASER. LEACH *v.* PUBLIC TRUSTEE.

[1955 F. 1329.]

Costs — Taxation — Objection — Taxing master's certificate irregular— Summons to review incompetent—"Donaldson" practice—R.S.C., Ord. 65, *r.* 27 (39) (40) (41).

By an order dated May 18, 1956, made in chambers (in an action in which there were two plaintiffs and six defendants) to which

everyone except the Attorney-General consented it was ordered that the action be referred to the taxing master to tax the costs and expenses of the defendant, the Public Trustee, and to tax the costs of the other parties to the action. As a result of that order the Public Trustee carried in a bill of costs. The parties came before the taxing master on a preliminary appointment and he directed that the bill should be amended or objections lodged within 10 days. No amended bill was lodged, but an objection was lodged in this form: "Objection taken by the first defendant to the preliminary taxation by" the taxing master.

On July 30, 1957, the taxing master made the following certificate: "In pursuance of the order herein bearing date the 18th "day of May, 1956 . . . whereas I should have proceeded to tax "the bills of costs as by the said order directed, but the solicitors "for the defendant, the Public Trustee, having carried in objections "to my direction dated the 20th day of June, 1957, whereby I "directed the said defendant to bring in details in lieu of a lump "sum charge in his bill of costs, I have considered such objections "and disallowed the same, and at the request of the said defendant "I make this my separate certificate so that the said defendant "may take the opinion of the court on the principle on which the "said bill should be taxed in relation to the said lump sum charge."

The first defendant, the Public Trustee, took out a summons for a direction by the court that his objections dated July 1, 1957, "to "the preliminary taxation of costs in this matter made under the "order dated May 18, 1956, may be allowed." None of the defendants appeared at the hearing:—

Held, that the summons must be dismissed as the certificate challenged was not in form and substance such as was required by the rules to enable the court to confirm or reject it, in that there had been no taxation, or allowance or disallowance of any item, and the taxing master had failed to state his conclusions and to give his reasons.

Observations on the practice said to be based on *In re Donaldson* (1884) 27 Ch.D. 544.

SUMMONS TO REVIEW TAXATION.

By an order of May 18, 1956, it was directed: "It is ordered "that it be referred to the taxing master (1) to tax the costs and "expenses of the defendant, the Public Trustee, of and incident "to this action, and (2) to tax as between solicitor and client the "costs of the plaintiffs and of the other defendants in this action ". . . including therein the costs and expenses of and incident "to the preparation and negotiation of the said terms both as "between the plaintiffs, or either of them, and the defendants, "or any of them, as well as between the plaintiffs themselves . . . "and including also the costs incurred in attempting to negotiate "a compromise in the years 1939 and 1940 of the matters" dealt with in the schedule.

As a result of that order the Public Trustee carried in a bill of costs, particulars of which are sufficiently set out in the judgment.

The parties having come before the taxing master on a preliminary appointment, he directed that the bill should be amended or objections lodged within 10 days. No amended bill was lodged, but an objection was lodged in this form: "Objection taken by

1957

FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE.

"the first defendant to the preliminary taxation by" the taxing master.

On July 30, 1957, the taxing master made a certificate, which is fully set out in the headnote.

The first defendant, the Public Trustee, took out a summons for a direction by the court that an "application on the part of "the first defendant that the objections of the first defendant "dated July 1, 1957, to the preliminary taxation of costs in this "matter under the order dated May 18, 1956, may be allowed."

The relevant rule relating to this procedure is R.S.C., Ord. 65, r. 27, and the material sub-rules are sub-rules (39), (40) and (41).[1]

P. C. Curtis-Bennett for the applicant.

The respondents did not appear.

The cases cited in argument are referred to in the judgment.

ROXBURGH J. This case is said to raise a question of principle —at least that is the view of the taxing master—and it has a very large number of most unusual features. The first one is the form of the order. The order was made in chambers by a master under circumstances that everybody consented, except the Attorney-General, and he did not object.

[1] R.S.C., Ord. 65, r. 27: "(39) Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the taxing master, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same. The taxing master may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the taxing master after his decision upon such objections.

"(40) Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. The taxing master may tax the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation.

"(41) Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the court or a judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

There were two plaintiffs and six defendants. The first defendant was the Public Trustee. The reason why the order is one that I would not have made myself (though, of course, there is no question of going behind the order) is that counsel and solicitors persuaded the court to put in extremely wide words with a view to seeing that they received all their costs out of a certain fund. There is always a danger in doing that, because the wider they are the vaguer the language becomes, and I am inclined to think that perhaps the main difficulty in this case, if it ever comes to a proper hearing, will revolve round the concluding words of the order as to costs. The order reads as follows: "It is ordered that "it be referred to the taxing master (1) to tax the costs and "expenses of the defendant, the Public Trustee, of and incident "to this action, and (2) to tax as between solicitor and client the "costs of the plaintiffs and of the other defendants in this action ". . . including therein the costs and expenses of and incident "to the preparation and negotiation of the said terms both as "between the plaintiffs, or either of them, and the defendants, or "any of them, as well as between the plaintiffs themselves . . ." Pausing there, that is a very full form of order, fuller than any order I think I have ever made. But it is not so much in those words as in the next that it seems to me the unusual feature occurs: "and including also the costs incurred in attempting "to negotiate a compromise in the years 1939 and 1940 of the "matters dealt with in the said Schedule." This order was made on May 18, 1956.

It may well be that those last costs might seem to be non-contentious costs. But I think it possible that they would be on a different footing from the other costs which were ordered to be taxed by this order; but I am expressing no opinion. I suppose it may be argued—again I express no opinion—that regarding the costs and expenses of and incidental to the preparation and negotiation of the terms both as between the plaintiffs, or either of them, and the defendants, or any of them, as well as between the plaintiffs themselves, some, or perhaps all, of those costs were non-contentious costs. I express no opinion, except that the order is so wide that it may raise questions which are not of common occurrence.

That being the order, the defendant, the Public Trustee, carried in a bill of costs which is divided into three parts. Part 1 is an itemized bill amounting in all to £2 0s. 4d. Part 2 is a lump sum bill, except that it does contain certain disbursements. That lump sum bill occupies somewhere about 18 pages, and I may say that, with the exception of the disbursements, no separate charge is assigned to any item in those pages. The total sum of disbursements which appear in Part 2 amount to £9 19s. 0d., but the unitemized charge is £94 10s. 0d. Then comes Part 3, which is an itemized bill amounting in all to about £14. So that the major part of the bill is the lump sum bill, that is to say, the major part of the bill as a whole.

1957

FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE.

Roxburgh J.

That being so—though whether I ought to know this, I am not sure, but at least I propose to state it, because I think it indicates one very good reason why the practice which I am proposing to deprecate should be deprecated—in fact, when the parties came before the taxing master on a preliminary appointment, he stated that the prior negotiations set out in Part 2 of that bill were contentious, and he said that the bill should be amended or objections lodged within 10 days. That is what in fact he said, because that is his record. An objection was lodged, and it is in this form: "Objection taken by the first defendant "to the preliminary taxation by" the taxing master. But there is no such thing as a preliminary taxation. That is a misnomer which runs through the whole of this case. There may be such a thing as a preliminary certificate, perhaps more appropriately it should be called a separate certificate—I am coming to that later on. But it is quite clear that there is no such thing under the rules as a "preliminary" taxation. It is very difficult to follow the description of the items in Part 2 of the bill. As it is the first defendant, who has lodged the bill (which is objected to) by the master's direction, appears from this document to be objecting to his own bill. That merely shows what a complete state of confusion this case is in. Of course, that is not what he is objecting to at all, but that is what this document would appear to show. An amended bill was certainly not lodged, and on July 30, 1957, the taxing master made the following certificate: "In pursuance of the order herein bearing date the 18th "day of May, 1956 . . . whereas I should have proceeded to tax "the bills of costs as by the said order directed"—and, therefore, it is plain on the face of it that he has not proceeded to tax them—"but the solicitors for the defendant, the Public Trustee, "having carried in objections to my direction dated the 20th day "of June, 1957, whereby I directed the said defendant to bring "in details in lieu of a lump sum charge in his bill of costs, I "have considered such objections and disallowed the same, and "at the request of the said defendant I make this my separate "certificate so that the said defendant may take the opinion of "the court on the principle on which the said bill should be taxed "in relation to the said lump sum charge."

I may say at once that I object to that form of order for many reasons. First of all, it is not, I understand, the practice for a direction of this sort to be put in writing, and I understand that in this case it was not put in writing, but the recital of the direction in the master's certificate seems to leave out something which may or may not be important, but which certainly occurs in his own record of the occasion. It cannot be a convenient practice that somebody should be entitled to challenge a direction and then that the judge should have to send for the taxing master and find out what the direction was which is being challenged. It is to be noted that he has not set out the whole of his direction in the certificate, and I do not suggest that he

purported to do so. Therefore, I am left in this position, that this would be an appeal concerning a direction about which I have no certain knowledge as to what it was. That is my first objection to this procedure.

The second is this. I do not know why the taxing master should be allowed to form an opinion on the point as to whether, if he does tax the bill, the questions which will arise on that taxation will be questions of principle. That is why I referred to the question of how far these matters are contentious. It may well be that no question of principle arises at all. It depends entirely on what these various items relate to, and on that it is essentially his business to make up his own mind. Then, if he likes to say what his mind is, this court, under the rules to which I will refer in a moment, can investigate the question whether he has rightly appreciated the principles involved. I am reasonably certain in point of fact that he would have disallowed on taxation the whole of Part 2 of this bill, though it may well be that, if he has an opportunity of reading this judgment, he may not do that but may differentiate between one part and the other. But that is nothing to do with me, except for this, that I think it is his duty to give his decision on the point in the certificate, and that it is his decision stated in the certificate which would be the proper matter to come before the court.

Thirdly, I think that the whole of this particular process is at variance with the relevant rule. The relevant rule is Ord. 65, r. 27, which occupies a large part of the Annual Practice. This is sub-rule (39): [His Lordship read the sub-rule and continued:] That presupposes that the taxing officer shall have gone through the bill and indicated, before drawing up any certificate at all, that he is going to allow or disallow particular items, it may be, in whole or in part, but it must be an allowance or disallowance "in any bill of costs" "of the whole or any part of any items." If he does that, then, as I understand, it is his duty to listen to the objections. The next thing is that the parties may apply to the taxing officer "to review the taxation in respect of the "same." Then there is a provision that he can issue a certificate on other items, but that does not affect the present case.

The next matter is sub-rule (40). It says: "Upon such "application the taxing officer shall reconsider and review his "taxation"—let it be noted it is his taxation, and the taxing officer agrees that he has not proceeded to taxation in this case—"upon such objections, and he may, if he shall think fit, receive "further evidence in respect thereof, and, if so required by "either party, he shall state either in his certificate of taxation "or allocatur, or by reference to such objection, the grounds and "reasons of his decision thereon, and any special facts or circum-"stances relating thereto." That makes it quite plain that he has to reach a decision—not the judge—and then sub-rule (41) says: "Any party who may be dissatisfied with the certificate "or allocatur of the taxing officer, as to any item or part of an

1957

FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE.

Roxburgh J.

"item which may have been objected to as aforesaid may . . . "apply to a judge at chambers for an order to review the taxation "as to the same item or part of an item." Again, that seems to me to make it quite plain that the duty of the taxing master is to make up his mind, stating his conclusions in the certificate and giving his reasons as provided for in sub-rule (40), and then the judge has a limited jurisdiction to upset his decision. I would point out that it is a limited jurisdiction, not a complete jurisdiction, such as exists, for instance, as between a Chancery judge and a Chancery master. It is by no means a complete jurisdiction.

It seems to me that this certificate is in fact not such a certificate as is contemplated by the rules, and it is not one on which any party can apply to the court for the reasons which I have endeavoured to give.

I might not have been taking the line I am taking in my judgment if this case had not had what seems to me a most curious history. Apparently, all the parties appeared before the master, but nobody except the first defendant has appeared before me. In that they have done nothing wrong. Nobody is bound to appear before the judge if he does not want to do so. In this particular case it is going probably to involve them in some costs, but that is their affair. I would, however, point out that it is not very satisfactory for any judge if he is told by the taxing master that he is asked to decide a question of principle—that is, the taxing master's own description of the case, whether right or wrong—and he finds that this principle is going to be argued on one side only, though there are six parties interested in arguing against the Public Trustee on this matter. For my own part I refuse to be influenced in the slightest degree by the recollection that other judges have made concessions about this kind of matter, when they have been promised and provided with argument on both sides. That entirely differentiates this case from any others in the books. I quite recognize that a party is entitled to proceed as against other parties as on a default, which is this case; but, after all, if he does so, then the sins of the pleader, and so on, may find him out, because, naturally, if I had the benefit of a proper argument on both sides—I have had a very proper argument on one side—I should have tried to avoid taking the technical points which I am now only too anxious to take for the reasons I have indicated. Therefore, as I say, I think I am entitled to construe these rules strictly, and I propose to do so.

There has been a good deal said about what is called the *Donaldson* practice, and I propose to explore the *Donaldson* practice rather fully. I will, first of all, read a passage from Butterworths Costs, p. 158, which I do not think uses the phrase "*Donaldson* practice," but does introduce the subject. It is a note to rule 41, which I have just read, and it says: "A "preliminary certificate may be issued by the master to enable

"a general objection to be taken before taxation of the bill." That is where I differ. Then in a note there is a reference to the so-called *Donaldson* practice. In my view, to start with, that is a complete misunderstanding of *In re Donaldson.*[1] That case was in the days when many of the things which are done by summons today were done by petition. It was not a taxation in an action, but a taxation which was procured under the relevant provisions of the Solicitors' Act, 1843. It was a dispute between a mortgagor and a mortgagee. In that particular case a peculiar question of principle (which really had very little to do with the duties of a taxing master) did arise. I will read from what the taxing master did. He made a separate certificate in which he said: "I was of "opinion that the rule that a trustee may not make a profit of "his trust, and therefore that a solicitor-trustee may not charge "any but costs out of pocket does not apply to the case of a "mortgagor taxing the costs of his mortgagee, where there is no "relation between them but that of mortgagor and mortgagee. "If the beneficiaries of the money lent to the mortgagor were "taxing the bill, the rule would no doubt apply, and I must "have allowed the objection; but in this case the trust fund will "not in any way be diminished, and the persons interested in "that fund will not suffer by my allowing to the solicitor profit "costs. It was suggested on behalf of the applicant that the "security may not be sufficient to pay the principal and interest "and profit costs; but if so, my decision in this case will not "prevent the beneficiaries taxing the bill of costs on the principle "contended for." The report proceeds: "Accordingly, the "master disallowed the objections. Miss Walter then took out "the present summons to have the objections allowed, and to "vary the certificate accordingly." I do not know what he did in that certificate, but it may well be that he did in fact disallow the items in question, in which case I have no objection whatever to a separate certificate provided that it either disallows or allows items as required by the rules. It may be said that that certificate did, but I also think that it may be that it did not. It is very difficult to say. It is all a matter of inference from the language of the report. If and so far as it differs, all I can say is that it was a very special case because it is to be remembered that that case was really a case raising the application to particular facts of certain general principles of equity. In other words, it was essentially a matter for a Chancery judge. On the other hand, the question whether one ought or ought not in a particular case to deliver a lump sum bill is not primarily a question for a Chancery judge. It is primarily a question for the taxing master himself, who is really the expert on such a matter, and the judge is entitled to have the benefit of the taxing master's expert opinion, and then, having got it and his decision, to consider whether in his limited jurisdiction he may proceed to

[1] (1884) 27 Ch.D. 544.

1957

FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE.

Roxburgh J.

reverse or to vary the certificate. I would say that *In re Donaldson* [2] is not intended to lay down any rule of general application. I have not paused to consider whether the rules of court were precisely the same in 1884. I assume they probably were, but perhaps they were not.

The next point about that case is this. At any rate, something in the judgment in *In re Donaldson* [2] is quite irrelevant and inappropriate to the present case, because what the Vice-Chancellor said was that if the lady, Miss Walter, wanted to raise this sort of point she should have raised it in her petition for taxation (which I suppose is what one would now call on the summons for taxation under the Solicitors' Act), and not have accepted the common form order. That is quite incapable of application to the present case.

The next case is—and this only shows how things of this sort find their way into text books without apparently anybody taking the trouble to study the cases referred to—*British Foreign and Colonial Automatic Light Controlling Co. Ltd.* v. *Metropolitan Gas Meters Ltd.*[3] Let us see what happened there. "By "arrangement between the parties, instead of waiting for the "completion of the taxation, and the dissatisfied party then "taking out a summons to review the taxation, the matter was "now mentioned to the court." I do not know how that could support the statement in the text book. Of course, a judge with the consent of the parties, or the parties with the consent of the judge, are often entitled to waive procedural rules, and very often it is convenient so to do. For my part, I would certainly have done so, if I had been provided with the luxury of argument on each side in this case. But if anybody is going to suggest that I am bound to allow the irregular proceedings which were allowed by Warrington J. in the *British Foreign and Colonial Automatic* case,[4] which were entirely reasonable in the particular circumstances of that case, but were none the less plainly irregular, all I can say is that is a complete misreading of the authorities.

The next case, *Korner* v. *H. Korner & Co. Ltd.*,[5] which is a rather more remarkable case to be cited in support of the proposition, makes it quite plain that the procedure was never investigated by the judge at all. It is not uninteresting to read what the taxing master himself said in this connexion: "I have "been requested by the defendants in this action to construe the "order herein as to costs and thereby enable the parties, if so "advised, to lay preliminary objections before me in accordance "with the practice outlined in *In re Donaldson.*[6]" I must confess that I cannot find any practice outlined in *In re Donaldson.*[6] When I asked counsel to formulate what he calls "the Donaldson form of order," what he formulated was not a

[2] 27 Ch.D. 544.
[3] [1912] 2 Ch. 82, 83.
[4] Ibid.
[5] [1951] Ch. 10, 12; 66 T.L.R. (Pt. 2) 469; [1950] 2 All E.R. 451.
[6] 27 Ch.D. 544.

form of order at all, but a sort of réchauffé of this sort of proposition. I do not blame him; he had nothing else to work on. One cannot make bricks without straw. But I do not think that any of those cases support the proposition which is laid down in Butterworths Costs. But I want to make plain that I am not suggesting that there is any objection to a separate certificate, and that if the passage in Butterworths Costs is carefully studied it does not go far enough to tell us what is put in the certificate, and, therefore, the proposition may be perfectly sound though the cases do not seem to me to support it. I am going to add this. Any separate certificate must be either an allowance or a disallowance within the meaning of Order 65, r. 27 (41). It has to be a certificate or allocatur "as to any item or part of "an item which may have been objected to as aforesaid." Then one can apply to the judge to review the taxation as to some item, or part of an item. In my view no certificate, whether one calls it "separate" or "preliminary" or anything else, complies with the rules, which does not comply with sub-rule (41), and indeed the court has no jurisdiction, apart from consent, to deal with any question which does not arise in accordance with sub-rule (41). That is the substance of the matter.

I will just turn to the summons, which reads as follows. It is an "application on the part of the first defendant that the "objections of the first defendant dated July 1, 1957, to the "preliminary taxation of costs in this matter under the order "dated May 18, 1956, may be allowed." But their objection is not to the preliminary taxation. There is no such thing in the world. Their objection is to the taxing master's direction that they should file what he calls a proper bill of costs but which they argued was not the requisite bill of costs. But that is not a "preliminary" taxation. By no manner of means can one get that into the words "preliminary taxation." Then the summons asks that it may be referred back to the taxing master to vary the certificate accordingly. I really do not know what that was intended to mean because, as I see it, if I had to deal with this question—which I probably should have done, if everybody, or a sufficient number of people, had appeared before me to argue it —I should have made some sort of declaration of principle, but I should not have needed to vary the certificate for the simple reason that the taxing master has not certified anything which is material, except that he says there is a question of principle. But that is not a decision on a question of principle. It is quite true he does say somewhere that he disallowed the objection, but, after all, he has to go further than disallow the objection, and he has to make a certificate which gives effect to the disallowance, and that he has never done. I would, of course, have given leave to amend the summons if I had had the opportunity of hearing both parties concerned, but, in my view, this summons

1957

FRASER, *In re.* LEACH *v.* PUBLIC TRUSTEE.

in its present form is impossible for the reasons which I have endeavoured to state, and I propose to dismiss it with no order as to costs.

Order accordingly.

Solicitors: *Theodore Goddard & Co.*

J. L. D.

[COURT OF APPEAL.]

C. A.

1957 *Oct.* 29, 30, 31; *Nov.* 1, 4, 5, 27.

Jenkins, Parker and Pearce L.JJ.

* NATIONAL COAL BOARD *v.* GALLEY.

[1956 N. 38.]

Master and Servant—Contract of service—Enforceability—Provision that servant to work for such periods weekly as might be "reasonably required."

Damages — Continuing breach — "Continuing cause of action" — Repeated breaches of contract of service—R.S.C., Ord. 36, *r.* 58.

Damages—Concerted action—Single defendant—Breach of contract by servant — Servant's knowledge of similar breaches by fellow-servants — Coal-mine — Servant employed as deputy — Breach of servant's contract resulting in loss of day's output of coal — Loss attributable to individual servant.

In October, 1947, a shortage of coal produced a serious crisis, and the miners, who had a five-day week agreement, agreed to work a Saturday voluntary shift, provision being made for overtime pay, and Saturday working took place at the defendant's colliery at all material times. The Saturday shift necessitated the presence of deputies on that day.

In March, 1949, the defendant entered into a written contract of service with the National Coal Board as a deputy; the contract provided, inter alia, that his wages should be "regulated by such "national agreement and the county wages agreement for the time "being in force and that this contract of service shall be subject "to those agreements and to any other agreements relating to or "in connexion with or subsidiary to the wages agreement and to "statutory provisions for the time being in force affecting the "same." The defendant was a member of a local trade union which was itself a member of the National Association of Colliery Overmen and Deputies and Shotfirers ("Nacods"), an unregistered trade union that was composed of area associations and had no individual members, and which discussed and arranged with the board any alterations of the terms of the deputies' employment.

Sometime before April, 1952, Nacods had put in a wage claim in respect of deputies, and subsequently, on July 29, 1952, an agreement "on revised terms and conditions of employment of deputies" was reached between the board and Nacods. This agreement contained a provision "that . . . deputies shall work such days or "part days in each week as may reasonably be required . . ."

On June 14, 1956, the deputies at the defendant's colliery gave notice to the management that they would not be turning coal on Saturdays in future and therefore no productive work was possible on Saturday, June 16, 1956. That position continued up to and including August 18, 1956. On August 25, 1956, the board arranged for substitute deputies at a cost of £3 16s. 10d. for each substitute for the Saturday shift, and the Saturday voluntary shift

was resumed. The loss of profit due to the impossibility of working the Saturday voluntary shifts on June 16, 1956, was £535, and between June 16, 1956, and August 18, 1956, it was £3,395.

On June 21, 1956, the board issued a writ against the defendant claiming damages, limited to £100, for breach of contract:—

Held, (1) that the defendant's personal contract of service was regulated by the Nacods agreement and the defendant, by working on the terms of that agreement, had entered into an agreement which included the term in dispute.

(2) That the Nacods agreement was intended to have binding effect and that the provision that a deputy was to work for such periods in each week as might "reasonably be required" did not, ipso facto, make the defendant's contract of service unenforceable.

Foley v. *Classique Coaches Ltd.* [1934] 2 K.B. 1 applied.

(3) That, in the circumstances, the hours of work required by the plaintiffs of the defendant were not unreasonable, and that, accordingly, the defendant was in breach of his contract by failing to report for duty on June 16, 1956.

(4) That a continuing cause of action within the meaning of R.S.C., Ord. 36, r. 58,[1] was not constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation, since there must be a quality of continuance both in the breach and in the obligation and, accordingly, the court in assessing damages was only entitled to take into consideration matters occurring before the issue of the writ.

Hole v. *Chard Union* [1894] 1 Ch. 293 distinguished.

(5) That the damages sustained by the plaintiffs and attributable to the defendant was the cost of a substitute on June 16, 1956, and no more, since although the defendant was undoubtedly acting in concert with others in failing to report for duty on the day in question, it was not shown that his breach of contract contributed to the loss of output of coal sustained on that day.

Ebbw Vale Steel, Iron and Coal Co. v. *Tew* (1935) 1 L.J. N.C.C.A. 284 considered.

Decision of Finnemore J. reversed in part.

APPEAL from Finnemore J., sitting at Nottingham Assizes.

The facts are taken from the judgment of the court.

The defendant, Stanley Galley, appealed from a judgment of Finnemore J., at Nottingham Assizes, awarding to the plaintiffs, the National Coal Board, £100 damages for breach of contract and costs on the High Court scale. The defendant contended that he was not liable in damages and that, even if he were liable, the damages should be only nominal. Although not strictly a test case, this was the first of 85 actions brought by the plaintiffs against other defendants raising similar issues. Probably the fate of those actions would be decided by this.

The defendant was employed by the plaintiffs as a deputy in their colliery at Oxcroft in Derbyshire. The case arose out of the defendant's deliberate refusal to attend for work at the plaintiffs' mine on Saturday voluntary shifts, in breach, it was alleged, of his terms of employment. All the other deputies at the mine refused similarly and simultaneously. Deputies, like

[1] R.S.C., Ord. 36, r. 58: "Where "damages are to be assessed in respect "of any continuing cause of action "they shall be assessed down to the "time of the assessment."

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

overmen (who were immediately above them in status) and shotfirers (who were immediately below them), had been described as the non-commissioned officers of the industry. The deputy was in charge of the miners and had to see that various safety precautions were observed. He was first in and last out in a shift. As a result, his shift was longer than the ordinary miner's, and even when the miners were only working a five-day week the deputy had certain safety duties at the week-end.

The defendant's trade union was the National Association of Colliery Overmen, Deputies and Shotfirers (Midlands Area). This body was in turn a member of the National Association of Colliery Overmen and Deputies and Shotfirers, an unregistered trade union that was composed of area associations and had no individual members; it was known popularly and referred to in this case as "Nacods." It was Nacods who discussed and arranged with the plaintiffs any alteration of the terms of the deputies' employment.

In April, 1947, following nationalization, a five-day week was introduced for miners by agreement between the plaintiffs and the National Union of Mineworkers. In May, 1947, a similar agreement in respect of deputies was made between the plaintiffs and Nacods. This agreement provided that local arrangements should be made to provide the working of additional shifts where it was necessary under statutory provisions and to ensure the safety and efficient working of the pit, and that the deputies should work reasonable overtime if required.

In October, 1947, shortage of coal produced a very serious crisis. In that month the National Union of Mineworkers made an agreement with the plaintiffs that the five-day week agreement should remain in force but that a proportion of miners would voluntarily do as many Saturday shifts as possible for the next six months. Provisions were made for overtime pay. Thereafter voluntary Saturday shifts were worked at most other mines, and at this mine in particular.

In April, 1948, the agreement for voluntary shifts on Saturdays was extended for a further year. Thereafter it was extended year by year up to April, 1952. The Saturday working was a serious attempt by miners and management to increase the output of coal. It necessitated each year an Order in Council under section 4 of the Coal Mines Regulations Act, 1908, based on the existence of a great emergency or a grave economic disturbance due to the demand for coal exceeding the supply.

On March 1, 1949, the defendant entered into a written contract of service with the plaintiffs. That contract was not a felicitous document and its terms were far from clear. The plaintiffs thereby agreed to engage the defendant and the defendant agreed to serve the plaintiffs on terms and conditions set forth in the contract rules for the time being in force at the board's collieries. No one appeared to know what these rules were.

By clause 4 the defendant declared that he "will serve the "board as regularly as the state of trade and interruptions from "accident or repairs to its mines and works or the non-arrival of "wagons or general holidays will from time to time permit and "that my wages shall be regulated by such national agreement "and the county wages agreement for the time being in force "and that this contract of service shall be subject to those "agreements and to any other agreements relating to or in "connexion with or subsidiary to the wages agreement and to "statutory provisions for the time being in force affecting the "same."

It was contended by the plaintiffs that this contract incorporated any alteration in deputies' terms of employment that might be agreed between the plaintiffs and Nacods. From that time onward the defendant as a deputy was working at week-ends, doing on an average approximately six shifts a week. But the shifts which he did on Saturday were voluntary and he received overtime pay in respect of them.

In April, 1952, when the national yearly agreement for the Saturday voluntary shift ran out, it was not renewed until August 22, 1952. From that date up to the present it had continued in force with yearly renewals not merely in respect of winter months but in respect of summer months (May to August inclusive) as well. Although many collieries had worked Saturday voluntary shifts in the summer, the Oxcroft Colliery had never done so before August, 1952.

Some time prior to April, 1952, Nacods had put in a wage claim in respect of deputies. During the summer of 1952, while the Saturday voluntary shift was in abeyance, there were various discussions between the plaintiffs and Nacods about deputies' pay and duties. The plaintiffs held the view that deputies (and overmen and shotfirers) were men of responsibility in the working of the mine who should hold a position more analogous to the management than to the miners. They suggested to Nacods that deputies should receive an upstanding weekly wage to include overtime. Minutes and transcripts of these negotiations were produced and put to the witnesses in evidence. It was clear that Nacods were afraid that the fixing of an upstanding weekly wage inclusive of overtime might result in men being put upon and being asked to work in excess of six shifts a week. (By "six "shifts a week" the court was referring to the average produced by an alternation of five shifts in one week and seven in another.) They were trying to ensure that this would not occur. The plaintiffs were, in effect, saying that the average working week was now about six shifts a week but that deputies could not have a maximum of six shifts a week since emergencies in the pits might on occasion demand more, but that it was not the intention that the men would work more than six shifts. No one was saying that six shifts a week was unreasonable or excessive.

In order to avoid the abuse of excessive unpaid overtime the

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

plaintiffs offered to keep records showing the overtime worked, and it was agreed that if the new agreement resulted in unreasonable impositions on the men, the matter should be discussed. No doubt both sides were then thinking that Saturday voluntary shifts would probably become unnecessary in a year or two, and it was said that no one at Oxcroft was anticipating summer Saturday voluntary shifts. Certainly no one was anticipating that Saturday voluntary shifts would still be worked by 1957.

As a result of these discussions, an agreement "on revised "terms and conditions of employment of deputies" between Nacods and the plaintiffs was reached on July 29, 1952. This agreement was interspersed with notes to explain what the various clauses meant. It was clear that the defendant was at all material times aware of it, though he personally was not in favour of the change to an upstanding wage and had voted against it.

The clauses relevant to this dispute were as follows: "Clause 5. Deputies grade I and II shall be paid an upstanding "weekly wage for each week worked without any additional pay- "ments in respect of overtime or week-end work. Clause 6. The "amount of such weekly wage in respect of deputies grade I "shall not be less than £14 per week, nor more than £16 10s. "per week. . . . Clause 12. Except where prevented by sickness, "accident or industrial disease to which the provisions of part E "of this schedule apply, deputies shall work such days or part "days in each week as may reasonably be required by the "management in order to promote the safety and efficient "working of the pit and to comply with statutory requirements. "Clause 13. The management at each pit shall cause to be kept "a record showing in respect of each week and each deputy "grade I or grade II the number of days and part days worked "by him in that week, and will so organise the work during the "week as to ensure that, as far as is practicable, time worked "is fairly distributed between deputies in the same grade in each "pit. . . . Clause 15. If, in any case, it is alleged that the "amount of time worked by any deputy or deputies is unreason- "able or is not reasonably distributed between deputies in the "same grade in the pit, such matter shall be settled by discus- "sion in such manner as the board and the association in the "division shall agree.

"Note (i). The objects of the revised arrangements are to "improve the status and quality of deputies grade I and II. The "institution of an upstanding weekly wage carries with it the "responsibility, on the part of the deputies, to work all such "time as may be reasonably required of them by the manage- "ment. It imposes upon management the responsibility of "ensuring that, so far as possible, work is organised so that "time to be worked is distributed fairly between deputies of the "same grade in each pit. Note (ii). Both the board and the "association have given assurances that these responsibilities will

"be accepted and implemented in the spirit in which they are "intended. Note (iii). Except when prevented from working "due to sickness, accident, or industrial disease, deputies will "be required to work all reasonable time required of them and "will be expected not to absent themselves without the prior "approval of the manager. Note (iv). The agreement does not "make any provision, and no such provision is intended, in "relation to financial penalties or deductions from the weekly "wage in cases where a deputy is voluntarily absent from work. "No deductions are to be made from the weekly wage in such "circumstances otherwise than as provided in the arrangements "for sickness, accident, and industrial disease provisions of the "agreement. It will be the responsibility of management to "deal with such circumstances by disciplinary measures, "including, where appropriate, downgrading or dismissal."

A more formal agreement in similar terms (omitting the notes) was signed by the plaintiffs and Nacods on August 25, 1952, by which date Saturday voluntary shifts had once more come into force. This agreement expressly rescinded the five-day week agreement of May 20, 1947. Wages were then fixed at divisional level, as envisaged by the agreement, at an upstanding weekly wage of £16 10s.; and thereafter the defendant worked for the plaintiffs on the basis of the Nacods agreement. He continued to work about six shifts. Between 1952 and 1956 the miners received substantial increases of pay, whereas the defendant and other deputies received only two small increases. As the differential between themselves and the miners decreased they became more conscious of the hardship of the long hours that they worked without any overtime pay. Finally, as a result of dissatisfaction with the treatment of a wage claim, all the deputies at the Oxcroft Colliery refused to work the Saturday voluntary shift. The plaintiffs did not accept this refusal as a repudiation of the contract of service, but continued to employ him.

On April 23 the manager of the Oxcroft mine received a letter saying that at a branch meeting of the deputies they had decided to take no further part in coal turning on Saturdays. At the same time they informed him that they were very upset at the smallness of the increase in wages that they had just received. As a result the plaintiffs were unable to do any coal turning on Saturday, April 28, and a notice had to be posted cancelling the ordinary work for that day. The same thing happened on the next three Saturdays. But on May 26 the deputies returned to normal Saturday work, and it was possible to work a Saturday voluntary shift on that day and on the next two Saturdays.

On June 14 the deputies gave notice that they would not be turning coal on Saturdays in future and therefore no productive work was possible on Saturday, June 16. That position continued up to and including August 18. On August 25 the plaintiffs arranged for substitute deputies at a cost of £3 18s. 10d. for each

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

substitute for the Saturday shift, and the Saturday voluntary shift was resumed. From that date the deputies refused to do work of any kind on Saturdays. In February, 1957, the deputies returned to their normal Saturday work. The loss of production on June 16, 1956, was £535, and between June 16 and August 18 it was £3,395.

On June 21, 1956, the plaintiffs issued a writ against the defendant (and others) claiming damages for breach of contract. They alleged that the defendant was directly bound by agreement between the plaintiffs and Nacods of August 25, 1952 ("the "Nacods agreement"), since he impliedly authorized them to conclude it on his behalf. Alternatively, by the defendant's individual contract of employment of March 1, 1949, his terms of service were expressed to be subject to any national agreements that might be entered into, and, since the Nacods agreement was a national agreement, it became incorporated in the defendant's contract of employment. Further, the defendant, by working on Saturday voluntary shifts from and after August 25, 1952, recognized that that was one of the duties of his employment. Such duty was a reasonable requirement of the plaintiffs, and by refusing to do it he was in breach of his contract.

The defendant, by his defence, denied that Nacods had any right to bind him by the Nacods agreement of August 25, 1952, but he admitted and asserted that from the beginning of August, 1952, he was employed on the basis of the earlier, less formal, agreement between Nacods and the plaintiffs of July 29, 1952. The term in that document as to doing such work as might be required by the management was too vague and uncertain to have any contractual effect. Alternatively, by reason of a number of circumstances, the requirement for Saturday working was not a reasonable requirement. He counterclaimed for a declaration that the plaintiffs were not entitled to require him to work at week-ends in excess of about 8½ hours on one Saturday (or Sunday) once in every four weeks, or to work for more than 42½ hours in each week save in an emergency.

Finnemore J. gave judgment for the plaintiffs.

The defendant appealed.

Gerald Gardiner Q.C. and *J. R. Bickford Smith* for the defendant.

Sir David Cairns Q.C. and *Michael Harrison-Hall* for the plaintiffs.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Eshelby* v. *Federated European Bank Ltd.*[2]; *Fritz* v. *Hobson*[3]; *Read* v. *Wotton*[4];

[2] [1932] 1 K.B. 254; 423 (C.A.).
[3] (1880) 14 Ch.D. 542.
[4] [1893] 2 Ch. 171.

Wheeler v. *Keeble (1914) Ltd.*[5]; *Edwards* v. *Summerton*[6]; *Young* v. *Canadian Northern Railway Co.*[7]

Cur. adv. vult.

November 27, 1957. JENKINS L.J. The judgment about to be read by Pearce L.J. is the judgment of the court.

PEARCE L.J. stated the facts and continued: The judge heard a considerable volume of evidence and was referred to a number of documents. It was made clear at the hearing that there is no personal feeling in this action that they have brought against the defendant. They regard him as a faithful servant and a good worker, but as a matter of principle they wish to establish that men in responsible positions must honour their contracts. The case has been fought throughout on that note.

The judge thought that, since one of the objects of Nacods was to negotiate the wages and conditions of all members and the defendant was a member of the local trade union which was itself a member of Nacods, the defendant was individually bound by the Nacods agreement. But in any event, by the defendant's personal contract his wages were to be regulated by national agreements for the time being in force and the contract was to be subject to those agreements; and therefore, since the Nacods agreement was a national agreement, the defendant was bound by it. "He has," continued the judge, "in fact accepted it and "worked under it. He has taken the advantages of it and "accepted the responsibilities of it for a period of some four "years before this particular trouble arose. On the point that "the agreement itself was not properly made, I think the "complete answer would be that it is expressly admitted in the "defence that the Coal Board, the plaintiffs, and the union did "enter into an agreement which in fact contains the vital matters "which are in dispute here."

Mr. Gardiner contends that the judge was wrong in holding that the defendant was personally bound by the Nacods agreement. If that point fell to be decided it might well be a matter of some difficulty. But, as the judge said, it is clear that the defendant's personal contract of service is regulated by the Nacods agreement, and the defendant by working on the terms of the Nacods agreement has entered into an agreement which contains the term now in dispute.

The defendant next contends that, even though the Nacods agreement was applicable to the defendant's employment, yet it had no contractual force, because it was too vague. It is an industrial agreement, he argues, covering a wide area, with no intention that it shall have a specific or enforceable effect.

[5] [1920] 1 Ch. 57.
[6] [1899] W.N. 120; 34 L.J.N.C. 418.
[7] [1931] A.C. 83.

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

Collieries differ, and what is reasonable in one will be unreasonable in another. The court has no yardstick to measure what are reasonable requirements. For instance, the stringency of those requirements depends on the number of deputies employed. It is a case within the principle of *May and Butcher* v. *The King* [1] rather than *Foley* v. *Classique Coaches Ltd.*[2]

But it seems to us, on a consideration of the Nacods agreement, that it was meant to have a binding effect. Realising the difficulties inherent in the situation, it provided for discussions, if it appeared to be working out unfairly for the deputies. To define with exactitude what are the duties of a servant is no easy task. The court will supply an implied condition as to reasonableness in many contracts where duties are not fully defined, as in *Hillas & Co. Ltd.* v. *Arcos Ltd.*[3] and *Foley* v. *Classique Coaches Ltd.*[4]

Mr. Gardiner also relies on the provision in clause 15 for discussion in the event of complaints. He contends that this is typical of an industrial agreement not intended to be enforceable in the courts. We do not, however, see how in principle such a provision differs from that in *Foley* v. *Classique Coaches Ltd.*,[5] which provided for the price to be agreed between the parties. It may be that discussion is a condition precedent to action, but once discussion is repudiated or fails the matter falls to be determined by the courts. Moreover, the defendant is in this further difficulty. He is asserting that the agreement as a whole exists, while seeking to deny the enforceability of clause 12. If clause 12 is too vague to be enforceable the whole agreement is not legally binding on either side: see *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading Co. Ltd.*[6]

In this contract the parties have expressly provided that reasonableness shall be the test. The fact that it is difficult to decide in a given case, should not deter the court from deciding what is a reasonable requirement by a master in the light of the surrounding circumstances. In our view, therefore, the judge was right in deciding that the term as to working was legally binding.

We come now to the central point in this appeal, namely, whether the defendant became in breach of his contract of employment when he refused to obey his employer's request to work the Saturday voluntary shift on June 16, 1956. He had already worked 11 shifts on the preceding 11 days. Could he reasonably be required to work a twelfth day before having two days off? In other words, was it reasonable to require him to work 12 days in the fortnight? It is, of course, clear that the court is in no way concerned with what are reasonable hours in the abstract. Its task is to consider the agreement made in 1952

[1] [1934] 2 K.B. 17n.
[2] [1934] 2 K.B. 1.
[3] (1932) 147 L.T. 503.
[4] [1934] 2 K.B. 1.
[5] Ibid.
[6] [1944] K.B. 12; 60 T.L.R. 37; [1943] 2 All E.R. 598.

and to determine on the evidence whether or not the defendant was being required to work in breach of that agreement. The only yardstick stated in the agreement is what is reasonably required by the management in order to promote the safety and efficient work of the pit and to comply with statutory requirements. But this clearly is not the only yardstick, since the hours of work a deputy could reasonably be required to work for these purposes would depend on the number of deputies employed. Ultimately the question must be whether the defendant himself was being required to work reasonable hours. If, of course, he was being required to work longer hours than other deputies, that, in the absence of some exceptional circumstances, would be evidence that the requirement made on him was unreasonable. There is, however, no suggestion of that in this case.

[His Lordship reviewed the evidence and said that the court had come to the conclusion that there was no evidence to justify the contentions that the defendant was being required to work in breach of the 1952 agreement. He continued:] Two points arise on damages.

The first is the question of whether in assessing damage the court can take into account matters that occurred after the issue of the writ. The judge held himself entitled to do so under R.S.C., Ord. 36, r. 58, and therefore he took into consideration the continued abstention of the defendant from the Saturday shifts from June 16, 1956, until February, 1957.

If he was not entitled to do so, the only Saturday that falls to be considered on the case as pleaded is Saturday, June 16, since there is no reference to earlier Saturdays in the statement of claim, and the writ was issued on June 21. It is not contended that apart from the provisions of R.S.C., Ord. 36, r. 58, there would be power to take account of the breaches of contract on Saturdays subsequent to the writ.

The terms of the rule are: "Where damages are to be assessed "in respect of any continuing cause of action they shall be "assessed down to the time of the assessment." The judge relied on *Hole* v. *Chard Union*,[7] where damages for nuisance by pollution of a stream were assessed subsequent to the writ by virtue of R.S.C., Ord. 36, r. 58. Lindley L.J. said[8]: "What is "a continuing cause of action? Speaking accurately, there is no "such thing; but what is called a continuing cause of action is "a cause of action which arises from the repetition of acts or "omissions of the same kind as that for which the action was "brought. In my opinion, that is a continuing cause of action "within the meaning of the rule. The cause of action complained "of and existing in the present case appears to me precisely the "kind of mischief at which rule 58 was aimed, its object being "to prevent the necessity of bringing repeated actions in respect "of repeated nuisances of the same kind. To adopt the argument

[7] [1894] 1 Ch. 293.

[8] Ibid. 295.

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

"of the Defendants would be to render the rule altogether a "nullity. I feel no doubt that the present case is a continuing "cause of action within the rule. It is a repetition of acts of "the same kind as those which had been investigated at the trial, "and had been decided to constitute a nuisance."

A. L. Smith L.J. said [9]: "The principal question in this "appeal turns upon the construction of R.S.C., Ord. 36, r. 58. "It is contended by the appellants, that when the act on which "an action is brought is established the cause of action can have "reference to that one act and to no other. In my opinion, that "is not necessarily so. If once a cause of action arises, and the "acts complained of are continuously repeated, the cause of "action continues and goes on de die in diem. It seems to me "that there was a connexion in the present case between the "series of acts before and after the action was brought; they "were repeated in succession, and became a continuing cause "of action. They were an assertion of the same claim—namely, "a claim to continue to pour sewage into the stream—and a "continuance of the same alleged right. In my opinion, there "was here a continuing cause of action within the meaning of "the rule."

Other cases were cited to us, but none was on all fours with this case or threw any real light on it. It must, we think, be a question of degree as to whether separate acts are so knit up together, so close in time and quality, as to be properly described in the words "a continuing cause of action."

The general proposition that persistence in tortious conduct of particular kinds such as trespass or nuisance constitutes a continuing cause of action must be regarded as established. It also must be accepted that in contract also, breaches of obligation of various kinds may amount to continuing breaches. But that must depend on the nature of the particular obligation broken. For example, a contract of service for a specified term might contain a stipulation that the employee should not during the period of his service carry on or be concerned in any other business of the same kind as the employer's business. If the employee, in breach of such a stipulation, did proceed to carry out some other business of the kind in question, the breach would, we think, clearly be a continuing one, in that the employee would de die in diem be continuously in breach of the stipulation so long as the prohibitive business was carried on. But where a contract requires payments to be made on stated dates (for example, a contract to pay an annuity of £1,000 per annum in equal monthly instalments on the first day of each calendar month) failure to pay the instalment due on February 1 is not, we should have thought, a continuance of the cause of action constituted by failure to pay the instalment due on January 1, but a distinct cause of action arising for the first time on February 1 and at no earlier date.

[9] [1894] 1 Ch. 293, 296.

Here the obligation broken by the defendant was the obligation to work the Saturday voluntary shift every other Saturday. The defendant having failed to perform this obligation on Saturday, June 16, 1956, the writ in the action was issued on June 21. Can it be said that the defendant's failure thereafter to work the Saturday voluntary shift on each of the alternate Saturdays on which it was his turn to do so was a continuation of the cause of action constituted by his failure to work the Saturday voluntary shift on June 16? We cannot see that it was. It cannot to our minds rightly be said that during the period between June 16, 1956, and the next Saturday on which it was his turn to work the Saturday voluntary shift the defendant was in continuing breach of his obligation to work it on June 16. The breach constituted by that failure was complete, over and done with on June 16, and could not be continued thereafter. If and when the defendant failed to work the shift on any subsequent Saturday when it was his turn to do so, a distinct cause of action in respect of that failure would arise on that day and not before. The fact that the defendant prior to June 16 manifested an intention not to work the Saturday voluntary shift any more, coupled with his actual failure to do so on June 16, might have entitled the plaintiffs to treat the contract as repudiated and to claim damages on that footing, but they did not do so. They chose to allow the contract to remain in force, and while it stood their cause of action in respect of his failure to work the Saturday voluntary shift on any given Saturday when it was his turn to do so arose if and when he failed to work the shift on that day and not otherwise. A continuing cause of action is not in our view constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation. We sympathize with the judge's view that convenience and common sense are in favour of dealing with the damages under R.S.C., Ord. 36, r. 58. But the defendant is entitled to insist on this point if he properly can. We reluctantly come to the conclusion that these Saturday breaches of contract cannot be dealt with as a continuing cause of action and that if the plaintiffs wish to pursue their remedy in respect of them they must issue a fresh writ.

The last point which arises concerns the measure of damages. The judge found that the plaintiffs had proved a loss of profit of £535 due to the impossibility of working the Saturday voluntary shift on June 16, 1956. He then went on to hold that the defendant and others—namely, all the deputies and shotfirers concerned with the loss—should be treated as being responsible for that loss and that the defendant was liable to the plaintiffs for his share. Having regard to the view he took on the first point in connexion with damages, it became unnecessary for him to fix the number of those responsible.

For the defendant it is contended that the judge was wrong in assessing the damage in this way. In contract, as opposed to

C. A.
1957
NATIONAL COAL BOARD v. GALLEY.

tort, it is argued, a defendant is only liable for the damage caused by his own breach, not that caused by others even if they have all acted in concert. The mere failure of the defendant to work on June 16 would not have prevented the working of the shift, and accordingly he is only liable for a proportion of his wages or for the cost of a substitute.

In our judgment, it is going too far to say that in no circumstances can A be liable for a share of the loss caused by A and B acting in concert. Indeed, were this not so it would in many cases be impossible to compensate a plaintiff for his real loss. This was recognized in *Ebbw Vale Steel, Iron and Coal Co.* v. *Tew.*[10] In that case the court was concerned with the measure of damages where a face-worker broke his contract. Having stated that the correct measure was the value of the output lost less the expenses which would have been incurred in obtaining it, Roche L.J. said[11]: "In the case of a hewer such as Tew, the "application of these principles is not difficult. It may be more "difficult with another class of workman not so directly concerned "in getting coal from the seam. But with another class of "workman, a tribunal must do its best either to assess the con-"tribution of the workman in question to output and arrive at "a figure representing his notional output during the period of "default, or if it cannot do that, it must decide upon the evidence "what would have been the value to the employer of the services "he did not give.

"It will be observed that in this judgment the output of or "referable to the particular workman or workmen who are defen-"dants in the proceedings has been throughout treated as the "output which is material to be considered and dealt with by "the trial judge. Apart from allegation and proof of a case of "conspiracy or some clear allegation and proof of other good "ground in fact and in law for connecting further and consequen-"tial loss of output, such as loss of output due to the cessation "of work by men other than the defendant, with the particular "workman's breach of contract, that further and consequential "loss of output does not constitute a head of damage recoverable "from a defendant." Where the breaches of contract by A and B acting in concert each contribute to the loss, then, we think, it would prima facie be right to value the loss of services of each as half the loss.

Here the defendant is charged with breach of his contract of service in that he failed to work the Saturday voluntary shift on June 16, 1956, when it was his turn to do so. It is said that he took this course in concert with his fellow deputies. But he is not charged with the tort of inducing his fellow deputies to break their contracts or of the tort of conspiracy which might be constituted by the defendant and his fellow deputies mutually inducing each other to break their contracts in this respect.

[10] [1935] 1 L.J.N.C.C.A. 284. [11] Ibid. 288.

Therefore the matter must be dealt with as being simply a matter of breach of contract, albeit the defendant knew when he committed the breach that his fellow deputies intended to do the same.

What, then, is the measure of damages in this particular case? If the defendant alone and on his own initiative had failed to work the Saturday voluntary shift on June 16, the measure of damages would, we apprehend, have been the net value to the plaintiffs of the work which he would have performed if he had worked that shift as he ought to have done. Prima facie, the measure of damages cannot be different because when he broke his contract in this respect he knew that his fellow deputies intended to commit similar breaches, except in so far as it would then be apparent that any damage likely to flow from the breach could not be avoided or lessened by their presence.

Suppose that no question of supervision entered into the matter and that five face-workers were obliged by the terms of their contracts of service to work a special shift. Suppose further that if they did work it they would produce between them coal of the net value to their employers of £500, each contributing equally to the total. Suppose further that one of these face-workers failed, in breach of his contract, to work the special shift. The damages resulting from the breach would, we should have thought, be £100, whether or not the other four face-workers intended, to his knowledge, to absent themselves as well. There would be no question of charging him with the whole loss of £500.

The present case only differs from that hypothetical one in that deputies exercise supervisory functions, so that the absence of any one of them may entail a far greater loss of output than the absence of one more face-worker. The question still is: what loss of output did the absence of the particular deputy charged with breach of his contract entail? The question in each case must be: what would his services have contributed to the net value of the output of the shift if the deputy concerned had duly worked it? That is in each case a question of fact.

In the present case, though the defendant was undoubtedly acting in concert with others, it is not shown that his breach contributed to the loss. He would not, as we understand it, have worked at a coal face, but would have been doing safety work. How, then, can it be said that loss of output is any measure of his liability? In these circumstances we do not think it can be said that any damage has been proved against him beyond the cost of a substitute, say £3 18s. 2d.

For these reasons we would allow the appeal to the extent of varying the amount of the judgment from £100 to £3 18s. 2d.

Appeal allowed in part.

Solicitors: *Helder, Roberts & Co. for Fidler & Pepper, Sutton-in-Ashfield; Donald H. Haslam for Lawrence C. Jenkins, Arnold.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

1957
Dec. 4.

Lord Goddard C.J., Devlin and Pearson JJ.

* HORACE PLUNKETT FOUNDATION *v.* ST. PANCRAS BOROUGH COUNCIL.

Rates and Rating — Social welfare — Assessment — Organization whose main objects concerned with advancement of education and social welfare — Previously exempt from rates as a scientific society — Exemption no longer claimed — Rate chargeable for first year of new valuation list where no rates previously charged—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (2).

Statute — Construction — Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which gives temporary rating relief to hereditaments occupied for the purposes of certain organizations not conducted for profit, provides by subsection (2) that for the first year of the new valuation list and for any subsequent year "the "amount of rates chargeable in respect of a hereditament to which "the section applies shall . . . be limited . . . (*a*) for the first year "of the new list, the amount so chargeable shall not exceed the "total amount of rates . . . which were charged in respect of the "hereditament for the last year before the new list came into "force;".

Premises occupied by a research foundation hitherto exempted from rates under the Scientific Societies Act, 1843, but which no longer claimed to be so exempt, were assessed for rates for the year ending March 31, 1957. The foundation appealed against the rate imposed on the ground that it exceeded the amount chargeable under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, section 8 (2), of which they claimed the benefit. The local authority admitted that the foundation was an organization not established or conducted for profit and whose main objects were concerned with the advancement of education and social welfare and was accordingly within section 8 (1) of the Act but contended that, as no rates at all had been charged in previous years in respect of the premises now rated, section 8 (2) did not apply in respect of them. Quarter sessions upheld that contention and dismissed the appeal. On appeal by the foundation:—

Held, that on the natural construction of the words used therein, section 8 (2) contemplated a situation in which some rates had previously been charged so that a comparison could be made between the old rate and the new; the subsection had no application to a case where no rate had previously been charged as in such circumstances there was no previous "total rate" with which to make the necessary comparison; accordingly, quarter sessions had come to a correct decision and the appeal failed.

CASE STATED by Appeals Committee of County of London Quarter Sessions.

On March 7, 1957, the Horace Plunkett Foundation appealed to the appeals committee against a rate made by the St. Pancras Borough Council on March 31, 1956, for the ensuing year on the ground that the rate was not made in conformity with law,

namely, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8.[1]

The committee heard the appeal on February 20, 1957, when the following facts were proved or admitted. The hereditament which was the subject-matter of the rate, namely, 10, Doughty Street, London, W.C.1, was occupied by the appellant foundation. The foundation was admitted to be an organization within the terms of section 8 (1) of the Act of 1955, namely, an organization not established or conducted for profit and whose main objects were charitable or concerned with the advancement of education and social welfare. In the council's rate book for the year ending March 31, 1956, the hereditament was entered as occupied by the foundation and "exempt, Scientific Societies "Act, 1843," the amount of rates recoverable was entered as "nil." For the year ending March 31, 1957, the hereditament was entered as the offices, library and caretaker's premises of the foundation, rateable value £259, rate at 14s. 6d. in the pound, £187 15s. 6d. No amount had ever been demanded as the annual general rate in respect of the premises prior to April 1, 1956. Although the council in July, 1956, had informed the foundation that in their opinion it was not an organization to which section 8 of the Act of 1955 applied they made no such contention before the appeals committee.

It was contended on behalf of the foundation that as they were entitled to the benefit of section 8 of the Act of 1955 the amount of rates charged exceeded that chargeable under subsection (2) of that section.

It was contended on behalf of the respondents that, as no rates had been charged in the preceding years, section 8 (2) did not apply and the rates were correctly charged.

The committee came to the conclusion, and so found, that the case did not come within section 8 (2) of the Act because the total amount of rates charged in respect of the hereditament for the preceding year was "nil"; "nil" was not an amount and it could not therefore be proportional or reduced; and therefore the amount charged for 1957 was not in excess. They accordingly dismissed the appeal but stated a case at the request

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(a) any hereditament occupied for "the purposes of an organisation "(whether corporate or unincorporate) "which is not established or con-"ducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare; . . . (2) For the purposes "of the making and levying of rates "in a rating area, for the year "beginning with the date of the "coming into force of the first new "valuation list for that area (in this "section referred to as 'the first year "'of the new list'), and for any sub-"sequent year, the amount of rates "chargeable in respect of a heredita-"ment to which this section applies "shall, subject to the following pro-"visions of this section, be limited as "follows, that is to say—(a) for the "first year of the new list, the "amount so chargeable shall not "exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year "before the new list came into "force;".

1957

HORACE PLUNKETT FOUNDATION v. ST. PANCRAS BOROUGH COUNCIL.

of the foundation. The question of law for the court was whether, upon the facts stated, the committee were right in dismissing the appeal.

Harold Williams Q.C. and *W. L. Roots* for the appellant foundation submitted that under section 8 (2) the amount which was to be proportioned or reduced was the amount now chargeable, namely, £187 13s. 6d. If no rates had previously been paid the sum of £187 13s. 6d., or whatever amount was charged, must exceed the amount previously paid (which was nil) and therefore could not be in conformity with section 8 (2).

C. E. Scholefield for the respondent council contended that the language of section 8 (2) was not apt to cover a case such as the present where no rates had been charged for the previous year. It was clearly intended to limit the rates payable and not to excuse them altogether. If the exemption which the foundation had previously enjoyed had been wrongly withdrawn they had a right of appeal under the Scientific Societies Act, 1843, and the right thing for them to do was to obtain a decision under that Act and not to try to obtain relief under the Act of 1955.

The following cases were cited in argument: *Jervis* v. *Tomkinson*[2]; *Regina* v. *Gee*.[3]

LORD GODDARD C.J. This is a case stated by the County of London Quarter Sessions, to whom the appellants appealed against a rate made by the respondents on the ground that the rate was not in conformity with section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The point is a very short one, and arises in this way: The appellant foundation, an unincorporated body, is admitted to be an organization covered by section 8 of the Act of 1955 as not established for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. It had, in previous years, claimed to be within the exemption conferred by the Scientific Societies Act, 1843, which exempts from rates and from assessment to rates scientific societies. Some question seems to have arisen as to whether or not that exemption applies to this foundation—it may be they have altered their objects—and we are asked to assume that they would no longer be entitled to exemption under that Act for the purposes of deciding this point which arises under section 8 (2) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

[His Lordship read the subsection and continued:] The words which we have to construe—and I think this is a pure matter of construction—are "the total amount of rates . . . charged." No rates were charged, and therefore I do not think that this provision has any application to the present case. Under the

[2] (1856) 1 H. & N. 195. [3] (1860) 1 E. & E. 1068.

subsection the amount chargeable is not to exceed the total amount of rates charged. If no rates were charged we cannot consider what the total amount of rates charged was. There was never a total with which to make a comparison. Under the Scientific Societies Act, 1843, it is provided that scientific societies shall not be assessed, so that they are, if I may so put it, outside rating altogether. It may be that a wrong view has been taken in the past and that this foundation is not entitled to exemption under the Scientific Societies Act, although if they are so entitled their exemption is preserved by section 8 (6) of the Act of 1955, which provides: "Nothing in this section shall affect any "exemption from, or privilege in respect of, rates under any "enactment other than this section." Speaking for myself, I think that where section 8 (2) (*a*) speaks about the total amount of rates charged it is contemplating that some rates were previously charged; one then has to find the total amount of the rates, and if that was "nil" there never was any rate charged. In such a case it does not seem to me that a subsection which deals with the "total amount" of rates charged can be applied.

For these reasons, I am of opinion that quarter sessions came to a correct decision, and the appeal must be dismissed.

DEVLIN J. I agree with the construction my Lord has put upon section 8 (2). I should not like to say that in every conceivable case where words of this sort are used the fact that no charge has been made or a nil amount has been charged would necessarily mean that wording of this sort was inapplicable. But one has to consider the phraseology in relation to the section as a whole and the object which it was intended to achieve, and it is for that reason I have not found the authorities cited by Mr. Williams on the construction of similar phraseology in other Acts to be of much assistance.

The object of this section, as Mr. Williams has put it before us, is clear enough. There were before 1955, and there are still, a number of premises occupied by bodies which have charitable or scientific objects and which accordingly have been wholly exempted from rates. The appellant foundation claims or claimed that it was one of them. When the Rating and Valuation (Miscellaneous Provisions) Act, 1955, was passed it was not intended to disturb the position in relation to those societies which were wholly exempt under the Scientific Societies Act, 1843, but it created three new classes of hereditaments of a semi-charitable character, if I may put it that way, and granted to them not total exemption but a certain measure of relief. The measure of relief was this, that the increase in rates that was otherwise contemplated by the Act was not to affect them—I am putting it broadly—but they were to remain as they were before, subject only to the old rating values. That was a temporary relief, as Mr. Williams has pointed out, merely to temper the wind to the shorn lamb, because under section 8 (3)

1957

HORACE PLUNKETT FOUNDATION v. ST. PANCRAS BOROUGH COUNCIL.

Devlin J.

the local authority may, in due course, bring their position into line with other premises, but that was the object of section 8. It seems to me, therefore, that it is plainly contemplated that section 8 is dealing with premises which were subject to the old rates. It is also expressly contemplated that it is not to have anything to do with premises which were exempt because subsection (6) specifically provides: "Nothing in this section shall "affect any exemption from, or privilege in respect of, rates "under any enactment other than this section."

The difficulty has arisen in this case because the appellant foundation has mistakenly been supposed to be exempt from rates and has therefore been entered in the list as "exempt." I say "mistakenly supposed to be" because that is the assumption we have to make. The position is, therefore, that we are dealing with an odd case, a case of a mistake which was never contemplated by the Act. So now, if one turns back to subsection (2), one asks oneself whether it is possible that the draftsman or Parliament contemplated no charge at all and a nil assessment. If it seemed clear from the section as a whole that they did, I should have been disposed at any rate to do my best to give the words the meaning which could be applied to such a situation. One could, for example, say that a "nil" charge was a charge of nothing and that the reduction of 100 per cent. was a proportionate reduction; but I see no need to strain the meaning of the words to achieve that result because it is plain to me that that is not what was contemplated by subsection (2) at all. It contemplated a situation in which rates were to be limited and in which there was an old figure to compare with the new. Therefore, I agree with the meaning which my Lord puts upon it, which is the natural meaning and also the right one in the contemplation of the section, and I agree that this appeal should be dismissed.

PEARSON J. I agree. If one looked only at paragraphs (*a*) and (*b*) of section 8 (2) I, personally, would have felt no difficulty in treating "nil" as an amount, and one could say under paragraph (*a*) that the amount chargeable shall not exceed the total amount of rates, which is nil. Then it would be 100 per cent. reduction or 100 per cent. proportion under paragraph (*b*). But I agree that if one considers the matter in relation to section 8 as a whole, and in relation to the Scientific Societies Act, 1843, the more reasonable view is the one which has been already expressed, namely, that where the subsection uses the expression "the amount of rates chargeable in respect of a "hereditament . . . shall, subject to the following provisions "of this section, be limited as follows," that provision for limitation is applicable only to a case in which there have been some rates charged, and some figure, which is more than "nil," is to be in some way limited. The provision for total exemption is contained in the Scientific Societies Act, 1843, and

where that Act applies the relevant provision is "No person "or persons shall be assessed or rated, or liable to be assessed "or rated, or liable to pay . . . any sum in respect of rates," and that provision does not reasonably fall within the wording used in subsection (2) of section 8 of the Act of 1955.

1957

HORACE PLUNKETT FOUNDATION v. ST. PANCRAS BOROUGH COUNCIL.

For those reasons I agree with the decision that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Barfield & Barfield; R. C. E. Austin, Town Clerk, St. Pancras Borough Council.*

E. M. W.

[PROBATE, ETC., DIVISION.]

* NEWMAN *v.* NEWMAN.

1957 *Nov.* 7.

Lord Merriman P., and Stevenson J.

Husband and Wife—Maintenance—Justices—Adultery by wife—Fresh evidence — Application to discharge order — Practice — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 7.

An order was made by justices in favour of a wife in 1952. In 1957 the husband learnt for the first time that the wife had committed adultery in 1942 and thereupon applied to the justices to discharge the order. On the justices' dismissal of his application he appealed to the Divisional Court:—

Held, that the discovery of the wife's adultery was fresh evidence under section 7 of the Summary Jurisdiction (Married Women) Act, 1895; although that section gave the justices a discretion to alter, vary or discharge, they had not exercised that discretion judicially and the appeal must be allowed.

Weightman v. *Weightman* (1906) 94 L.T. 620; 22 T.L.R. 362 followed.

Per curiam. In the circumstances of the case it would have been open to the husband to appeal out of time directly to the Divisional Court to have the original order, which had been wrongly obtained, set aside.

APPEAL from justices.

The parties were married in October, 1933, and two children were born, in 1934 and 1940 respectively. Some time between September and December, 1942, the wife committed adultery, but that fact was entirely unknown to the husband at the time. Both before the justices and in the Divisional Court there was the clearest and most frank and unequivocal admission by counsel on behalf of the wife that the husband neither knew of this adultery nor by reasonable diligence could have known of it until the fact was proved on February 22, 1957, through the discretion statement put in evidence by the wife at the hearing of her divorce suit.

On December 15, 1952, the wife complained to the Worthing justices of the husband's wilful neglect to provide reasonable maintenance; and they made a maintenance order of £2 for the

1957

NEWMAN v. NEWMAN.

wife and 10s. for one only of the two children of the marriage, £2 10s. in all, and the wife was given the custody of that particular child.

On June 21, 1957, the husband, having become aware of the wife's adultery prior to the making of the order, applied to the justices for its discharge under section 7 of the Matrimonial Causes Act, 1950.[1] The justices dismissed the application and from this dismissal the husband appealed to the Divisional Court. In the course of the hearing of the appeal counsel for the husband sought and obtained leave to add to his notice of motion an application to extend the time for appealing against the original order of December 15, 1952.

A. T. Hoolahan for the husband.
J. R. Macgregor for the wife.

The cases cited in argument are referred to in the judgment.

LORD MERRIMAN P. referred to the facts, gave leave to extend the time for filing the notice of appeal and continued: I now come to the merits of the case, which raise a very curious and interesting point.

On December 15, 1952, the wife obtained the order which the husband, by his present complaint, seeks to have set aside. He seeks to have it set aside under the first part of section 7, on the ground that he has shown cause upon fresh evidence to the satisfaction of the court, which entitled the court at any time to discharge such an order, namely, the order of December 15, 1952, and the first question is whether he was entitled to proceed under section 7 to that end.

At this point I ought to add that Mr. Hoolahan has applied for, and, there being no opposition, has been granted, leave to add to his notice of motion an application to extend the time for appealing against the original order, with the implication that this court, if that application was granted, would then of its own motion set the order aside as having been obtained wrongly. It was obtained wrongly, because by the terms of section 6 of the Summary Jurisdiction (Married Women) Act, 1895, the original Act in the code which gives justices jurisdiction in matrimonial affairs, it is enacted that "No orders shall be made "under this Act on the application of a married woman if it "shall be proved that such married woman has committed an "act of adultery: provided that the husband has not condoned or "connived at, or by his wilful neglect or misconduct conduced

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 7: "A court "of summary jurisdiction . . . may, "on the application of the married "woman or of her husband, and upon "cause being shown upon fresh "evidence to the satisfaction of the "court at any time, alter, vary, or "discharge any such order . . . If "any married woman upon whose "application an order shall have been "made under this Act . . . shall "voluntarily resume cohabitation "with her husband, or shall commit "an act of adultery, such order shall "upon proof thereof be discharged."

"to such act of adultery." It is now proved that the married woman has committed an act of adultery ten years before her complaint of wilful neglect to maintain which resulted in this order. It is expressly admitted that there was no question of condonation. Indeed, the husband knew nothing about it, as is admitted, and it was not suggested, in the very full trial that was held at Lewes before Mr. Commissioner Gallop in February, 1957, that there had been any question of connivance or conduct conducing to that act of adultery. In other words, as the facts now stand, it is quite plain that the justices, had they known of them, would have been bound to hold that they were without jurisdiction to make any order at all on the wife's complaint.

Then the question arises, how shall this be dealt with? Mr. Hoolahan has asked us to deal with it on the ground that this belated discovery of the adultery, albeit it is adultery which, unlike that under the second part of section 7, was committed before the wife's complaint came up for hearing, enables the court to regard it as fresh evidence, and for that proposition he relies on the decision in *Weightman* v. *Weightman*[1] in a Divisional Court, consisting of Sir Gorell Barnes P. and Bargrave Deane J. I do not think it is necessary to read the whole judgment, but only sufficient to show what the court was deciding. Sir Gorell Barnes P., in his judgment, begins by saying[2]: "In the present "case there was a summons taken out on the ground that fresh "evidence had been discovered." A little lower down, after reading the material words of section 7, to which I have already alluded, he said[3]: "But it is necessary that magistrates should "clearly understand what 'fresh evidence' means, though in "my view there is no real doubt about it." He had already referred to *Johnson* v. *Johnson*,[4] in which Sir Francis Jeune P. had defined the meaning of the words "upon fresh evidence," and that decision is summarised by Sir Gorell Barnes P. in these words[5]: "It was practically the same sort of evidence as "that upon which a new trial would, in the ordinary course, "be granted; it must relate to something which has happened "since the former hearing or trial"—now that, of course, does not arise—"or it must be evidence which has come to the know-"ledge of the party applying since that hearing or trial, and "which could not by reasonable means have come to his "knowledge before that time."

This case is precisely covered by those words, and it is admitted—it was admitted in the court below and has been admitted here—that this adultery in 1942 was, for the purposes of this application in 1957, "fresh evidence" upon which an order for discharge might have been made, and I am fully prepared to follow the decision in *Weightman* v. *Weightman*.[6] I see that it is cited in the up-to-date textbooks as a valid

[1] (1906) 94 L.T. 620; 22 T.L.R. 362.
[2] 94 L.T. 620, 621.
[3] Ibid.
[4] [1900] P. 19.
[5] (1906) 94 L.T. 620, 621.
[6] 94 L.T. 620.

1957

NEWMAN v. NEWMAN.

Lord Merriman P.

decision which has never been questioned, and I see no reason to question it now. On the contrary, I think it is plainly right, and it decides, incidentally (and this has been decided in other cases too), that because of the use of the words "fresh evidence ". . . at any time" the six months' bar imposed by section 11 of the Summary Jurisdiction Act, 1848, on the hearing of any complaint which is over six months old does not apply, so that it is irrelevant that it was not until 1957, the earliest time at which, in fact, it could have been used at all, that this attempt to raise the question of fresh evidence in relation to something which happened as long ago as 1942 first occurred.

The wording of section 7, as is, I think, rightly submitted, does raise a question of discretion. Unlike the case in respect of adultery after the making of the order, which is dealt with in the second part of the section, where the word "shall" is used, and has been held to be mandatory, the wording of the first part of the section uses the word "may"—"on the "application, on fresh evidence, may" (amongst other things) "discharge any such order," and it is said that we ought not to interfere with the discretion of the justices in a matter which is plainly discretionary after so long a lapse of time. His Lordship then referred to the fact that the justices, in their reasons, had stated wrongly, as was admitted, that they were not satisfied that the husband had established that he was unaware of his wife's adultery prior to December 15, 1952, and that no fresh evidence had been adduced to substantiate such a submission and continued:

The justices having given a reason which, if valid, cuts at the root of this jurisdiction to make the order which was sought by the husband—because, unless there was fresh evidence, they had no right to listen to the complaint at all—and having given a reason which is quite unsustainable, I do not think it is necessary to go any further in considering whether they exercised their discretion rightly or wrongly.

I would like to add this, if I have not made it clear already, that if I did not think that this appeal can be supported on the authority of *Weightman* v. *Weightman*,[7] I should have been prepared to give leave to appeal out of time against the original order, and, having done so, to set it aside on the merits, for precisely the same reasons as those I have already given, which are covered by *Weightman* v. *Weightman*.[8]

In my opinion this appeal should be allowed, and the original order set aside for the reasons stated.

STEVENSON J. I agree.

Appeal allowed.

Solicitors: *Dale Parkinson & Co.; Vizard, Oldham, Crowder & Cash for Parker & Bangor-Jones, Worthing.*

E. J.

[7] 94 L.T. 620. [8] Ibid.

[PRIVY COUNCIL.]

* PRACTICE NOTE (PRIVY COUNCIL: COSTS).

J. C.†

1957
Dec. 9.

Privy Council — Costs — Unnecessary expense — Inclusion of irrelevant matter in record—Cost of printing deducted from costs.

Their Lordships, at the conclusion of their judgment, delivered by LORD REID, dismissing an appeal from a decision of the Court of Appeal of Singapore dated July 1, 1955 (*Lim Siew Neo* v. *Pang Keah Swee* (No. 17 of 1956)), said: "Their Lordships regret "to note that considerable unnecessary expense has been incurred "by including in the printed record notes of counsel's arguments "and certain preliminary matter not relevant to the subject-"matter of this appeal. Their Lordships have been informed "by counsel that the appellant's advisers wished to omit these "parts of the record but that the respondent's advisers required "their inclusion. The usual order for costs must be modified "so that the cost of printing this part of the record does not fall "on the appellant. Their Lordships will humbly advise Her "Majesty that this appeal should be dismissed. The appellant "must pay the costs of the appeal subject to deduction of the "cost of printing those parts of the record which should not have "been included."

C. C.

† *Present*: LORD REID, LORD SOMERVELL OF HARROW and THE RT. HON. L. M. D. DE SILVA.

[COURT OF APPEAL.]

* TATE *v.* SWAN HUNTER & WIGHAM RICHARDSON LTD.

C. A.

1957
Dec. 12.

Lord Denning, Hodson and Morris L.JJ.

[1955 T. No. 4172.]

Factory — Floor — Opening — Plankway — Whether plankway used by workmen for access to different parts of shipyard gantries a "floor"—Workman falling through unfenced aperture in plankway—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 25 (3).

An electrician, employed in a shipyard on maintenance work on cantilever cranes, which were mounted on steel gantries some 100 feet above the ground, fell through an aperture while standing on a wooden plankway connecting up the gantries, and was killed. The plankway consisted of planks placed irregularly alongside each other and going round various parts of the steelwork to enable workmen to get from one part of the structure to another; they could be taken up if desired and were not fixed in any permanent way. Part of the aperture through which the man fell was normally occupied by a ladder which had on the day of the accident been removed to facilitate other maintenance work. In an action by his

C. A.

1957

TATE
v.
SWAN
HUNTER &
WIGHAM
RICHARDSON
LTD.

administratrix against the employers for breach of the duty to fence securely "all openings in floors" under section 25 (3) of the Factories Act, 1937:—

Held, that a plankway of this kind was not a "floor" within the ordinary and natural meaning of the word and, accordingly, no breach of statutory duty was established against the employers.

Decision of Donovan J. reversed.

APPEAL from Donovan J.

On August 4, 1953, Novello Malcolm Tate, an electrician, aged 23, was employed in the shipyard of Swan Hunter & Wigham Richardson Ltd., in connexion with maintenance work during the holiday period. He was engaged on a gantry, a huge steel structure, which carried cantilever cranes and overhead cranes. At a great height above the ground there were some longitudinal gantries and also transverse gantries, and along them were placed planks by means of which men got from one part of the structure to the other for their work. These planks were not continuous in straight lines, but went round various parts of the steelwork where there were ladders, stanchions, and so forth. The electrician, having attended to an electrical defect on one of the cantilever cranes mounted on a gantry about 100 feet high, descended to a cross-gantry beneath and, standing on the planks on the middle level, watched the passage of the crane to check that his work was all right. As the crane passed a little above him he signalled to the crane driver indicating that all was well. At that moment he was standing close to an aperture in the planking which formed the walkway of the cross-gantry, some three feet six inches square, which normally accommodated a wooden ladder which came right through it to give access to similar plankways above and below it. If the ladder was removed there was space for a man to fall through, and on this particular day the ladder had in fact been removed to facilitate certain maintenance work.

Seconds after he had given the sign to the crane driver the electrician must have stepped back and fallen through the aperture. In the ordinary way he would have landed on the lower gantry, some three or four feet below, where ordinarily there would be other planks; but on this particular day one of those planks had been taken away for certain painting work to be done, and he fell 80 or more feet to the ground below, and was killed.

He was unmarried and lived at home with his mother and invalid father and contributed to the household expenses. His mother, as his administratrix, brought an action against the employers claiming damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. She alleged, inter alia, that the employers had been in breach of their statutory duty under section 25 of the Factories Act, 1937.[1] The defendants denied that they were in breach of their statutory duty.

Donovan J., in a reserved judgment on May 21, 1957, at Newcastle Assizes, found that the deceased man fell through the aperture. On the claim under section 25 (1),* he held that if the planking on the cross-gantry was treated as a floor or a passage or a gangway within the meaning of that subsection it was soundly constructed and properly maintained, and that no criticism could be levelled at its safety unless it was that an opening in it had been left unfenced. But that, he said, was a matter separately dealt with by subsection (3), and if the gap or aperture in the planking constituted an opening in a floor within the meaning and scope of that subsection, then a breach of statutory duty had occurred, for it was admitted that the nature of the work in hand did not render it impracticable to fence the opening securely except on the one side used to accommodate the ladder. His Lordship continued: "One still has to find . . . that the planks "in question were a 'floor' of such a factory, and a floor in the "ordinary sense of the meaning of that word. It would be more "natural to describe it as a 'gangway' rather than a 'floor,' "and it is noteworthy that in subsection (1) of section 25 both "words are used. From this it would no doubt be possible to "conclude that Parliament did not regard a gangway as a floor "for the purposes of the Factories Act; but instances of tautology "are frequent in this Act, and the planking (one might almost "say the 'flooring') now under consideration served at least "some of the ordinary purposes of a floor. Persons passed and "repassed over it and they used it to stand on; it was a recog-"nized passageway. Though, of course, it could easily be taken "up whenever desired, it was not temporary in the sense that "it was put there only while some specific job was being done; "it served the purpose of a recognized footway. While I am "conscious that the word 'floor' would not be one's first choice "of a word to describe this planking, I can find no satisfactory "ground on which to declare that it is not a floor; and if in an "Act of Parliament, designed to protect workmen from injury "and possible death, a word occurs which will further this "purpose if an ordinary and unstrained interpretation is put on "it, I do not feel that I should try to achieve a contrary result "by straining to find some different interpretation. If, therefore, "one reaches the conclusion, as I do, that this planking must "be regarded as a 'floor' within the meaning of section 25 (3), "there is an end of the case, for there was an opening in it "which could have been securely fenced on three sides and it "was fenced on none." His Lordship gave judgment for the plaintiff, awarding her £950 under the Fatal Accidents Acts and

* Factories Act, 1937, s. 25: "(1) All floors, steps, stairs, passages "and gangways shall be of sound "construction and properly main-"tained. . . . (3) All openings in "floors shall be securely fenced, "except in so far as the nature of "the work renders such fencing "impracticable."

C. A.
1957
TATE
v.
SWAN HUNTER & WIGHAM RICHARDSON LTD.

£300 under the Law Reform (Miscellaneous Provisions) Act, and £47 12s. 6d. funeral expenses, a total of £1,297 12s. 6d.

The employers appealed.

R. H. Forrest Q.C. and *Norman Harper* for the employers.
George Waller Q.C. and *R. P. Smith* for the plaintiff.

The following cases were referred to in the course of the argument: *Bath* v. *British Transport Commission* †; *Hosking* v. *De Havilland Aircraft Co. Ltd.*‡; *Harrison* v. *Metropolitan Vickers Electrical Company Ltd.*§; *Street* v. *British Electricity Authority.*¶

LORD DENNING stated the facts and continued: It is not suggested that the employers were guilty of any negligence at common law. They conducted this yard in the way that other shipyards are conducted, quite efficiently and carefully. The only ground of claim that is made against them is under the Factories Act, 1937. Originally the case was put on the footing that he had been knocked off by the movement of the crane, but that was no longer pursued. The only ground pursued was that this planking along the gantry was a floor and that the space through which he fell was an opening in the floor. It is said that it ought to have been fenced, because section 25 (3) of the Act provides: "All openings in floors shall be securely fenced, "except in so far as the nature of the work renders such fencing "impracticable." It would have been quite practicable to have put an iron rail up around this place, and therefore if it was an opening in a floor it ought to have been securely fenced. The judge held that it was a floor, and the employers appeal to this court, contending that this plank-run on the gantry was not a "floor" within the meaning of the Act.

Section 25 (1) provides: "All floors, steps, stairs, passages "and gangways shall be of sound construction and properly "maintained," and subsection (3) is concerned with openings in floors only.

There have been two cases in this court where this section has been considered: one is *Harrison* v. *Metropolitan-Vickers Electrical Co. Ltd.*[1] and the other is *Bath* v. *British Transport Commission.*[2] I do not think that either of those throw much light on our present problem. The question is: What is a floor? And there is no definition in the Act to help us. The ordinary and natural meaning of a floor is something within walls, indoors, on which people walk or stand. A plank-run such as this on a

† [1954] 1 W.L.R. 1013; [1954] 2 All E.R. 542.
‡ [1949] 1 All E.R. 540.
§ [1954] 1 W.L.R. 324; [1954] 1 All E.R. 404.
¶ [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[1] [1954] 1 W.L.R. 324; [1954] 1 All E.R. 404.
[2] [1954] 1 W.L.R. 1013; [1954] 2 All E.R. 542.

gantry—or on a staging or on a scaffolding—does not seem to me to be within the ordinary meaning of a "floor." There would be great difficulty in applying the word "floor" to this plank-run. If it is a floor, what is the edge of the floor as distinct from an opening in it? Does the floor go round the stanchions or is there a gap in it, and so forth? That all goes to show that this is not properly described as a floor at all. It can be described as a plank-run or a gangway or a platform, but it is not a floor.

The judge seems to have thought that it was not, in the ordinary sense, a floor, but that the Act ought to be extended to cover it. I am afraid we cannot go so far as this. As this is not a floor it means that the plaintiff cannot bring the case within the Act. It is one of those unfortunate accidents for which the remedy is in the system of national insurance, now in force, and not by claims against the employer in this manner. I would therefore allow the appeal and give judgment for the defendants.

HODSON L.J. I agree. There is no question but that the defendants' shipyard is a factory within the meaning of the Factories Act, 1937, and the only question before the court is whether there has been a breach of section 25 of that Act. [His Lordship read subsection (1) and continued:] There is no contention that there has been any breach of subsection (1) in respect of the runway or plankway on which the deceased man was standing when he unfortunately fell.

Subsection (3) reads: "All openings in floors shall be securely "fenced, except in so far as the nature of the work renders such "fencing impracticable." Fencing was practicable, and the only question is whether this place is a floor, and whether the agreed place through which the man fell was an opening in the floor.

It is very difficult, by words, to describe exactly what it is that this man was standing on. We have been shown photographs of the gantry which show us that along it were placed planks alongside one another, and, so far as one can see, not fixed. The judge found that they could easily be taken up when desired, and it also appears from photographs that this gantry, made of open steelwork, was not, on the bottom part of it, covered wholly by these planks. The planks do not go to the whole area of the bottom of the structure; they are irregular in the sense that they leave a space on the right which might be described as the edge of the planking or a hole between the edge of the planking and the ironwork of the girder.

I agree with the judge in the view which he took that the word "floor" is not one's first choice of a word to describe this planking, although he found a difficulty in putting forward any satisfactory ground for saying that it was not a floor. He referred, in his judgment, to some of the ordinary purposes of a floor for which these planks were used: such as that persons

C. A.
1957
TATE
v.
SWAN HUNTER & WIGHAM RICHARDSON LTD.
Hodson L.J.

passed and repassed over them, and they were used to stand on. But, of course, it is not every place on which workmen stand, on which they pass and repass, which could be called a "floor." For example, one would not, in the ordinary way, at any rate—although there might be an exception to this—regard the flat roof of a factory as a floor; and in reading subsection (3) one has to bear in mind that primarily what is in contemplation is no doubt floors in factories which are there for work to be done upon them, because "the nature of the work" is referred to in subsection (3).

This being a passageway or plankway of an irregular kind, where it is difficult to define the extent of the floor, I find it even more difficult to say that the word "floor" is appropriate. As the judge said in the course of the case, by way of an interlocutory observation, one can understand that an opening in a floor is one thing because that postulates a floor which is not continuous; on the other hand, one may have a floor which simply does not cover the whole of the place, and clearly a floor which does not cover the whole of the place is not aptly described as a floor with a hole in it. To my mind that description fairly fits the situation in this case; and with some diffidence—because I appreciate that the judge applied his mind with very great care to this problem, and I respect the conclusion to which he came—I am of the opinion that that conclusion is not right, and, therefore, that this appeal should be allowed.

MORRIS L.J. I am of the same opinion. The only question before us is whether the deceased man, at the moment before he fell to his death, was standing on what could properly be described as a "floor" within the meaning of subsection (3) of section 25.

There is no doubt that he was within a factory, and it is to be remembered that in the definition of "factory" in section 151 of the Act it is provided, by subsection (7), that "Premises shall "not be excluded from the definition of a factory by reason "only that they are open air premises."

I think that there must be a certain measure of overlap in the words used in subsection (1) of section 25—the words "All "floors, steps, stairs, passages and gangways." There may be some passages and some gangways which may be floors, or which at least may have floors on them.

I find myself, in approaching this case, feeling very much as Somervell L.J. did when he expressed himself in his judgment in *Bath* v. *British Transport Commission*.[3] In that case it was held that it was impossible to regard an excavation which constitutes a dry dock as an "opening" within the meaning of subsection (3) of section 25, and Somervell L.J., in this court, said[4]: "I do not think that I can add much on that point. One

[3] [1954] 1 W.L.R. 1013. [4] Ibid. 1015.

"is sometimes tempted to construe perfectly familiar words, but "if they are, as these words are, perfectly familiar, all one can "do is to state whether or not one regards them as apt to cover "or describe the circumstances in question in any particular "case."

The Act itself does not give a definition of the word "floor." It seems to me, therefore, that while having in mind all the evidence and the assistance afforded by the plans and the photographs, the question must be posed whether one can fairly and reasonably describe the place on which the deceased was standing as being a floor. Approaching the matter in this way, although recognizing that the judge has come to a different conclusion, I feel obliged to record my opinion that I would not describe the place as being a floor.

There might have been a further question as to whether the place vacated by reason of the absence of the ladder could properly be described as an "opening" in the floor, because it might have been said that the only floor laid down, if there had been a floor at all, was that which went to the right of the iron ladder. But it is unnecessary to say anything in regard to that matter for the reason that in my judgment the planking on which the deceased was standing was not properly to be regarded as a floor. I agree, therefore, that the appeal succeeds.

Appeal allowed.
Judgment for the defendants, with costs in the Court of Appeal and below.

Solicitors: *T. D. Jones & Co. for Linsley & Mortimer, Newcastle-upon-Tyne; Rowley Ashworth & Co.*

M. M. H.

[HOUSE OF LORDS.]

* FOMENTO (STERLING AREA) LTD. . APPELLANTS;
AND
SELSDON FOUNTAIN PEN CO. LTD. AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)†
1957
Oct. 22, 23, 24; *Dec.* 4.

Patent—Licence to manufacture under—Assessment of royalties—Manufacture of patented articles—Terms as to royalties—Auditors' duties—Scope of inquiry—Sale of articles claimed to be outside patent field—Provision as to granting of licence to another trader at lower royalty—Construction of licence.
Accountant or Auditor—Auditor—Duties—Right to obtain professional advice.

---

† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

H. L. (E.)

1957

FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.

On the granting of a non-exclusive licence under certain patents relating to ball-pointed writing instruments and their refills, the deed of terms entered into in 1950 provided by clause 7 that the licensed company should "keep . . . all necessary books of account "relating to the sale or distribution by it of the patented articles "and containing such true and complete entries as may be necessary "or appropriate for computing royalties hereby reserved . . . and "shall . . . when required by [the licensor company] produce the "said books of account to its auditors . . . and shall give to the "said auditors all such other information as may be necessary or "appropriate to enable the amount of the royalties payable here-"under to be ascertained as aforesaid provided that such auditors "shall if so required by the [licensee] company give an undertaking "to treat all such information obtained as confidential information "disclosed only for the purpose of verifying the amount of royalties "which have become payable . . ." By clause 3 it was provided that the licensee company was to pay by way of royalty (a) 6 per cent. on complete writing instruments sold at £1 or less, (b) 4 per cent. on such instruments sold at between £1 and £2, (c) 3 per cent. on such instruments sold at more than £2, and (d) 6 per cent. on refills, ink and writing paste. By clause 15 it was provided that should another licence be granted at a lower royalty, "that lower "royalty shall apply in substitution for the royalty herein agreed." When the auditor of the licensor company was making the investigations provided for by clause 7, the licensee company produced documents concerning refills therein described as "Type A" and admittedly within the relevant patent field. The documents also referred to sales of other refills described as "Type B" and "Type C" which were stated not to have been included in the returns because they were outside the relevant patent field. The licensee company refused to supply the auditor with specimens or specifications of these types so as to enable him to satisfy himself of the correctness of this contention. The licensee company also contended that by reason of the fact that in 1953 the licensor company had granted to another company a licence stipulating for a royalty of 5 per cent. on the price of all articles sold to the public, the royalty of 6 per cent. stipulated for by clause 3 of the deed of terms should be reduced to 5 per cent. under the terms of clause 15:—

Held (Viscount Simonds and Lord Tucker dissenting), that, on the true construction of the agreement, the auditor was entitled to require the information and, in refusing it, the respondent company committed a breach of the agreement, since the information in question fell within the words "all such other information as may "be necessary or appropriate to enable the amount of the royalties "payable hereunder to be ascertained." The auditor was not confined to the mere mechanics of checking vouchers and making arithmetical computations.

Held further, unanimously, that, on the true construction of the agreement, the royalty payable by the licensee company under clause 3 (a) and (d) should be reduced from 6 per cent. to 5 per cent., and it was immaterial that in respect of the goods dealt with by clause 3 (b) and (c) royalties of 4 per cent. and 3 per cent. were prescribed since "royalty" meant the relevant royalty for articles in a comparable category.

Decision of the Court of Appeal [1956] R.P.C. 344 reversed in part and affirmed in part.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 8, 1956, allowing an appeal from a judgment of Harman J. dated July 30, 1956, in an action in which the appellants, Fomento (Sterling Area) Ltd., were plaintiffs and the respondents, Selsdon Fountain Pen Co. Ltd., Ralph Selsdon and Rebecca Selsdon, his wife, were defendants. The hearing before Harman J. occupied three days and before the Court of Appeal five days.

The facts are fully stated in the opinions of Viscount Simonds and Lord Morton of Henryton.

K. Shelley Q.C., *Kenneth Johnston Q.C.* and *John Whitford* for the appellants.

Charles Russell Q.C. and *Owen Swingland* for the respondents.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Couchman* v. *Greener* [1]; *British Industrial Plastics Ltd.* v. *Ferguson* [2]; *In re London and General Bank (No. 2)*.[3]

Their Lordships took time for consideration.

December 4. VISCOUNT SIMONDS. My Lords, in the action and counterclaim out of which this appeal arises the appellants claimed that the respondents had committed a breach of an agreement to which I shall refer and that they had accordingly rightfully determined it. The respondents, denying the breach and rightful determination, alleged that the appellants had themselves broken a term of the agreement relating to the grant of a licence at a lower royalty and claimed the appropriate relief. On both points Harman J. gave judgment in favour of the appellants, but on both points was reversed by the Court of Appeal.

I have referred to an agreement between the parties, but in fact there were two documents which must be read together. The first was a deed, referred to as a "deed of terms," dated May 17, 1950; the second a formal sub-licence of the same date. A complicated history of dispute lies behind the execution of these documents. I think it necessary only to say that they were originally entered into in settlement of litigation between a company called the Miles Martin Pen Co. Ltd. and the respondents. That company changed its name first to Biro Pens Ltd. and then to Biro Swan Ltd.; the head licence, under which the sub-licence to the respondents was granted, was at a later date surrendered by Biro Swan Ltd. with the benefit of the sub-licence which had been granted to the respondents, while at the same time a head licence was granted to the appellants for the area within which the sub-licence to the respondents was operative. In settlement of further disputes the appellants and respondents and other

[1] (1884) 1 R.P.C. 197.
[2] [1940] 1 All E.R. 479.
[3] [1895] 2 Ch. 673; 11 T.L.R. 573.

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Viscount Simonds.

parties in 1954 executed another deed of which I need only say that its practical effect was that for the purposes of that appeal the relevant clauses of the deed of terms and sub-licence can be read as if the name of the appellants were substituted for that of the Miles Martin Pen Co. Ltd. I am not in a position, nor is it necessary, to explain the purpose or effect of these moves and counter-moves in the history of the relations between the parties. Nor need I refer to the terms of the formal sub-licence. It is sufficient to refer to the deed of terms, and that I must do in some detail.

The deed of terms (to which a Uruguayan company whom I need not further mention was also a party) first recited that the Miles Martin Pen Co. Ltd. (in whose shoes the appellants now stand) owned a sole and exclusive licence for twenty years from December 9, 1945, to manufacture, distribute, market, service and exploit ball-pointed pens, refills and ink or writing paste, such licence being granted as therein mentioned, and had agreed to grant to the respondent company a sub-licence upon the terms thereinafter appearing. It then, so far as material, proceeded as follows, the respondent company being referred to as "the "Selsdon company":

"2. Miles Martin hereby agrees to grant and the Uruguayan "company and Martin hereby agree to confirm to the Selsdon "company full but non-exclusive sub-licence to manufacture use "and sell writing instruments spare parts therefor refills ink and "writing paste which or any part of which is protected by the "patents which are granted or which shall proceed to grant "(hereinafter called 'the patented articles') in the countries and "territories listed in the Schedule hereto (hereinafter called 'the "'licensed territory') upon and subject to the terms herein and "in the said sub-licence contained for a term of twenty years "from December 9, 1945.

"3. During the continuance of the said sub-licence and of "any further sub-licence which may hereafter be granted by "Miles Martin in pursuance of these presents and provided that "all or any of the patents which are granted or which shall "proceed to grant remain subsisting in the United Kingdom and "have not all been declared invalid by a court of competent "jurisdiction therein the Selsdon company shall pay to Miles "Martin as and by way of royalty the following sums subject to "the deduction of United Kingdom taxes required by law, that "is to say:—

"(*a*) Six per cent. on the full selling price to the public "(excluding purchase tax) if such price is £1 or less of all or "any complete writing instruments sold by it which or any part "of which is protected by the patents.

"(*b*) Four per cent. on the full selling price to the public "(excluding purchase tax) if such price is £2 or less but more "than £1 of all or any such writing instruments as aforesaid.

"(c) Three per cent. on the full selling price to the public "(excluding purchase tax) if such price exceeds £2 of all or any "such writing instruments as aforesaid.

"(d) Six per cent. on the full selling price to the public "(excluding purchase tax) of all or any parts for writing instru- "ments refills ink and writing paste sold by it which or any part "of which is protected by the patents. The 'full selling price "'to the public' shall mean the full price at which the article is "normally offered for sale to the public (i.e. the price commonly "known as the full list price) at the time and place of the sale in "question irrespective of the price actually paid or received and "in the case of writing instruments shall mean the price of the "complete fully assembled writing instrument or if the writing "instrument is sold in disassembled parts shall mean the "aggregate price of all the parts PROVIDED that nothing in "this clause shall make subject to royalties any articles which "are returned otherwise than for resale to the Selsdon company "for full credit."

"7. The Selsdon company shall keep or cause to be kept at "its principal place of business for the time being all necessary "books of account relating to the sale or distribution by it of the "patented articles and containing such true and complete entries "as may be necessary or appropriate for computing royalties "hereby reserved and showing all relevant sale prices and shall "at all reasonable times if and when required by Miles Martin "produce the said books of account to its auditors for the time "being and permit them to inspect the same and take copies of "extracts therefrom and shall give to the said auditors all such "other information as may be necessary or appropriate to enable "the amount of the royalties payable hereunder to be ascertained "as aforesaid provided that such auditors shall if so required by "the Selsdon company give an undertaking to treat all such "information obtained as confidential information disclosed only "for the purpose of verifying the amount of royalties which have "become payable provided further that the Selsdon company will "supply when called upon so to do by Miles Martin full details "of all ball-pointed pens and other supplies returned to them for "credit."

On August 10, 1954, the parties entered into a further agreement, the expressed purpose of which was to remove doubts as to the proper construction of clause 7 of the deed of terms. It failed so signally of its purpose that neither party relied on it in your Lordships' House.

I come now to the alleged breach by the respondents of their obligations under clause 7 which gave the appellants the right to determine the sub-licence.

In the course of carrying out the audit for the period April 1, 1953, to June 30, 1954, for the purpose of ascertaining the amount of royalties payable, the appellants' auditor ascertained, as the fact was, that there were recorded in the books of the respondents

BIBL. LONDON

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Viscount Simonds.

sales of three types of refills which were called Type "A," Type "B" and Type "C." The respondents included in their returns for royalty purposes the refills of Type "A": they did not include those of Type "B" or Type "C." The auditor asked for further information regarding Type "B" and Type "C." He demanded a specification or description or a specimen of these types in order that he might satisfy himself that they were not patented articles (i.e., articles which or any part of which were protected by the patents in question) and accordingly subject to royalty. The respondents declined to give this information, deeming it sufficient to say that they were not patented articles and that it was only in regard to patented articles that they were required to give information. The appellants claim and the respondents deny that the respondents have committed a breach of their obligations under clause 7. This was and remains the issue between the parties, and the difference of judicial opinion upon it suggests that it is not easily determined. It is not disputed that the sub-licence has been lawfully determined if there has been such a breach.

My Lords, it is an irrelevant consideration that the question asked is an easy one to ask and, maybe, an easy one to answer. Certainly it is easy to demand a Type "B" refill and easy to hand one over, though it may require a decision of this House to determine whether or not it is a patented article. Nor can it be determined whether it is necessary or appropriate that the respondents should furnish certain information to enable the appellants' auditor to perform his duty unless the scope of that duty is precisely defined. It is a deceptively easy answer to say that it is his duty to ascertain the amount of the royalties payable under the sub-licence and that any information which helps him to do so must be necessary or appropriate. It would, of course, be properly assumed in such an answer that the information would be asked for in good faith and for no extrinsic purpose. But, my Lords, I am satisfied that this answer is radically unsound and, as I unfortunately differ from some of your Lordships, I must give my reasons fully. They are not materially different from those given by the Court of Appeal.

The relevant clause is such a clause as I should expect to find in a licence to exploit a patent. It is a reasonable protection for the licensor that his licensees should keep books of account showing the distribution and sale of patented articles, and that such books should contain true and complete entries to enable the royalties to be computed and should show all relevant sale prices, and that they should if required at all reasonable times produce the books to the licensor's auditors for their inspection and allow them to take copies of extracts. Nor does it surprise me that the licensees should be required to give "all such other "information as may be necessary or appropriate to enable the "amount of the royalties payable hereunder to be ascertained." It was conceded that much information could be gleaned about

admittedly patented articles from price cards and other literature which would not appear from the books of account. It is obvious that such further information might form a valuable check upon what appeared from the books alone. But it is at this point that the controversy begins. For the appellants claim that their auditor is entitled to information which will not only enable him to check the number of patented articles sold and the price at which they have been sold, but also to examine and, I suppose, decide whether other articles have not been included for computing the royalty which ought to have been included. In the present case the demand is a simple one: "Hand over the article "and I will see whether by mistake or deliberately you have "been falsifying the account," though, as I have pointed out, the question may be one of extreme nicety. To this the respondents give an answer, which is somewhat contemptuously described as their "ipse dixit," that, however easy it may be to do so, they will give no information about anything which is not a patented article and that this was not a patented article. Let me observe at this stage that no charge of fraud or mistake has been made: if it were, other considerations would arise. Here the position is quite different. In effect the auditor says: "I "have all the information which enables me to compute the "amount of royalties upon the articles which you say are "patented, but how do I know that you are not mistaken or "fraudulent? Let me see other articles that I may form my "own judgment upon them." My Lords, I cannot too strongly express the view that this forms no part of the right or duty of an auditor under such a clause as this. I say "right or duty," for, if it is his right, it is also his duty. It is unnecessary to consider what may be his right or duty under other and different clauses, and it is wholly irrelevant to refer to his statutory duties under the Companies Acts. I cannot, however, forbear to recall that it has often been said that his duty is not detection but verification, and on one occasion more picturesquely that he is a watch-dog, not a bloodhound (see *In re Kingston Cotton Mill (No. 2)* [1]).

In their consideration of this clause the Court of Appeal have, in my opinion, rightly laid great stress on the fact that it is an auditor whose rights they are considering. No one will deny that in the course of their professional practice accountants, chartered or incorporated, may acquire a wide range of commercial knowledge, but the accountant will not claim that it is part of his professional skill and expertise to determine whether or not an article or any part of it is protected by a patent. The accountant here concerned frankly said that, given the article, he would take the advice of a patent agent—who in his turn might well say it was a question about which he would like to consult counsel. This appears to me to throw a flood of light upon the scope of the

[1] [1896] 1 Ch. 331; 12 T.L.R. 123; affd. [1896] 2 Ch. 279, 288 (C.A.).

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Viscount Simonds.

clause. The obligation of the licensees is to give to the auditor books and other information which will enable him as an accountant to ascertain or (to use another word in the same context) to verify the amount of royalty payable under the licence. If he must rely, not on what his own professional skill and knowledge have taught him, but upon the advice of others—on a question of patent likely enough to be but tentative—for the ascertainment and verification of the amount of royalty payable, he cannot fairly say that he has himself ascertained or verified anything at all. He can at most say that, though the licensees claim that a certain article is not, such and such a patent agent or counsel has advised that it is or may be, protected by a patent. I decline to believe that the clause has such a scope as this.

But, it is said, even if the clause has such a result as I have indicated, at least it will have the advantage for the licensor that it will give him information which he would otherwise have difficulty in getting. I am by no means satisfied that he would have any difficulty. But suppose it to be so. I see no valid reason for saying that the clause is intended to authorise a roving inquiry by the licensor through the auditor in order to see whether the licensee is manufacturing under the patent other articles than those which he admits to be protected and brings into the royalty account. Where is this to end? Harman J., from whose opinion I am always reluctant to differ, committed, I think, a fundamental error which was repeated many times at the Bar when he said that the refills of Type "B" and Type "C" were prima facie articles carrying royalty. They were nothing of the kind, any more than were any other "writing instruments spare "parts therefor refills inks and writing paste" which the licensees sold in the course of their business. He may have been influenced by the fortuitous and insignificant fact that articles of Type "A" and Type "B" or Type "C" were recorded as having been sold at the same time and under the same docket. I say "insignificant" because there is as little significance in a vendor of "writing instruments" selling two different types at the same time to the same purchaser as there would be in the same manufacturer making two types in one factory. And so I ask, where is this demand by the auditor for further information to end? If it is his right and therefore, as I have pointed out, his duty to require further information because he ascertains that in addition to Type "A" refills the licensees sell other refills, he will presumably be entitled to inquire, and fall short of his duty if he does not inquire, about every other article sold by the licensees which falls or might be claimed to fall within the so-called patented field, and demand specimens for submission to expert opinion. Thus under the guise of an accountancy transaction a far-ranging investigation of the licensees' manufactures will be involved. At the risk of repeating myself I must say that an interpretation of the clause which has this inevitable result is plainly repugnant to common sense and should be rejected.

A second consideration which to some extent influenced the Court of Appeal lay in the clause requiring the auditor to give an undertaking to treat as confidential any information given to him, and a good deal of argument was addressed to it at the Bar. I find it enough to say that the clause certainly does not militate against the opinion that I have otherwise formed, though I am not satisfied that it adds any weight to it.

I turn now to the second matter of appeal. It is independent of the first and arises upon clause 15 of the deed of terms, which provides that should Miles Martin (that is now, the appellants) grant a licence under the patents in question at a lower royalty, that lower royalty should apply in substitution for the royalty therein agreed with a proviso which is immaterial. On July 16, 1953, the appellants granted a non-exclusive sub-licence to Biro Swan Ltd. to exploit the patents which had been the subject of the sub-licence to the respondents. It was provided by clause 5 (*a*) of this sub-licence that Biro Swan Ltd. should pay to the appellants during its continuance by way of royalty a sum at the rate of 5 per cent. of the advertised price to the public in the country of sale (less purchase tax) of all ball-pointed writing instruments manufactured and sold or manufactured and delivered by way of gift but not trade samples. When this sub-licence was brought to the notice of the respondents they not unnaturally claimed that clause 15 of their own sub-licence was brought into play and that the royalty of 6 per cent. payable by them under clause 3 (*a*) and 3 (*d*) thereof should be reduced to 5 per cent. I do not know whether before action brought they were aware of the further clause in the sub-licence to Biro Swan Ltd. whereby the appellants acknowledged that that sub-licence was granted on more favourable terms than that to any other sub-licensee. It would not, I think, have deterred them from prosecuting their claim, but it must not be regarded as conclusive in their favour.

It is clear that the effect of the Biro Swan sub-licence, as I will call it, is to enable that company, which presumably competes with the respondents, to pay only 5 per cent. royalty in respect of the wide range of goods covered by clause 3 (*a*) and (*d*) of the respondents' sub-licence as against 6 per cent. payable by the respondents. That is precisely the competitive advantage against which clause 15 was intended to protect the respondents.

But it is said that, if the sum of the royalties at 5 per cent. paid by Biro Swan in respect of all the articles covered by clause 3 of the respondents' sub-licence (the royalties upon which vary from 6 per cent. to 3 per cent.) is added up over a certain period. it will be found or may be found, or at least it has not been proved that it will not be found, that it is not a lower sum than if they had paid at the several rates prescribed by the respondents' sub-licence. This is an ingenious but unconvincing argument. Clause 15 of the respondents' sub-licence is by its nature intended to come into operation at once and once for all when a licence at a lower royalty has been granted. The appellants' contention

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Viscount Simonds.

involves that at the end of some arbitrary period a calculation, which the respondents would have no means of making or checking, must be made to ascertain both what Biro Swan in fact paid and what they would have paid if they had paid at different rates. Only then could it be said that the appellants had or had not granted a licence at a lower royalty, so as to bring clause 15 retrospectively into operation. Nor is it clear whether a fresh calculation would in this view have to be made at the end of the next arbitrary period. My Lords, this is to make nonsense of what is intended to be a workable commercial document, and it does so unnecessarily. For it is easy to give an effective meaning to it by the simple process of expanding the clause in the Biro Swan sub-licence so that a royalty of 5 per cent. is chargeable against each of the groups of articles comprised in 3 (*a*), (*b*), (*c*) and (*d*) of the respondents' sub-licence and then asking whether in respect of any of those groups a lower royalty is payable under the Biro Swan licence. This is well expressed by the learned Master of the Rolls where he says [2] that the phrase in clause 15, "the royalty herein agreed," "means "the relevant royalty, and that if it turns out, therefore, as "regards any particular section of the patented field another sub-"licensee is granted the right to sell them at a royalty which in "respect of that class of articles is lower than the appropriate "or relevant royalty in [the respondents' sub-licence], then the "latter is reduced to the level of the former." I agree with this and would add only two further observations. It appears to me that to give effect to the appellants' contentions would be to open the door to trickery, for nothing could be easier than to alter slightly, even insignificantly, the structure of the royalty clause in a later sub-licence and then to argue as the appellants have argued here that the earlier royalty clause has no effective operation. Finally, it was argued that under the Biro Swan sub-licence the sub-licensees had to pay royalty on all ball-pointed writing instruments, etc., whether or not they were manufactured under the relevant patents. This was said to add to the difficulty of determining whether the royalty payable under the Biro Swan sub-licence was a lower one or not. I dare say it would, but without determining a question in the absence of one of the vitally interested parties I would say that such an interpretation has little to commend it and, if it is the right one, it makes clause 15 upon the appellants' construction even more unworkable than I had supposed.

I would dismiss the appeal on both points.

LORD MORTON OF HENRYTON. My Lords, on May 17, 1950, predecessors in title of the appellant company granted to the respondents "full but non-exclusive sub-licence to manufac-"ture use and sell writing instruments spare parts therefor "refills ink and writing paste which or any part of which is

[2] [1956] R.P.C. 344, 352.

"protected by the patents which are granted or which shall "proceed to grant . . . in the countries and territories listed in "the schedule hereto" as on and from December 9, 1945, for a term of 20 years, subject to certain terms and conditions. The patents in question related to ball-pointed pens and accessories thereto, covered by a large group of patents. On the same day the same parties entered into a "deed of terms" setting out the terms upon which the sub-licence was granted. It is common ground, for the purposes of this appeal, that the appellant company was from 1954 the successor in title of the company referred to in this deed as "Miles Martin."

Clause 3 of the deed of terms provided that the respondent company (therein referred to as "the Selsdon company") was to pay to Miles Martin as and by way of royalty (a) 6 per cent. on complete writing instruments protected by the patents which were sold at a price of £1 or less; (b) 4 per cent. on such writing instruments sold at a price between £1 and £2; (c) 3 per cent. on such writing instruments sold at a price exceeding £2; and (d) 6 per cent. on parts for writing instruments, refills, ink and writing paste. The royalty was to be measured on the "full "selling price to the public," which was more fully defined in the deed.

Clause 7 of the deed of terms must be quoted at length. It is as follows: [His Lordship read the clause, and continued:]

Clause 8 provided that the Selsdon company should render a quarterly statement showing the total sales effected by it of the patented articles during the preceding three months, together with the relevant sale prices and the sum due to Miles Martin for royalties in respect of such period, and should, with each such statement, pay or remit to Miles Martin the sum for royalties thereby shown to be due.

Clause 11 provided that the Selsdon company should notify Miles Martin of all the names under which they were selling any of the patented articles.

Clause 13 provided that if either of the parties to the agreement should commit any breach of any of the obligations or agreements on their part therein contained, the other party might give notice in writing calling upon the party committing such breach to remedy the same; and if such breach should not be remedied within 30 days thereafter, the other party should be at liberty to terminate the sub-licence by notice in writing.

Clause 15 is of importance and is in the following terms: "Should Miles Martin grant a licence under the said patents "at a lower royalty that lower royalty shall apply in substitution "for the royalty herein agreed. . . ." Then there followed a proviso which is irrelevant for the present purpose.

Two quite separate questions arise on this appeal, the first under clause 7 of the deed of terms, the second under clause 15.

The first question is: Did certain information requested by

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Lord Morton of Henryton.

the appellant company's auditors, and refused by the respondents, come within the description of "all such other information "as may be necessary or appropriate to enable the amount of "the royalties payable hereunder to be ascertained as aforesaid" within the meaning of clause 7 of the deed of terms?

The events giving rise to this question are as follows.

The auditors of the appellant company were Messrs. Farrow, Bersey, Gain, Vincent & Co. and the partner carrying out the audit under clause 7 was a Mr. Young, who gave evidence at the trial. It is, I think, obvious that Mr. Young could not "ascertain" the amount of the royalties *payable* under the deed without satisfying himself upon two points—(a) the total number of articles sold which were within the patents, and (b) the full selling price of each of these articles. He found from inspection of the books and documents before him that the respondent company had sold, amongst other articles, refills described as Type "A," Type "B" and Type "C" respectively, and it is to be noted that refills are included among the articles mentioned in clause 1 of the sub-licence and in clause 3 of the deed of terms.

Consequently, Messrs. Farrow & Co. wrote, on October 13, 1954, to the accountants of the respondents saying that Mr. Young would like an appointment with Mr. Selsdon (the second respondent) to discuss certain matters which had arisen during the audit of the royalties payable to the appellants. They continued: "In particular we would mention the following "points which Mr. Young wishes to discuss with him:—(*a*) The "sale of Types 'B' and 'C' refills and the patents by which "these refills are covered. . . ." The respondents' accountants replied on October 28, 1954: "With regard to the points raised "in your letter, we are instructed to say:—(*a*) 'B' and 'C' "refills are not covered by patents. . . ."

On November 23, 1954, Messrs. Farrow & Co. replied saying (inter alia): "We should also be obliged if you would obtain for "us specimens or specifications of each of the 'A,' 'B' and "'C' type refills so that we may satisfy ourselves which are "covered by the Biro patents. We feel sure that as accountants "you will agree that the above information constitutes the "minimum necessary to enable us to certify the royalties payable "by your clients." Further correspondence followed, but the respondents by their accountants took up the attitude that the auditors were not entitled to the information which they requested. Thereupon the appellant company served the necessary notice under clause 13 of the deed of terms, and as the respondents failed to comply with it the appellant company purported to determine the licence by letter dated March 22, 1955, and issued the writ in this action claiming that the sub-licence and deed of terms had been terminated. The respondents filed a counterclaim to which I shall refer later.

Harman J. granted the declaration as claimed, but his decision was reversed by the Court of Appeal.

I now return to the first question which I have already stated. My Lords, all the words of clause 7 of the deed of terms are English words in common use, and it seems to me clear that the information sought by Mr. Young was, in the circumstances, "necessary or appropriate to enable the amount of the royalties "payable hereunder to be ascertained as aforesaid." Mr. Young could not ascertain the amount of the royalties payable without ascertaining whether the refills called by the respondents Type "B" and Type "C" were or were not within the patents. The respondents might honestly believe that the types of refills to which they had given these names did not come within the patents, but they might well be mistaken. Further, it is, I think, important to note the wording of the proviso to clause 7: "provided that such auditors shall if so required by the Selsdon "company give an undertaking to treat all such information "obtained as confidential information disclosed only for the "purpose of verifying the amount of royalties which have become "payable." The word "verifying" affords a strong indication that the auditors were not bound to accept the statement of the respondents which was, after all, merely a statement of their opinion.

It is indeed difficult to see why the respondents should have refused to supply specimens of Types "B" and "C" to the auditors. These articles had been sold, and any person who purchased one would be entitled to take it to pieces and observe its construction if he so desired. If the specimens had been supplied, all that Mr. Young had to do was to show the articles to a patent agent, hand him the patents, and ask him whether either of the articles came within any of the patents. In so doing he would not be revealing any information which was not already in the possession of the public.

The result is that, in my opinion, if the words in clause 7 are read in their ordinary meaning and without putting any gloss upon them, the auditors were entitled to ask for the information now in question, and the respondent company committed a breach of clause 7 in refusing it. The respondents, however, invite your Lordships to put a very limited construction upon the clause. This construction is stated in clause 14 (i) of their printed case. Mr. Russell amplified this statement in argument but did not depart from its terms. It is as follows: "Clause 7 of the deed "of terms in all its parts, including that referring to information, "is related only to patented articles: unless an article dealt "in by the licensee is established as being a patented article "there can be no breach in its absence from the books of "account kept or from the entries therein 'necessary or appro-"'priate for computing royalty hereby reserved': nor conse-"quently can information as to such article be required on the "ground that it is information 'necessary or appropriate to "'enable the amount of the royalties payable hereunder to be "'ascertained as aforesaid.'"

H. L. (E.)
1957

FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.

Lord Morton of Henryton.

My Lords, I am quite unable to accept this construction of the clause. It involves, in effect, implying in clause 7, after the words "all such other information" the insertion of the words "relating to articles stated by the Selsdon company to be within "the patents." Thus the appellant company would be bound to rely upon the ipse dixit of the Selsdon company and would have no means of "establishing" (to quote the words of the respondents' case) whether or not any article shown to have been sold was or was not a patented article.

By using the words "all such *other* information" the parties have made it clear that the auditors are to be entitled to ask for, and receive, information which does not appear in the respondent company's books of account, and they have inserted a clear limitation on the extent of such information—it must be necessary or appropriate to enable the amount of the royalties payable to be ascertained. That is the only limitation, and it seems to me a natural and sensible limitation. The implied limitation suggested by Mr. Russell places the licensors in an impossible position, and I cannot doubt that if the respondents had suggested the insertion of any such limitation the licensors would have rejected the suggestion. If this sub-licence, a business document, had the meaning for which Mr. Russell contends, the result would be as follows: Throughout the period of the licence the licensees could sell ball-pointed pens, spare parts therefor, refills, ink or writing paste, entering all or any of these articles on their books under the wholly uninformative names Type "A," Type "B," or Type "C," and meeting all requests for information with the bare statement of their opinion, "Types 'B' and "'C' are not covered by the patents." This seems to me a result to which no licensor would agree, and I can find no indication in the sub-licence or the deed of terms that any such result was intended.

Mr. Russell relied strongly upon the fact that the information is to be given (to quote again the respondents' case) "not to the "appellants or to patent agents, but to auditors who are not "qualified to appreciate or understand the problems involved in "a question of infringement: this indicates that the quality of "the information referred to does not include that demanded."

My Lords, to my mind it is entirely appropriate that the auditors, and no one else, should be given all information, of every kind, which is necessary or appropriate to enable them to do their work as auditors, that is, the work of ascertaining and verifying the amount of royalties payable. That is exactly what clause 7 says in terms. If the auditors ask for information which is neither necessary nor appropriate for this purpose, the respondent company can refuse to give it; and if a dispute arises, it is for the court to determine whether the information sought is necessary or appropriate.

A further argument advanced by Mr. Russell is stated in paragraph 14 (iii) of the respondents' case as follows: "The

"information is receivable by the auditors in confidence. This "confirms that it is of quality exclusive of the information sought "in this case. Moreover, the auditor could not seek advice on "the information without breach of confidence."

My Lords, it is not quite accurate to say that the information is receivable by the auditors in confidence. Clause 7 merely confers a power upon the respondent company to require from the auditors an undertaking to treat the information obtained as confidential information, and there is no evidence that they have ever required such an undertaking. In any event, I cannot see that this portion of clause 7 in any way supports the limitation of the meaning of the word "information" for which Mr. Russell contends. On the contrary, I should have thought that if it was of any assistance in construing the simple words "all "information," it would tend the other way. If the auditors are bound to accept as correct a statement by the respondent company that "Type 'A' is within the patent and Types 'B' "and 'C' are not," it is difficult to see what information of a confidential nature he would desire to obtain. On the other hand, if the words are given their natural meaning, and the only limitation on the information required is that it must be necessary or appropriate for the purpose mentioned in the clause, it seems much more likely that information of a confidential character might be sought. I add that in the present case, as I have already pointed out, if specimens of Type "B" and "C" had been supplied, the auditors could have "sought advice on "the information without breach of confidence."

In the result, my Lords, I am entirely unconvinced that any limitation should be implied upon the words "all such other "information as may be necessary or appropriate to enable the "amount of the royalties payable hereunder to be ascertained as "aforesaid," and I remain of the opinion that the information sought by Mr. Young was information of the kind described in these words. It follows that, in my view, Harman J. arrived at the right conclusion and his order should be restored.

The second question for decision arises under a counterclaim by the respondents. They refer to clauses 3 and 15 of the deed of terms, to which I have already referred, and contend that in the case of the articles described in clause 3 (*a*) and 3 (*d*) the appellant company has "granted a licence under the said patents at a "lower royalty" within the meaning of clause 15, and consequently, that lower royalty should be substituted for the royalty mentioned in clauses 3 (*a*) and 3 (*d*).

The Court of Appeal held that this contention was well founded, as the appellant company, on July 16, 1953, granted a licence to Biro Swan Limited to sell (inter alia) articles coming within clause 3 (*a*) and 3 (*d*) of the deed of terms at a royalty of 5 per cent. My Lords, on this part of the case I agree with the reasoning and conclusion of the learned Master of the Rolls, which was accepted by his brethren; and as I understand your

H. L. (E.)
1957

FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.

Lord Morton of Henryton.

Lordships are all in agreement upon this point, I shall not delay you by any observations of my own.

The result is that I would allow the appeal so far as regards the claim of the appellant company, and restore the order of Harman J.; but I would dismiss the appeal so far as regards the counterclaim of the respondents.

If your Lordships share my view, the order as to costs should be that the respondents do pay the appellants' costs of the claim, here and below, and the appellants do pay the respondents' costs of the counterclaim, here and below.

LORD TUCKER. My Lords, I would dismiss this appeal for the reasons which have been stated by my noble and learned friend, Viscount Simonds, with which I am in complete agreement.

LORD KEITH OF AVONHOLM. My Lords, I agree with the speech of my noble and learned friend, Lord Morton of Henryton.

LORD DENNING. My Lords, in this case auditors were appointed "for the purpose of verifying the amount of royalties" payable by the Selsdon company in respect of certain patented articles such as ball-pointed pens, refills, inks, and so on. In the course of their investigation the auditors found that royalties had been paid on refills of Type "A" but not on refills of Types "B" and "C." They thereupon asked the Selsdon company for further information about these refills, saying that they wanted to discuss: "The sale of Types 'B' and 'C' refills and "the patents by which these refills are covered." The only reply they got was: "'B' and 'C' refills are not covered by patents." The auditors pressed for specimens or specifications but they got no more information.

The question is whether the auditors were bound to accept the assertion of the Selsdon company that "'B' and 'C' refills "are not covered by patents," as being honest, accurate and sufficient: or whether they were entitled to insist on further information so as to check whether or not the assertion was correct. This depends on the true construction of clause 7 of the deed of terms. The words which impose an obligation to give information are very general. The Selsdon company must give "all such other information as may be necessary or appropriate "to enable the amount of the royalties payable hereunder to be "ascertained." Those words—especially the word "payable"—would seem to cover the information here sought. But the apparent width of these words has been held by the Court of Appeal to be cut down by several considerations, and in particular by these four: 1. That the information was to be given to *auditors*. 2. That it was to be given under a seal of *confidence*. 3. That it was limited to the *patented articles*. 4. That it could not have been intended to authorize a *roving inquiry* over the business of the Selsdon company. I propose to consider them in order.

1. The first point raises the question: What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations: and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. He is not to be written off as a professional "adder-upper and subtractor." His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly he must come to it with an inquiring mind—not suspicious of dishonesty, I agree—but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none. I would not have it thought that the *Kingston Mill* case[3] relieved an auditor of his responsibility for making a proper check. But the check to be effective may require some legal knowledge, or some knowledge of patents or other specialty. What is he then to do? Take, for instance, a point of law arising in the course of auditing a company's accounts. He may come upon a payment which, it appears to him, may be unlawful in that it may not be within the powers of the corporation, or improper in that it may have no warrant or justification. He is then not only entitled but bound to inquire into it and, if need be, to disallow it, see *Roberts* v. *Hopwood*,[4] and *In re Ridsdel*.[5] It may be, of course, that he has sufficient legal knowledge to deal with it himself, as many accountants have, but if it is beyond him, he is entitled to take legal advice on the principle stated in *Bevan* v. *Webb*,[6] that "permission to a man to do "an act, which he cannot do effectually without the help of an "agent, carries with it the right to employ an agent." So also with an auditor who is employed for the purpose of checking the royalties payable. It is part of his duty to use reasonable care to see that none have been omitted which ought to be included. He is not bound to accept the ipse dixit of the licensee that there are no other articles which attract royalty. He is entitled to check the accuracy of that assertion by inquiring the nature of any other articles which, it appears to him, may come within the patented field. If he cannot be sure, of his own knowledge, whether they attract royalty or not, he can take the advice of a patent agent, just as, within the legal sphere, he can take the advice of a lawyer. This is, however, subject to the seal of confidence, which brings me to the second point.

2. The auditor here acknowledged that, if he got the information, he would need the advice of a patent agent. It is said that

[3] [1896] 2 Ch. 279; 12 T.L.R. 430.

[4] [1925] A.C. 578, 605; 41 T.L.R. 436.

[5] [1947] Ch. 597, 604; [1947] 2 All E.R. 312.

[6] [1901] 2 Ch. 59, 75; 17 T.L.R. 440.

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Lord Denning.

he could not take such advice without breaking the seal of confidence imposed on him by the agreement. I do not think this is correct. If once the auditor were given the desired information about refills "B" and "C," he could get all the technical advice he needed without breaking any confidence. He could, for instance, put before the patent agent a hypothetical case. Or he could ask his advice on a specimen refill of Types "B" and "C" which had already been sold on the open market and were thus in the public domain. In such a case, although he would have been put on the track by means of the confidential information, he would not actually be disclosing it. Such would not be a breach of the stipulation. In any case, I do not think the stipulation should be construed so narrowly as to prevent the auditor consulting his own servants and agents. The stipulation is that the auditor shall treat the information as "confidential information disclosed only for the purpose of "verifying the amount of royalties . . . payable." Even without this express stipulation the auditor would be bound to keep the information confidential and not divulge it to the outside world. The effect of this stipulation is to prevent the auditor from disclosing it even to his own client. He can only report to him the result of his investigation, not the information he obtains in the course of it, such as the names and addresses of the licensees' customers. But the stipulation does not prevent the auditor from disclosing the information to his own servants and agents when it is necessary to enable him to carry out the very purpose for which the information is disclosed, namely, to verify the amount of royalties payable. Each of his servants and agents is bound, just as the auditor himself is, to keep the information confidential and not to divulge it: and this is a duty which, by the very nature of the case, is owed to the party who has given the information.

3. It is said that clause 7 is confined to "patented articles" and therefore that it cannot be invoked by the auditor except in respect of articles which are *admittedly* patented articles or are *established* to be patented articles: which refills of Types "B" and "C" are not. This argument put a gloss on the words "patented articles" which is not warranted by the definition in the agreement. "Patented articles" mean articles which are in fact protected by the patents, not merely those which are admitted or established to be protected. If it should turn out that refills of Types "B" and "C" are within the patents, then they attract royalty, and have done so all the time, no matter how fiercely the Selsdon company may have asserted the contrary. But how is it to be ascertained, one way or the other, whether they attract a royalty unless the Selsdon company give the information that is desired? Mr. Russell said that the licensors could find out for themselves. They could do the same, he said, as any patentee did, who wished to ascertain if his patent was being infringed. They could buy the offending

article in the market, take it to a patent agent, and pursue all the usual inquiries until the offence was brought home. Mr. Shelley said that this would be quite impracticable, because there were a large number of Biro pens and refills on the market, and it was impossible to tell the Selsdon refills from any others. Howsoever that may be, the information is clearly "appropriate to enable the amount of the royalties payable" to be ascertained. It is much more appropriate for it to be obtained direct from the Selsdon company than for the licensors to go searching up and down the market for it. It is therefore information which the auditor may properly require.

4. It was said that, if the auditor were authorized to require information of this kind, it would mean that the Selsdon company could be interrogated about all the articles they sell—even those which had nothing to do with ball-pointed pens—and that this could not have been intended. The short answer to this is that the auditor is only entitled to such information "as may "be necessary or appropriate." If his inquiries went as far as is suggested, they would not be necessary or appropriate. They would be oppressive, and the Selsdon company could justifiably refuse to answer them. But that cannot be said of the simple inquiry here.

I find myself, therefore, unable to put any such limitations on the clause as the Court of Appeal did. I think the auditor's question was appropriate to ascertain the royalties payable and should have been answered. I would allow the appeal in this respect and restore the order of Harman J. on this part of the case.

I turn now to the other part of the case. This depends on the true construction of clause 15, the "most-favoured licensee" clause. The object of that clause is to ensure that if the licensors should grant a new licence at a lower royalty than that agreed in this licence, then the agreed royalty should be reduced to the level of the new lower royalty. The question that arises is what is to be done when the royalty structure in the new licence is different from that in this licence.

Mr. Shelley started with the proposition that under clause 15 the word "royalty" meant the total sum payable for the licence. On this basis he argued that you could not say, by looking at the new licence, whether it was granted at a lower royalty than the agreed royalty. The agreed royalty was on a sliding scale varying from 6 per cent. on the cheapest articles to 3 per cent. on the most expensive. The new royalty was 5 per cent. on all alike. Whether it was more favourable or not depended on the way in which the sales were spread. If there was a large sale of the cheapest models and few of the expensive ones, the new royalty would be lower, but otherwise not.

Such being the problem, Mr. Shelley said that the matter must be tested by taking the sales of the Selsdon company for the appropriate accounting period—one quarter of a year—and

H. L. (E.)
1957
FOMENTO (STERLING AREA) LTD. v. SELSDON FOUNTAIN PEN CO. LTD.
Lord Denning.

seeing how the rival royalties would work out when applied to those sales. If 5 per cent. on all the sales of the Selsdon company gave a total which was less than that given by the sliding scale, then they would have the option of substituting 5 per cent. thenceforward for the rest of the term. Pressed with the question: Which quarter of which year was to be taken for the test? Mr. Shelley said it was open to the Selsdon company to take any quarter they liked, but as they had taken none in this case and had given no evidence, they could not say that the royalty under the new licence was lower than that under the agreed licence.

I cannot accept this argument, for the simple reason that clause 15 contemplates that, by simply looking at the new licence, you should be able to see from its terms whether the royalty is lower or not, without testing it by sales. The fallacy in Mr. Shelley's argument lies in his original proposition. The word "royalty" in this clause does not mean the total sum payable for all articles produced under the licence. It means the relevant royalty for articles in a comparable category. Thus if the agreed royalty on articles under £1 is 6 per cent. and the new royalty on like articles is 5 per cent., then 5 per cent. is to be substituted for 6 per cent. Whereas if the agreed royalty on articles between £1 and £2 is 4 per cent. and the new royalty on a like article is 5 per cent., there is no substitution and the 4 per cent. prevails. Any other view would mean that, by the simple device of altering the structure on which royalties are paid, the licensor could avoid the clause altogether: which would not, I am sure, commend itself to your Lordships: seeing that the whole object of the clause is to ensure that the Selsdon company are not exposed to unfair competition.

I would therefore dismiss the appeal on this part of the case.

Appeal allowed in part and dismissed in part.

Solicitors: *Payne, Hicks, Beach & Co.; Rowe & Maw.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)†
1957
Dec. 10.

* INLAND REVENUE COMMISSIONERS . PETITIONERS;

AND

WOOD BROTHERS (BIRKENHEAD) LTD. . RESPONDENTS.

House of Lords—Leave to appeal—Terms—Money in dispute deposited at low rate of interest.

† *Present*: LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Wood Brothers (Birkenhead) Ltd.*[1]

The Appeal Committee allowed the petition.

It appeared that, the respondent company being in liquidation, the amount of tax in dispute, £9,000, had been deposited with the Board of Trade, which paid only 2½ per cent. interest on the money. In resisting the application it was submitted on behalf of the company that it would be a hardship to it if this sum were to remain outside its control at this low rate of interest during the considerable time which must elapse before a decision could be arrived at by the House.

Alan Orr for the Crown.
Philip Shelbourne for the respondent company.

LORD REID said that leave to appeal would only be granted on terms that the Commissioners of Inland Revenue would not seek to disturb the orders for costs below and would, in any event, pay the respondent company's costs in the House of Lords, and, further, would undertake to pay 3 per cent. interest on the sum involved until the matter was determined, in addition to the 2½ per cent. which the company was receiving from the Board of Trade. If the Commissioners of Inland Revenue wished to proceed, they should be free to do so on these terms.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons for March, Pearson & Green, Manchester.*

[1] [1957] 3 W.L.R. 713; [1957] 3 All E.R. 314.

---

* PELTON . . . . . PETITIONER;

AND

GRIFFITH . . . . . RESPONDENT.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Griffith* v. *Pelton.*[2]

The Appeal Committee dismissed the petition.

[2] [1957] 3 W.L.R. 522; [1957] 3 All E.R. 75.

[CHANCERY DIVISION.]

1957
Dec. 4.

Danckwerts J.

* DISTRICT BANK LTD. *v.* WEBB.

PRACTICE NOTE.

[1955 D. 2215.]

Mortgage—Practice—Summons for possession—Claim by third party to be entitled to possession—Hearing in open court—R.S.C., Ord. 55, *r.* 5A.

ORIGINATING SUMMONS under R.S.C., Ord. 55, r. 5A.

By this summons possession was claimed of mortgaged property from the mortgagor and from other persons in occupation of the property, the summons was adjourned to the judge in chambers, but was heard by Danckwerts J. in open court.

DANCKWERTS J., in the course of his judgment, said that the judges of the Chancery Division had considered the procedure to be adopted in cases in which a mortgagee was attempting to enforce his security and persons not parties to the mortgage claimed to be entitled in possession to, or to remain in possession of, the mortgaged property. In such cases, if any of the parties was dissatisfied with the decision of the master, the proper practice was for him to adjourn the summons into court and to make, in appropriate cases, an order under R.S.C., Ord. 38, r. 1, for the attendance for cross-examination of deponents to the affidavits filed in the proceedings.

[Reported by JENNIFER WEST, Barrister-at-Law.]

[HOUSE OF LORDS.]

H. L. (E.) †

1957
Oct. 30, 31;
Nov. 4, 6;
Dec. 4.

* MORIARTY . . . . . APPELLANT;

AND

EVANS MEDICAL SUPPLIES LTD. . . RESPONDENT.

(APPEAL AND CROSS-APPEAL.)

Revenue—Income tax—Capital or income receipt—Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma—Whether receipt of company's trade or proceeds of sale of capital asset—Depreciation of capital asset—Meaning of "know-how"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sch. D, Case I*).

---

† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

A company which carried on the business of manufacturing chemists and wholesale druggists entered into an agreement with the Government of Burma, by which the company agreed to assist the Government in the establishment and operation of a pharmaceutical industry. Under the terms of Part I of the agreement entered into on October 20, 1953, the company was to supply technical data and designs for the erection of the factory and the installation of machinery required for the manufacture of the pharmaceutical products. They were also to disclose to the Government the secret processes used by them in the preparation, storage and packaging of the various pharmaceutical products. These processes had never been disclosed before to anyone else, and during the seven years' currency of the agreement the company agreed not to disclose them to anyone else in Burma. By Part II of the agreement the company agreed to manage the factory, to train native personnel and to provide the necessary staff meanwhile. The company was permitted to continue its agency in Burma, but that agency would become of less value as the Burmese Government established their own industry. The consideration for the agreement was a lump sum payment of £100,000, together with an annual fee of not less than £25,000 for the obligation to operate and manage the factory during the currency of the agreement. The Commissioners for the Special Purposes of the Income Tax held that the sum "arose to "the company either in the course of the trade which it had hitherto "carried on or in the course of a new trade which it commenced "to carry on on October 20, 1953." They upheld an assessment to income tax in respect of the company's profits as wholesale druggists for the year 1954–1955 under Case I of Schedule D, the sum of £100,000 being treated as a receipt of its trade liable to be included in the computation of its profits. On appeal to the House of Lords:—

Held (*per* Viscount Simonds, Lord Tucker and Lord Denning), (1) that the £100,000 was not properly included in the assessment because the finding of the commissioners in the alternative form was not sufficient to impose liability on the company, since, if the sum was received in the course of a new trade, it could not be brought into the assessment made in respect of the company's existing trade for 1954–55 which was the only assessment in question. The assessment, accordingly, could not be upheld.

(2) That the case should not in the circumstances be remitted to the commissioners to split up the £100,000 into capital and income.

Viscount Simonds and Lord Tucker were of opinion that the £100,000 was a capital receipt. Lord Keith of Avonholm and Lord Denning were of opinion that it was an income receipt. Lord Morton of Henryton (agreeing herein with the Court of Appeal) was of opinion that it was in part a capital receipt and in part an income receipt.

British Dyestuffs Corporation (Blackley) Ltd. (1924) 12 T.C. 586; *Butterworth* v. *Page* (1933) 150 L.T. 262, C.A.; (1935) 153 L.T. 34, H.L., and *Edwards* v. *Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48 considered.

Decision of the Court of Appeal sub nom. *Evans Medical Supplies* v. *Moriarty* [1957] 1 W.L.R. 288; [1957] 1 All E.R. 336 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This appeal and cross-appeal were from an order of the Court of Appeal dated December 13, 1956, made on an appeal by the

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.

appellant, Louis Moriarty, H.M. Inspector of Taxes, from an order of the High Court (Upjohn J.) dated May 18, 1956. By the order of the High Court an appeal by the respondent company, Evans Medical Supplies Ltd., from a determination of the Commissioners for the Special Purposes of the Income Tax Acts on a case stated by them in respect of an assessment to income tax made on the respondent company was allowed and their determination was reversed. By the order of the Court of Appeal the order of the High Court reversing the determination of the commissioners was discharged and in lieu thereof it was ordered that the case should be remitted to them to ascertain the further facts directed in the order, and to adjust the assessment to income tax made on the respondent company accordingly.

In the original appeal the appellant asked that the determination of the Special Commissioners should be affirmed in its entirety and that the assessment in the amount agreed on the basis of that determination should be maintained. In the cross-appeal the respondent company asked that the determination of the Special Commissioners should be reversed and that the assessment should be reduced so as to exclude from it the whole sum in dispute in the appeals.

The facts are fully stated in the opinion of Viscount Simonds.

Sir Frank Soskice Q.C. and *Alan Orr* for the appellant.

John Senter Q.C. and *Desmond Miller* for the respondent company.

The following cases, besides those referred to by their Lordships, were cited in argument: *Cordy* v. *Smith Barry* [1]; *Balgownie Trust Ltd.* v. *Inland Revenue Commissioners* [2]; *Lomax* v. *Peter Dixon & Son* [3]; *Inland Revenue Commissioners* v. *Reinhold* [4]; *Vestey's Executors* v. *Inland Revenue Commissioners* [5]; *Great Western Railway Co.* v. *Bater* [6]; *Gavazzi* v. *Mace* [7]; *Federal Commissioner of Taxation* v. *United Aircraft Corporation* [8]; *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* [9]; *Inland Revenue Commissioners* v. *British Salmson Aero Engines Ltd.* [10]; *Rustproof Metal Window Co. Ltd.* v. *Inland Revenue Commissioners* [11]; *Desoutter Brothers Ltd.* v. *J. E. Hangar & Co. Ltd.* [12]; *Margerison* v. *Tyresoles Ltd.* [13]; *Bentleys, Stokes & Lowless Ltd.* v. *Beeson* [14]; *Howson* v. *Monsell.* [15]

Their Lordships took time for consideration.

[1] (1946) 62 T.L.R. 614; [1946] 2 All E.R. 396.
[2] 1929 S.C. 790; 14 T.C. 684.
[3] [1943] 1 K.B. 671; 59 T.L.R. 376; [1943] 2 All E.R. 255.
[4] 1953 S.C. 49; 34 T.C. 339.
[5] [1949] 1 All E.R. 1108; 31 T.C. 1.
[6] [1922] 2 A.C. 1; 38 T.L.R. 448.
[7] (1926) 135 L.T. 634.
[8] (1943) 68 C.L.R. 525.
[9] [1896] 1 Q.B. 147; 12 T.L.R. 18.
[10] [1938] 2 K.B. 482; 54 T.L.R. 908.
[11] [1947] L.J.R. 1479; [1947] 2 All E.R. 454.
[12] [1936] 1 All E.R. 535.
[13] (1942) 25 T.C. 59.
[14] [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82.
[15] (1950) 66 T.L.R. (Pt. 2) 916; [1950] 2 All E.R. 1239n.

December 4. VISCOUNT SIMONDS. My Lords, the respondent company, Evans Medical Supplies Ltd., and its predecessors have for a long time carried on in the United Kingdom and elsewhere the business of manufacturing chemists, wholesale druggists and kindred trades. It has a worldwide trade and reputation. In the year 1953 it carried on business in Burma through an agency in that country.

On October 20, 1953, it entered into an agreement with the Government of the Union of Burma under which it became entitled to receive and received the sum of £100,000 and certain other sums therein mentioned. It will be necessary for me to refer in some detail to this agreement.

The company was duly assessed in respect of its profits as wholesale druggists for the year 1954–55 under Case I of Schedule D, and in this assessment the sum of £100,000 was treated as a receipt of its trade liable to be included in the computation of its profits. Against this assessment the company appealed to the Commissioners for the Special Purposes of the Income Tax Acts, who upheld the assessment but at the instance of the company stated a case for the opinion of the High Court. The case came on for hearing before Upjohn J., who allowed the appeal of the respondent company and reversed the determination of the Special Commissioners. From his judgment the Crown appealed to the Court of Appeal. That court discharged the order of the learned judge and ordered that the case be remitted to the Special Commissioners with the direction "to ascertain in accordance with the judgments and "subsequent proceedings of the Court of Appeal what part, "if any, of the amount of £100,000 should be attributed to the "imparting of the secret processes to the Government of Burma, "such part to be treated as a capital receipt, and to adjust the "assessment accordingly, and with power to the parties to call "such evidence as they may consider necessary," and it was further ordered that the commissioners should (if required by either party) state a supplemental case setting forth the facts and their determination. Neither party had asked for, or suggested the propriety of, such an apportionment. The Crown has appealed against the order, inviting your Lordships to restore the determination of the commissioners; the respondent company has cross-appealed, claiming that the judgment of Upjohn J. should be restored. Both sides have argued throughout on the basis of "all or nothing."

My Lords, largely, I think, as a result of the way in which the case was originally presented on behalf of the Crown and the consequent form of the commissioners' determination, a number of difficulties have been created which might well have been avoided. Essentially the case seems to me to be a very simple one, except only on one point, which has caused me some anxiety.

Inasmuch as the case stated raises, amongst other questions,

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Viscount Simonds.

the familiar one whether there was evidence upon which they could make their determination, it will be necessary to refer to the case in some detail.

The commissioners, after stating the question as I have already stated it, refer to the fact that at the hearing of the appeal evidence was given by a Mr. Fergusson, the chairman and managing director of the company, and that certain documents (including the agreement of October 20, 1953) had been put in evidence and formed part of the case. They then refer to the incorporation and objects of the company as stated in its memorandum of association, and mention that it took over a business which began in the year 1809 and is one of the leading pharmaceutical manufacturers with a world-wide trade. Paragraphs 4 and 5 of the case have been relied on by one side or the other, and I set them out verbatim.

"4. The company carries on its trade abroad, in some cases "by means of subsidiary companies in various countries, in other "cases by means of foreign agencies, and for a considerable "period prior to the year 1953 it had an agency in Burma. In "the year 1953 the Burmese Government decided to build a "factory and laboratories in Burma for the purpose of estab-"lishing an industry there for the production of pharmaceutical "and other products. Accordingly, the Burmese Government "despatched a trade mission to Europe, with a view to inducing "some leading firm of manufacturing chemists to advise as to "the erection of such a factory, the supply of equipment for "manufacture, and to impart to them the processes, formulae, "and knowledge necessary to the production and manufacture of "pharmaceutical products in Burma.

"5. The said trade mission got into touch with firms of "wholesale manufacturing chemists on the Continent of Europe "and, also, through the medium of United Kingdom Government "Departments, with the Association of the British Pharma-"ceutical Industry, and finally treated with three leading firms "of manufacturing chemists in the United Kingdom of which "the company is one. There was keen competition with several "continental firms and the British Government was anxious that "a British firm should, if possible, come to terms with the "Burmese Government. Negotiations were opened between the "company and the trade mission on behalf of the Burmese "Government, and the company at first suggested a lump sum "of £350,000 for the sale of drawings, designs, plans, and "technical and other data, and 'know-how' necessary for the "establishment, erection and installation of the factory and the "commencement of production, and for management services for "a period of years. The Burmese Government were unwilling "to agree upon a single lump sum, but desired that part of the "consideration should take the form of fees based on production. "The company then made fresh proposals, which were accepted

"on behalf of the Burmese Government and embodied in the "agreement of October 20, 1953 (Exhibit A)."

I come, then, to the agreement, and, as I regard it as the vital point of this case, I must refer to it at length. The recitals have rightly been regarded as of importance. They are as follows:

"(1) The Government of the Union of Burma proposes to "build in Burma a factory and laboratories (hereinafter together "referred to as 'the factory') for the purpose of establishing an "industry there for the production of pharmaceutical and other "products.

"(2) Evans Medical" (i.e., the respondent company) "has "developed and owns processes formulae and knowledge relating "to the manufacture of pharmaceutical products and to the use "of machinery plant appliances and devices used in such "manufacture.

"(3) For facilitating the building and running of such factory "Evans Medical propose to supply the Government of the Union "of Burma with information and to organize the factory in the "manner hereinafter mentioned."

The operative part of the agreement is divided into five parts and again I think it desirable to set out the provisions of Part I in full. They are as follows:

"In consideration of the payment to Evans Medical by the "Government of the Union of Burma of the capital sum of "£100,000 (One hundred thousand pounds sterling) payable in "the United Kingdom free from any deduction whatsoever.

"(A) Evans Medical will provide and make available to the "Government of the Union of Burma all drawings designs and "plans and technical and other data and 'know-how' necessary "for the establishment erection and installation of the factory "and the commencement of production thereat of the pharma-"ceutical and other products mentioned in the schedule hereto.

"(B) Evans Medical will supply to the Government of the "Union of Burma designs and lay-out for the erection of plant "including machinery and equipment and all other requisites "and shall supply full data and specifications with drawings and "instructions and all other information relating to the sources "and manufacturers and suppliers of such machinery and "equipment.

"(C) Evans Medical will make available to the Government "of the Union of Burma all information relating to the supply "of prototype machinery and equipment for the manufacture of "the pharmaceutical and other products mentioned in the "schedule.

"(D) Evans Medical hereby undertake that during the "currency of this agreement the facilities hereby agreed to be "furnished to the Government of the Union of Burma under the "preceding subclauses of this clause shall be exclusive to the

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Viscount Simonds.

"said Government and shall not during the currency hereof be "furnished to any other person or corporation in Burma."

Part II of the agreement provides for the giving of advice and rendering of services by the company to the Government. It is, for instance, to advise the Government as to the building and operation of the factory, to act as purchasing agent for the Government, to act as managers, to engage and train the staff, to procure and train as quickly as possible Burmese nationals in Europe and Burma and cause such nationals to be appointed to positions of responsibility in the factory and to render similar services. It then provides that as remuneration for the services provided for in that part of the agreement the Government would pay to the company a fee in respect of each year of the continuance of the agreement of either 5 per cent. of the value of all products whether or not specified in the schedule thereto produced at the factory in accordance with the provisions of that agreement or the sum of £25,000 whichever sum should be the greater. This part contained a number of other provisions to which I need not refer. Nor need I refer to Part III. Part IV provided that the agreement should remain in force for 7 years, but might be renewed as therein mentioned, and contained the term that the Government would not, without the consent of the company, export to any other country any of the goods manufactured in accordance with the provisions of that agreement except as therein mentioned. Part V contained the perhaps important term that the Government would not divulge to anyone the information conveyed to them by the company under that agreement without the written consent of the company, such consent not to be unreasonably withheld.

Having referred to this agreement, the commissioners proceed, in paragraphs 10 and 11, as follows:

"10. (i) The schedule referred to, forming part of the said "agreement (Exhibit A), specifies two main classes of biological "products (A) and (B) and a number of pharmaceutical products "enumerated under a few broad descriptions (C), (D) and (E). "All the products referred to are general types and do not "include any of the company's proprietary products. By far the "most valuable from the company's point of view were the "secret processes involved in the preparation, storage, and "packaging of certain human and veterinary anti-toxins, sera "and vaccines.

"(ii) The secret processes referred to in sub-paragraph (i) "above have been evolved at great cost in several fields over a "period of 50 years and the company considers that such secret "processes are superior to those evolved by other companies. "At least two other companies in the United Kingdom, and "firms in Western Germany and Holland, have the necessary "knowledge to prepare such products and do, in fact, prepare "them. The company has, however, over a number of years "experimented and perfected its own methods of preparing and

"conserving these products and has never, until it entered into "this agreement with the Burmese Government, communicated "these methods to any other person or corporation.

"(iii) The pharmaceutical products, as broadly classified in the "schedule to the agreement, number about 3,500 out of 6,500 "such products actually manufactured by the company. Here "again, there is no secret as to the composition of the various "ointments, pastes, tablets and capsules. The ingredients are "set out in the British Pharmacopoeia, and similar products are "manufactured by other British and foreign manufacturing "chemists. The secret processes consist in the actual methods "of preparation of the products and, also, in the method of "storing and packaging. For example, a special type of ampoule "is used by the company for certain of its products, and the "company, by its agreement, undertook to impart its own "methods of manufacture and packing to the Burmese "Government.

"(iv) The processes referred to in sub-paragraphs (i), (ii) and "(iii) above cannot be learned by the study of textbooks. "Knowledge of these processes is in some cases imparted by "the company to the Burmese Government by training suitable "Burmese or European staff for employment in the factory in "Burma. In other cases the knowledge is being imparted by "the direct communication of written information.

"11. The company might have erected its own factory in "Burma, but its directors were convinced that the Burmese "Government was determined to have its own chemical industry "in Burma and that several continental firms were willing and "able to provide the Burmese Government with the means to do "so. In entering into the agreement, the company chose the "method of developing its business which seemed to its directors "to be the best available in the circumstances. No similar "agreement with any other foreign government or any other "party had been made by the company. Since entering into "the agreement, the company has retained its agency in Burma "and has continued to supply this agency with its own products. "The company's Burmese agency will become progressively less "important as the Government factory in Burma comes into "production. At the time of the hearing of this appeal "(February, 1955) the factory was not completed but, as "provided by paragraph 1, Part IV, of the agreement, the mini-"mum sum of £25,000 was being paid as from October 20, 1953."

I have thought it necessary to set these findings out at length, because, in a case such as this in which one question is whether there was evidence upon which the commissioners could properly arrive at their determination, it may do them less than justice to attempt a paraphrase. The same consideration applies to their statement of the contentions of the parties and their own determination. Accordingly I set out these also.

"13. It was contended on behalf of the company: (i) that

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Viscount Simonds.

"under Part I of the agreement, to which the sum of £100,000 "was solely annexed, the company was parting with items of "fixed capital; (ii) that, in the alternative, the said sum of "£100,000 was a sum received by the company for an exclusive "licence to the Burmese Government; (iii) that, in either event, "the said sum of £100,000 was, as described in Part I of the "said agreement, a capital sum; (iv) that, in any event, the "sum received by the company for disposing of the fruits of its "experience did not arise in the course of a trade carried on by "the company; (v) that, in any event, the said sum of £100,000 "was not properly included in computing for income tax purposes "the profit of the company for the said year 1954–1955.

"14. It was contended on behalf of the respondent: (i) that, "on the true construction of the said agreement, the said sum of "£100,000, no less than the annual sum of £25,000, was received "by the company for providing services in the course of carrying "on its trade as wholesale druggists; (ii) that, on the true "construction of the said agreement, Parts I and II were inter-"locking and inter-dependent, and involved services to be "rendered to the Burmese Government, and that the payment "of the said sum of £100,000 was only the first instalment of "remuneration for such services; (iii) that the disposal of secret "processes by the company was not the sale or assignment of "property of the company but a method of developing and "exploiting its business by imparting its knowledge and experi-"ence to the Burmese Government in return for a consideration "of an income nature; (iv) that the provision of the facilities "agreed to be furnished under Part I of the said agreement was "within the trading objects of the company, and, in so far as "the said sum of £100,000 was received in consideration for "provision of these facilities, it arose to the company either "from the trade it had previously carried on, or from a new "trade which it had commenced to carry on on October 20, 1953; "(v) that, in any event, the said sum of £100,000 was properly "included in computing for income tax purposes the profits of "the company for the said year 1954–55.

"15. We, the commissioners who heard this appeal:

"(i) Held that it was not possible, on the evidence set out in "paragraphs 3–12 above, to consider each part of the agreement "of October 20, 1953, separately. While the factory was in "course of erection; while the training of staff was proceeding; "and while plant and machinery were being obtained, payments, "which the company admitted to be of an income nature, were "being made, and we were unable to take the view that the "said sum of £100,000 was paid simply for the sale or assign-"ment to the Burmese Government of secret processes analogous "to patents;

"(ii) even if the view were taken that the main part of the "consideration of £100,000 was received by the company for "imparting these secret processes to the Burmese Government,

"we were still of opinion that the company had not sold or "assigned any property. For example, other British and "continental firms admittedly had the knowledge and did "prepare anti-toxins, and the company after the signing of the "agreement, as much as before, was still in a position to prepare "such products according to the formulae and methods which it "had perfected, which remained secret, except to the extent that "some of them had been imparted to the Burmese Government;

"(iii) considering as we do that the whole agreement must "be read together, we think that it is one for the provision of "services. The provision by the company under Part I of the "agreement of what, in clause (D) of that Part, are called "'facilities' is not in our opinion the sale or assignment of a "capital asset in consideration of a capital price, nor is it the "grant of a licence in consideration of a capital payment;

"(iv) we also rejected the company's alternative contention "that the said sum did not arise to the company as a receipt "of its trade as wholesale druggists because it had never "previously entered into such an agreement. On the contrary, "we held that the company had, on the evidence in this case, "chosen the method which appeared to its directors to be the "best means of exploiting its business as wholesale druggists "in Burma, such method being in our opinion clearly within "the powers taken by the company in its memorandum of "association. We, therefore, held that the said sum of £100,000 "arose to the company either in the course of the trade which "it had hitherto carried on or in the course of a new trade "which it commenced to carry on on October 20, 1953, and that "in either event the said sum was properly included in the "computation for income tax purposes of the company's profits "as wholesale druggists for the said year 1954–55."

Finally they stated the point of law for the opinion of the High Court in these terms: "17. The point of law for the opinion "of the High Court is whether on the facts found by us and set "forth in paragraphs 3–12 inclusive, there is evidence on which "we could properly arrive at our determination that the said "sum of £100,000 was properly included in the computation for "income tax purposes of the profits of the company's trade for "the year 1954–55, and whether on the facts so found our "determination was correct in law."

My Lords, it is always easy to be wise after the event, and I would not be unduly critical of the way in which the commissioners discharge their very difficult task. But it is clear that much confusion has arisen in this case from the fact that the Crown was permitted to put forward alternative contentions, and that the commissioners' determination was stated in an alternative form. That part of paragraph 15 (iv) of the case which begins with the words: "We, therefore, . . . " clearly cannot be supported unless there is a finding of fact that the company did commence to carry on a new trade on October 20, 1953, in

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Viscount Simonds.

the course of which this sum of £100,000 arose to the company. But there is no such finding, and if there was, the sum could not possibly be included in the computation of the company's profits as wholesale druggists for the year 1954–55. It would not, I think, on this ground alone be improper to say that the commissioners' determination cannot stand. But I prefer to rest my opinion on broader grounds which are substantially those of Upjohn J. and the Court of Appeal.

In my opinion, the fundamental error of the commissioners lay in a misconstruction of the agreement which is the basis of their determination in paragraph 15 (i), (ii) and (iii) of the case. I agree so fully with the way in which Romer L.J. has dealt with this part of the case that I will adopt his words. After a careful analysis of the agreement he says[1]: "From this it follows, and "is in my opinion the fact, that the £100,000 was solely referable "to the promises given by the company under Part I of the "agreement, and none the less because there appears to be some "degree of overlap between those promises and the services which "it agreed to perform under Part II. Accordingly, the only "relevant investigation, for the purposes of this aspect of the "matter, is as to what the company had to do in order to earn "the £100,000 as distinct from what it had to do before it could "claim the annual remuneration." This is wholly at variance with the view of the commissioners that the whole agreement must be read together. I repeat their words: first, "We . . . "held that it was not possible . . . to consider each part of the "agreement of October 20, 1953, separately," and secondly, "considering as we do that the whole agreement must be read "together, we think that it is one for the provision of services." I could not accept the conclusion that the agreement, even if its parts are read together, could be regarded as one for the provision of services and nothing else. For Part I is still there. It was an error of the commissioners to treat the consideration which moved from the company under that part as being for services and nothing else. This argument was persisted in before the House, but it so flatly contradicts the language of the agreement that I need say no more about it.

It was, no doubt, the corollary of their view that the agreement was one for the provision of services, that the commissioners should say that, in any event, the company had not "sold or assigned any property" to the Government. Here, again, they fell into an error which vitiates their determination. For it is manifest that a secret process, whether in composition or methods of storing and packing, is something which can be disposed of for value and that, by imparting the secret to another, its owner does something which could not fairly be described as "rendering a service." I would not think that authority is

[1] [1957] 1 W.L.R. 288, 307; [1957] 1 All E.R. 336.

needed for so obvious a proposition, but it may be found in *Butterworth* v. *Page*.[2]

It still remains to ask whether, assuming that the £100,000 was in whole or in part consideration for the sale and purchase of an asset or assets, such assets were, to use the language of the company's first contention, "items of fixed capital." This is a question frequently arising in income tax cases and I should be disposed in general to accept the determination of the commissioners. For the line is often difficult to draw. But, in the present case, bearing in mind particularly what Lord Radcliffe said in *Edwards* v. *Bairstow*,[3] I come to the conclusion that the view of the commissioners cannot be sustained. It was perhaps a doubt in the mind of the inspector of taxes whether this sum could be regarded as an income receipt of the company's trade as "wholesale druggists" which led to the alternative suggestion of a new trade. But, however that may be, the evidence (I am now looking at the question propounded in the case) is overwhelming that the company parted with a capital asset and received for it a capital sum. Of paramount if not decisive importance is the agreement itself. I need not repeat its recitals or its terms. The company parted with something for which the Government was prepared to pay no less than £100,000. Its possession had secured for the company a substantial share of the Burmese market: its loss will mean (in the words of the commissioners) that the "company's Burmese agency will "become progressively less important," or, in other words, that the company has parted with an asset which was the source, or one of the sources, of its profit. I venture to repeat the question stated by Bankes L.J. in *British Dyestuffs Corporation (Blackley) Ltd.* v. *Inland Revenue Commissioners*[4]: ". . . looking at this "matter, is the transaction in substance a parting by the com-"pany with part of its property for a purchase price, or is it a "method of trading by which it acquires this particular sum of "money as part of the profits and gains of that trade?" I look, accordingly, at this transaction and, with all respect to those who take a different view, do not see how the question can be answered except by saying that the company has parted with its property for a purchase price, and when I say "its property" I mean, as the Lord Justice meant, a capital asset. In this respect I see no difference between a patent and a secret process, and for that view I find ample authority in the decision of the Court of Appeal in *Page* v. *Butterworth*.[5]

A contention was put forward on behalf of the Crown that, even if the divulging of a secret process to the whole world could be regarded as parting with a capital asset, the same could not be said of divulging it to one other. This does not make sense.

[2] (1933) 150 L.T. 262 (C.A.); (1935) 153 L.T. 34 (H.L.).
[3] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.
[4] (1924) 12 T.C. 586, 596.
[5] 150 L.T. 262.

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Viscount Simonds.

The whole value of the secret might conceivably not be lost at once to the original owner but that its value must be greatly diminished is obvious: in the present case it is doubtful whether, within a measurable time, it will have any value at all, at any rate so far as the Burmese market is concerned. I adopt with respect the apt words of Lord Fleming in *Haigh's Trustees* v. *Inland Revenue Commissioners*[6]: "... the transaction here "in question was not merely a use of the subject salva rei "substantia but necessarily involved the realization of a con- "siderable part of its capital value."

My Lords, I think that the commissioners have in this part of the case been led into error by two things: first, by the introduction by the Crown of the suggestion of a new trade, consisting presumably of imparting information as to secret processes and other matters, with which I have already dealt; secondly, by the construction they put upon, and the weight they gave to, the evidence of Mr. Fergusson. In paragraph 11 of the case it is summarized thus: "In entering into the agree- "ment the company chose the method of developing its business "which seemed to its directors to be the best available in the "circumstances." In paragraph 15 (iv) they say: "We held "that the company had, on the evidence in this case, chosen "the method which appeared to its directors to be the best means "of exploiting its business as wholesale druggists in Burma." I am inclined to agree with learned counsel for the company that there has been a significant change in the language of the two paragraphs, but I do not attach much importance to it. For the decisive fact is not what was the company's motive in entering into the agreement but what it in fact effected. I cannot, however, suppose that Mr. Fergusson, if he spoke of the best available method of developing the company's business, had in mind any fine distinction between an income or a capital receipt or indeed had anything in mind except that, if the Government were to become competitors in Burma, the company's prudent course was to cut its loss as best it could and use the proceeds in the development of its business elsewhere. I should not care to attribute to any man of business the notion that the best way of developing the company's business in Burma was to take a step which might effectually put an end to it. I conclude, therefore, that the Crown's appeal must be dismissed, and I come to the cross-appeal. Here I have felt greater difficulty.

My Lords, as I observed at the outset of this opinion, both sides have argued this case from the beginning, before the commissioners and Upjohn J. and the Court of Appeal, upon what I have called the "all or nothing" basis. The Crown, appealing from the order of Upjohn J., moved that his order should be reversed and the determination of the commissioners affirmed. It is true that the usual formal words followed, "or that such

[6] 1939 S.C. 676, 685; 22 T.C. 725, 735.

"further or other order be made as to the court may seem just." But there was no specific suggestion that the sum of £100,000 could or should be split up, part being regarded as a capital, and part as an income, receipt. It is probable that, if such a suggestion had been made at the outset, evidence would have been directed to the point. Should the taxpayer now, when it has been decisively determined that the £100,000 was not a sum paid for the provision of services and nothing else, at this stage be subjected to the further or alternative claim that some part at least of that sum was so paid? I have been persuaded by what has fallen from your Lordships that he should not, and in particular by the opinion, which I have had the privilege of reading, of my noble and learned friend, Lord Denning. It would have been reasonable to come to a different conclusion if there had been any concealment by the company of relevant facts which have now come to light. But that has not been the case. Knowing all that was material to know, the Revenue authorities deliberately made a challenge which has been rejected. I do not think they should be allowed to make another. I may add that I am the more ready to adopt this view because I think that both sides were probably right in throughout regarding the whole sum of £100,000 as indivisible. It would, I believe, pass the wit of man to apportion the sum between the items comprised in Part I of the agreement which are clearly, less clearly, or doubtfully, of a capital nature. Nor would the problem be rendered easier by the fact that an item which might in isolation not be regarded as a capital asset could in its context be so regarded. I should, for instance, think it difficult to separate the value of a secret imparted to the Government and the value of the service rendered in imparting it.

I have therefore come to the conclusion that the cross-appeal should be allowed. In the result I move your Lordships that the appeal of the Crown should be dismissed and the cross-appeal of the company allowed, that the judgment of Upjohn J. should be restored, and that the Crown should pay the costs of the company here and in the Court of Appeal.

LORD MORTON OF HENRYTON. My Lords, the relevant facts of this case have been fully stated by my noble and learned friend, Viscount Simonds, and I shall not repeat them. The case has given rise to a remarkable difference of opinion on the question whether the sum of £100,000 now in question was, in the hands of the respondent company, an income receipt or a capital receipt. The Special Commissioners found that it was wholly income, Upjohn J. held that it was wholly capital, and the Court of Appeal took the view that it was capital in so far only as it was to be attributed to the imparting to the Government of Burma of the secret processes mentioned in paragraph 10 of the case stated, and remitted the case to the Special Commissioners to

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Morton of Henryton.

ascertain what part, if any, of the £100,000 should be so attributed.

My Lords, I think that this is a difficult and borderline case, but, in my opinion, the Court of Appeal arrived at the right conclusion. I am content to adopt the reasoning of the Master of the Rolls and Romer L.J., in which Birkett L.J. concurred, and I shall not take up your Lordships' time by repeating that reasoning in language of my own; but, having regard to the course of the argument in your Lordships' House, I shall add a few words on two questions. They are, first, whether, having regard to the evidence and to the terms of the agreement of October 20, 1953, it is possible to sever the imparting of the secret processes from the rest of the consideration moving from the company under Part I of that agreement; secondly, whether the course of the proceedings in this House and in the courts below affords any reason for reversing the order made by the Court of Appeal.

My Lords, I realise fully that if the order of that court stands, it will be no easy task for the commissioners to ascertain what part, if any, of the £100,000 should be attributed to the imparting of the secret processes to the Government of Burma, but I do not regard the difficulties as insuperable. Paragraph 10 of the case stated shows that the commissioners already have a considerable amount of knowledge as to the nature of these secret processes, and no doubt further evidence would be given before them as to the value to be attributed to the imparting thereof, on the terms set out in the agreement, as compared with the value of the other matters mentioned in Part I of the agreement. And, to my mind, the imparting of these secret processes, even if it can properly be described as a "service," is a service different in kind from all other services mentioned in Part I. However the imparting may be carried out, it is completed when the secret processes come into the knowledge of the Government of Burma; and I agree with the Court of Appeal in thinking that when that event happens, the company will have sold a part of its property, which is a capital asset. It appears to me that this part of the company's property could have been sold by itself, even if nothing else had been included in Part I; and if so, it must surely be possible to identify it and single it out from the rest of Part I.

As to the course of the proceedings, counsel for the Crown have contended strenuously that the £100,000 is wholly income, while counsel for the company have contended, no less strenuously, that it is wholly capital; but Mr. Senter, for the company, not unnaturally asked your Lordships, if you could not accept his primary contention, to uphold the order of the Court of Appeal. I see no injustice, either to the company or to the Crown, in taking this course; indeed it seems to me the only possible course if the true view is that the part of the £100,000 paid for the imparting of the secret processes was a

capital receipt, and that there was evidence which justified the Special Commissioners in finding that the balance thereof was an income receipt.

I would dismiss the appeal and the cross-appeal.

LORD TUCKER. My Lords, for the reasons which have been stated by my noble and learned friend, Viscount Simonds, I agree that the appeal should be dismissed and the cross-appeal allowed.

LORD KEITH OF AVONHOLM. My Lords, this appeal relates to an assessment made under Case I of Schedule D of the Income Tax Act, 1952, and so is concerned with a tax charged in respect of a trade carried on in the United Kingdom or elsewhere. As stated by the Special Commissioners in the case stated, the sole question for their determination was whether a sum of £100,000 paid to the company by the Burmese Government in the circumstances described in the case was a receipt of the company's trade liable to be included in the computation of its profits for the purposes of the assessment for 1954–55. The commissioners have found that the said sum was properly included in such computation, and the question is whether, on the facts found, their determination was correct in law.

I do not repeat the facts found, which have already been sufficiently stated. If I may summarize the position in a few words, the company which had for many years prior to 1953 been selling its pharmaceutical and other products through an agency in Burma, found itself faced with a challenge to the continuance of this trade in the decision of the Burmese Government to set up a factory in Burma and acquire from some firm of manufacturing chemists the process formulae and knowledge necessary for the production of pharmaceutical products there. The company, in the face of keen competition and with the encouragement of the British Government, secured an agreement with the Burmese Government to give effect to this purpose. It is expressly found as a fact by the commissioners that in entering into the agreement the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances. This finding cannot, in my opinion, be challenged, and it may be supplemented by a quotation from a brochure of the company which is made part of the case: "The "agreement will, during the next seven years, add several million "pounds to U.K. exports. A considerable part of the exports "will consist entirely of 'know-how' and will require no raw "materials."

Upjohn J. took the view that the effect of the agreement was to contradict the determination of the commissioners which he took to mean, I think correctly, that the receipt of the £100,000 under the agreement was a trading receipt in the course of carrying on the trade. If the learned judge was correct, that,

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Keith of Avonholm.

I think, was an end of the case, for it was only on a trading receipt that the company was being assessed. He went on, however, to consider whether the £100,000 was a receipt of an income or capital nature. The Court of Appeal, on the other hand, took the view that the £100,000 was received by the company in the course of its trade, but appear to have taken the view that in so far as part of the £100,000 can be attributed to the imparting of secret information, or secret processes, to the Burmese Government there was the realization of a capital asset and that only the balance of the £100,000 can be regarded as a trading receipt.

I find myself unable to agree with the learned judge or wholly with the learned Lords Justices of the Court of Appeal. I turn at once to the agreement which is the crucial part of the case. I do not, however, regard the circumstances in which the agreement was made as unimportant. The company intended it, as the commissioners found, to be a trading agreement. But it may, of course, contain terms which as regards some or part of the sums received under the agreement prevent them from being treated as trading receipts.

I accept it that the £100,000 was the consideration for what the company undertook to do under Part I of the agreement. What did it undertake to do? A large part of Part I covers, in my view, nothing but the provision of services which might have been supplied by other concerns with whom the company had been in competition to secure the agreement. Such are the provision of drawings, designs, plans and other data for the establishment, erection and installation of the factory; designs and lay-out for the erection of plant, etc., and data and specifications with drawings and instructions and all other information relating to the sources and manufacturers and suppliers of machinery and equipment. I shall assume, though it is not expressly stated in Part I of the agreement, that the information to be supplied included information on secret processes used by the company. There is a reference to "know-how," and this may be significantly related to the reference to "know-how" in the quotation from the brochure already given.

A person in trade or business who has a secret process which he decides to sell may do so in various situations. He may be retiring from business and selling his business to a purchaser. Obviously this is a capital transaction that attracts no tax. Again, he may remain in business, but, being unable from lack of capital or otherwise to develop his secret process, he may sell it outright to another trader. That again would be the sale of a capital asset which would not attract tax. A third type of case would be where the trader imparts his secret knowledge to some other trader, but retains the right to use it in his own business and it may be to share it further with other traders. In such a case it may be said that the secret knowledge is no longer secret knowledge. But that is not perhaps strictly accurate. It is not so secret as it was, but it may still retain a value. And if a

trader, having developed some secret process, made a practice of turning it to profit by selling it like a commodity to other interested parties, possibly with restrictive conditions attached, there would seem to be no sound reason for saying that he was doing anything other than trading in "know-how." Like stock in trade, it might ultimately run down. But in the manifold opportunities of commercial and trading life it might remain a source of profit for a very considerable time. The point to be emphasised is that there is really no difference between trading in "know-how" consisting of a secret process and any other kind of "know-how." I would observe that trading in "know-how" is not quite the same thing as turning one's property to a profitable use. A man may rent his house, or license the use of his patent, without being engaged in trade. With either the trader or the property owner similar considerations may come into play in deciding whether a receipt is a capital or a revenue receipt, but where the receipt is a receipt in the course of trade that may be sufficient to turn the scale in favour of holding a receipt which has the appearance of a capital receipt to be a revenue receipt. Illustrations may be seen in *Californian Copper Syndicate Ltd.* v. *Harris* [7] and *Ducker* v. *Rees Roturbo Development Syndicate Ltd.*[8] The issue in this case is well focused in a sentence of Bankes L.J. in *British Dyestuffs Corporation (Blackley) Ltd.* v. *Inland Revenue Commissioners* [9]: "The real "question is, looking at this matter, is the transaction in substance a parting by the company with part of its property for "a purchase price, or is it a method of trading by which it "acquires this particular sum of money as part of the profits "and gains of that trade?"

The question, then, and the only question, as I see it, is: Was the company trading in "know-how" or realizing "know-how"? In my opinion, there was ample evidence on which the commissioners could arrive at the conclusion that it was trading in "know-how." I find it impossible to hold that they "acted without any evidence or upon a view of the facts which "could not reasonably be entertained," to use the language of my noble and learned friend, Viscount Simonds, in the case of *Edwards* v. *Bairstow*.[10]

If the company had undertaken to build and equip the factory for production it could hardly be doubted that any profit would have been a profit or gain of trade. Instead, it undertook to supply the necessary "know-how" for building and equipping the factory. It is, to my mind, immaterial if included in this "know-how" was information known only to itself. That only goes to show that secret information was thrown into the general pool of things provided. If part of the information, facilities and services was provided as a trading operation, and this, to my

[7] 1904 6 F. 894; 5 T.C. 159.
[8] [1928] A.C. 132; 44 T.L.R. 307.
[9] 12 T.C. 586, 596.
[10] [1956] A.C. 14, 29.

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Keith of Avonholm.

mind, is an inescapable conclusion, then the whole, in my opinion, was supplied as a trading operation. I find it impossible to split the £100,000 into a non-trading receipt and a trading receipt according as the information supplied was secret and non-secret.

Further, alongside and contemporaneously with the obligation of Part I, the company was carrying out the obligations of Part II of the agreement. These included training Burmese and others in what must, ex hypothesi, have been both secret and non-secret "know-how." The annual payments made by the Burmese Government under Part II are accepted as payments that attract tax and, as I see it, necessarily so because they are payments for the supply of services. The Special Commissioners have held that the payment under Part I was also for the supply of services, and I think they were right in so holding. The services may have been different in kind from those given under Part II, but both were directed to the same end. I cannot see any essential difference that would lead to the conclusion that one set of services led to a profit earning or trading receipt and the other to the realization of a capital asset.

Lastly, though this is more by way of addendum to what I have already said, the agreement imposed on the Burmese Government an obligation of secrecy not to divulge such information as was conveyed to them by the company without the written consent of the company, which was not to be unreasonably withheld. Also the Burmese Government was not, without the written consent of the company, to export any goods manufactured under the agreement, with certain exceptions, and, if consent was given, the company was to be paid a royalty on exports for a period not exceeding 14 years. These stipulations in themselves go a long way to prevent the agreement resulting in the dissipation of a valuable asset. There is a great difference between giving away knowledge to the world at large or for the exclusive use of a buyer to the exclusion of the seller and selling the knowledge to selected individuals from time to time while retaining the right to continue using the knowledge oneself. In the present case the company could repeat the process, if not ad infinitum, at least for a very considerable time, to governments or individuals all over the world with considerable profit to itself.

I would refer to only a few of the cases cited during the hearing. None of them seems to me to touch the particular circumstances of this case, and they are more useful to point differences rather than similarities.

Reference was made to the case of *Withers* v. *Nethersole*.[11] It was, I think, relied on by Upjohn J. to some extent. I do not get much assistance, however, from that case. The critical finding of the commissioners was that Miss Nethersole was not carrying on a profession or vocation at the material time. The

[11] [1948] L.J.R. 805; 64 T.L.R. 157; [1948] 1 All E.R. 400.

question was whether Miss Nethersole was liable in tax under Case VI of Schedule D as having received sums of a revenue nature. What the Court of Appeal and the House of Lords held was that there was a sale or assignment by Miss Nethersole of her rights in a play and that the sums received were capital, the price, in other words, received from the realization of her property. Lord Simon said [12]: "Here we have the sale and "transfer outright of an item of property which previously "belonged to the respondent, not the licence to use it granted by "its unchanged owner, and this does not give rise to annual "profits or gains *unless the sale takes place in the course of "carrying on a trade or profession.*" The emphasis on the concluding words in this passage is mine. The other members of the House took the same view, though Lord Porter and Lord Uthwatt prayed in aid the language of the Copyright Act. I would emphasize again, however, the words of Lord Uthwatt [13]: "A sale, *not in the way of trade*, of an asset does not attract tax "on the consideration. Whatever else comes within the ambit "of annual profits and gains, the consideration received by Miss "Nethersole does not." If Miss Nethersole had been carrying on the business or profession of authoress or dramatist, very different considerations would have arisen. It would, in my opinion, have been very difficult to reach the conclusion that the sums received by her were not business or trading receipts. A very similar case was that of *Haig's Trustees* v. *Inland Revenue Commissioners.*[14] There again it was found that the trustees were not carrying on a trade or adventure, and the Court of Session sitting as Court of Exchequer held that sums received by the sale of publication rights in Earl Haig's war diaries were capital receipts, not revenue receipts, under Case VI of Schedule D. The court proceeded largely on the view that the transaction involved the realization of a considerable part of the value of the diaries, a very material factor in a case under Case VI, but of relatively little importance in a case under Case I or Case II.

Lastly, I should mention *Page* v. *Butterworth.*[15] This again raised no question of trading. The case was concerned with the nature of sums received under awards made by the Royal Commission on Awards to Inventors in respect of the user of aeroplane designs and patents by H.M. Government and the United States Government during the 1914–1918 war. Mr. Handley Page was at the time of the user the owner of the patents and designs. An assessment to income tax was made on him in respect of the awards. The case was thus one of receipts of ownership, not receipts of trading, and would fall under Case III or Case VI. In this House the assessment was discharged on a point that was not considered by the Court of Appeal. The Court of Appeal had discharged the assessment on the ground that the payment was

[12] [1948] L.J.R. 805, 809.
[13] Ibid. 811.
[14] 1939 S.C. 676.
[15] 150 L.T. 262 (C.A.).

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Keith of Avonholm.

in the nature of a capital payment and not taxable under Schedule D. The ratio of this decision was that Mr. Handley Page had been compelled by the Government to part with the whole of his property, which was mainly in the designs. As Slesser L.J. put it [16]: "His property was his secret process and "his knowledge, and that property was, at the request or by "compulsion of the Government, dissipated among all his com-"petitors." The case was cited chiefly, however, for a passage in the judgment of Romer L.J. where, assimilating the knowledge of the owner of a secret process to that of the monopoly of a patentee, he says [16]: "The owner of a secret process such as "was possessed by Mr. Handley Page stands in a very analogous "position; he has not a monopoly at law, but he has a monopoly "in fact—a monopoly in fact arising from the possession by him "of the secret knowledge of the process that he is carrying on. "That secret knowledge is as much his capital asset as is the "patent monopoly the capital asset of the patentee, and, like "the patentee, he can use that capital asset in either or both of "the following ways: he can himself carry on the secret process, "or he may—it is very seldom done owing to the obvious danger "involved—grant a licence to a third person to carry on the "secret process, securing himself against his secret process being "divulged by that third party to others. In both these cases the "profits he derives from carrying on the secret process himself "and the royalty he might derive from the licensee would be "annual profits or gains within the meaning of Schedule D. But, "supposing he sells his secret process, or supposing, as here, he "surrenders his *quasi* monopoly by making it public to the world, "then I say that, if he gets paid for doing either one or the "other of those things, the money he receives in payment is a "capital asset. Here, at the invitation of the Government, he "surrendered to the world his secret knowledge, and his capital "asset thereupon ceased to exist." While the case is not, I think, strictly in point where a man is using his secret process for purposes of trade as here, I would place this case, if necessary, in the second category specified by Romer L.J., and on that view, the sum received would on the learned Lord Justice's analysis be a profit or gain under Schedule D.

Since preparing this opinion I have had the opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Denning. The reference by the commissioners in paragraph 15 (iv) of the case stated to a new trade is a puzzling feature of the case. It does not appear in the statement of facts and it is not, I think, a finding in fact. It is at best an inference in law, and I can find nothing in the findings of fact to support it. What the company did was, in my opinion, no more than a legitimate extension of their existing trade.

In this case it is, I consider, impossible to disturb the determination of the commissioners. I would allow the appeal, dismiss

[16] 150 L.T. 262, 272.

the cross-appeal, and answer the question in law in the case in the affirmative.

LORD DENNING. My Lords, the case stated that the *sole* question was whether "a sum of £100,000" paid to the company by the Burmese Government was a receipt of the company's trade liable to be included in the computation of its profits for the year 1954–55: and the Special Commissioners held that it was. The case treated the £100,000 as being a single undivided amount. Yet the Court of Appeal have remitted the case to the commissioners with a direction to divide it up. They have directed the commissioners to ascertain "what part, if any" of the £100,000 is a capital receipt and to adjust the assessment accordingly.

Both parties now appeal to this House against the order of the Court of Appeal: and well they may, seeing that they had throughout fought their battle on the footing that either the whole £100,000 was a taxable receipt or none of it was. It was "all or "nothing." Yet this order exposes them, not to the one battle they reckoned on, but a long-drawn-out war. The Master of the Rolls, after he made the order, said: "It would not surprise me "if it were years before this case was finally decided after going "back to the Special Commissioners," and Birkett L.J. said: "I can imagine endless controversy."

I very much doubt whether it was open to the Court of Appeal to remit this case as they did. The only point of law stated for the opinion of the court is whether "the said sum of "£100,000" was properly included in the profits. It should be noticed that it does not say "or any part thereof." I realize, of course, that a whole is often taken to include a part without anything being said: but that is not a universal rule. I call to mind covenants against assignment or underletting where it has been held that the whole does not include a part. When this case is construed in its setting, I think "the said sum of "£100,000" does not include a part of it. The case refers to the agreement under which the £100,000 was paid. It was paid as an entire sum for a specified consideration. The consideration was the imparting of information and technical data, all of which may be summed up in the new and expressive word "know-how." The Court of Appeal would seek to divide it into two parts: (1) information about secret processes; (2) information about other things. The information about secret processes had in the past been kept confidential to Evans Medical and their staff, and was especially valuable on that account. The information about other things was technical knowledge which was not secret but was no doubt valuable in that it could only be obtained from firms who were expert in it. I can see no sensible distinction between money paid for information of secret processes and money paid for the other information. The only difference is that in the one case the money was paid for information which

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Denning.

up till then had been *secret*, being obtainable only from the one firm: whereas in the other case it was paid for information which was *scarce*, being obtainable from three or four firms. But the money was paid for the same sort of thing in either case. At any rate, the parties to this agreement did not seek to draw any distinction between the two. £100,000 was paid for the lot. It was a single payment for "know-how." The case stated follows suit. It does not attempt to divide the £100,000 into parts. No evidence was given before the commissioners about splitting it up. No point was taken on it either before the commissioners or Upjohn J. It is a new point which appeared for the first time in the Court of Appeal.

Seeing that the case stated does not raise this new point about splitting up the £100,000, I do not think it was open to the Court of Appeal to raise it. The court has, of course, power to remit a case to the Commissioners for further findings when such are necessary to determine the point of law which is raised in the case. That was done in *Leeming* v. *Jones*.[17] But I do not know of any power to remit it for a finding on a new point which has not been raised before. The general rule of every appellate court is not to allow a new point to be raised except on a question of law which no evidence could alter: and this applies equally to a case stated under a statute worded like section 64 (6) of the Income Tax Act, 1952, see *Kates* v. *Jeffery*.[18] *London County Council* v. *Farren*.[19]

I turn, therefore, to consider the entire sum of £100,000. It was payable to Evans Medical on the execution of the agreement of October 20, 1953, and was, no doubt, received soon afterwards. The Revenue authorities included it in their assessment upon Evans Medical for the year 1954–55 under Case I, Schedule D. The question is whether it was properly so included.

Applying the statute, this question can be divided into two parts: (1) Was the £100,000 to be included in the "annual "profits or gains?"; (2) Did it arise or accrue to Evans Medical "from any trade" carried on by it? The first of these, for all practical purposes can be turned into the question: Was it capital or income? The second into the question: Was it received in the course of the company's trade?

So far as the first question is concerned, the Special Commissioners made findings which show that, in their view, the £100,000 was in the nature of income and not capital—see findings (i), (ii) and (iii): and Lord Evershed M.R. made it clear that, if he had to treat it as one entire sum, he, too, would say it was income and not capital. I find his reasoning on this part of the case very convincing: and it is forced home by the speech of my noble and learned friend, Lord Keith of Avonholm, to which we have just listened. I would just mention, if I may, that Romer

[17] [1930] 1 K.B. 279, 284 (C.A.); [1930] A.C. 415; 46 T.L.R. 296 (H.L.).

[18] [1914] 3 K.B. 160.

[19] [1956] 1 W.L.R. 1297; [1956] 3 All E.R. 401.

L.J. made what looks to me like a slip at a critical point of his reasoning. He assumed that the £100,000 was only payable after the consideration for it was fully performed. It was in truth payable in advance—and indeed so paid—for information to be given over an indefinite period in the future. This period might run into years and has in fact done so, for the factory was not even built three years later when the case reached the Court of Appeal.

The way I look at it is this: Evans Medical were faced with a difficult problem. The Burmese Government were determined to make these products themselves. This would mean that Evans Medical would be forced out of the Burma market or, at any rate, would lose a good deal of business there. Their goodwill in that country would be diminished in value. But that would not be due to any sale by them of a capital asset. It would take place no matter which of the competing firms obtained the contract. To make up for this coming loss of market, Evans Medical did a sensible thing. They secured the contract to supply the "know-how" to the Burmese Government. This did not purport to be—and was not in fact—a *sale* of secret processes. All that Evans Medical did was to tell the Burmese Government about those processes so that they could use them too. Evans Medical still retained the right to use the processes themselves and stipulated that the Burmese Government should not divulge the information without their consent. So regarded, the supply of information about the secret processes was nothing more nor less than the supply of "know-how"—a particularly valuable part of it, no doubt—but still the supply of "know-how." And that is how the parties to this agreement treated it. They drew no distinction between it and the other kinds of "know-how" to be supplied in return for the £100,000.

What, then, is the position of "know-how" for tax purposes? It is undoubtedly a revenue-producing asset. The possessor can use it to make things for sale: or he can teach it to others for reward. But he cannot sell it outright. It is rather like the "know-how" of a professional man. He can use it to earn fees from his clients: or he can teach it to pupils for reward: and so produce revenue. But he cannot sell it as a capital asset for a capital sum. He cannot sell his brains. So with a company which has special manufacturing skill and experience, but has no secret processes. Its "know-how" is inseparable from the "know-how" of its staff and servants. It cannot prevent them using it any more than it can prevent them using their own brains: see *Herbert Morris Ltd.* v. *Saxelby*.[20] It cannot sell it as a capital asset. It can only use it or teach it. Even with a company which owns secret processes, the supply of "know-"how" is not like the sale of goodwill or a secret process, for such a sale imports that the seller cannot thereafter avail himself of the special knowledge with which he has parted, see *Trego*

[20] [1916] 1 A.C. 688, 704; 32 T.L.R. 297.

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.
Lord Denning.

v. *Hunt*,[21] and it may then rightly be regarded as the sale of a capital asset, see *Butterworth* v. *Page*.[22] But the supplier of "know-how" always remains entitled to use it himself, as was the case here.

For my own part, therefore, I see nothing wrong in the findings (i), (ii) and (iii) of the commissioners, and am prepared to accept the view that the £100,000 was received for the supply of "know-how"—call it services if you like—over the ensuing years. But I feel difficulty in saying that it was received "in "the course of the company's trade" as wholesale druggists and so forth. It may be said to be an activity of a different kind altogether. The Revenue authorities appear to have felt the same difficulty, but thought it did not matter so long as the £100,000 was received in the course of some trade or other. They took the view that it did not matter whether it arose from *the existing trade* which Evans Medical had theretofore carried on or *from a new trade* which it commenced on October 20, 1953. Being in this state of mind, they formulated their contention on this point in the alternative. They contended that the £100,000 "arose to the company either from the trade it had previously "carried on, or from a new trade which it had commenced to "carry on on October 20, 1953." Even if the Revenue authorities did not formulate the contention themselves, the commissioners so understood it and inserted it in the case. It was no doubt submitted to the Revenue authorities and approved by them, so they cannot now disavow it. The commissioners accepted the contention in the very formula which the Revenue authorities had adopted: "We, therefore, held" they said, "that the said sum of £100,000 arose to the company either in "the course of the trade which it had hitherto carried on or in "the course of a new trade which it commenced to carry on on "October 20, 1953."

It is very unfortunate for the Revenue authorities that they formulated their contention in that alternative form or approved it as they did: for it has since become quite apparent that it does matter very much whether the £100,000 was received in the course of the existing trade or at the beginning of a new trade. If it was received in the course of a new trade, it could not be brought into the assessment of the company's existing trade for 1954–55 which was the only assessment here in question: but would have to come into a new assessment for the new trade calculated in the special way that profits are calculated at the commencement of a new trade. When Upjohn J. pointed out this difficulty to Sir Frank Soskice, he abandoned any reliance upon a new trade. But this abandonment does not get the Revenue authorities out of the difficulty. Sir Frank Soskice, for all his wit, cannot cancel half a line of the finding nor can

[21] [1896] A.C. 7, 24, 25; 12 T.L.R. 80.

[22] 150 L.T. 262 (C.A.).

his tears wash out a word of it. The finding by the commissioners still remains an alternative finding. The Revenue authorities have no right to take the first alternative which suits them and reject the second alternative which does not. For aught we know, the commissioners, if asked to decide between the two alternatives, might have come down in favour of the second.

Sir Frank Soskice found himself, therefore, forced to say that the only proper inference from the primary facts was that the £100,000 was received in the course of the *existing* trade. He relied on the fact found by the commissioners that "in entering "into the agreement, the company chose the method of "developing its business which seemed to its directors to be "the best available in the circumstances." But this fact is neutral. "Its business" may mean either its existing business or its new business. When read with the alternative finding, it is clear that the commissioners did not intend by that sentence to decide whether the company was developing its existing business or starting a new one. The case stated, read as a whole, seems to me quite consistent with the view—which Upjohn J. thought was the only reasonable view—that[23] "the company "was not 'exploiting' its business in the only sense in which "that word is relevant, that is, of carrying on its trade of whole-"sale druggists in Burma, but in and by the agreement it "entered into the *entirely new activity* of acting as adviser of "the Burmese Government by assisting to set up a completely "new industry there." Such new activity might have been taxable as being an adventure in the nature of trade but it cannot be brought into the asessment of the company's existing trade for 1954–55.

The upshot of it all is that, although the Revenue authorities have a finding in their favour that the £100,000 was income and not capital, nevertheless they have no finding that it was received in the course of the existing trade which is being taxed. It may equally well have been received in the course of a new activity which is not being taxed. That is not good enough to enable the Revenue authorities to succeed in this case stated. The law never gives judgment in favour of a plaintiff when the only finding is equally consistent with liability or non-liability. The Revenue authorities have themselves to thank for this result because of the way they formulated their contentions. They are hoist with their own petard. They can go away and ponder again the words of Lord Cairns in *Partington* v. *Attorney-General*[24]: "If the Crown, seeking to recover the tax, cannot "bring the subject within the letter of the law, the subject is "free."

[23] [1956] 1 W.L.R. 784, 802; [1956] 2 All E.R. 706.

[24] (1869) L.R. 4 H.L. 100, 122.

H. L. (E.)
1957
MORIARTY v. EVANS MEDICAL SUPPLIES LTD.

I would therefore dismiss the appeal and allow the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Whitfield, Byrne & Dean for Whitley & Co., Liverpool.*

F. C.

[QUEEN'S BENCH DIVISION.]

1957
Dec. 6.
Lord Goddard C.J., Devlin and Pearson JJ.

* WERNICK *v.* GREEN.

Animal—Poultry—Disease—Poultry bought and resold day later for slaughter — Poultry fed — Whether poultry "fed" for slaughter—Live Poultry (Movement Records) Order, 1954 (*S.I.* 1954, *No.* 122), *art.* 2 (1).

By article 2 (1) of the Live Poultry (Movement Records) Order, 1954, "'Poultry dealer' means a person habitually engaged in the "business of buying and reselling poultry . . . a person shall not "be deemed to be a poultry dealer by reason only that he sells for "slaughter poultry which he has purchased and fed for that "purpose."

The defendant was charged that, being a poultry dealer, he failed to keep records as required by article 3 of the order. The defendant bought poultry already fattened and generally kept them on his premises for one day before selling them for slaughter. He fed the poultry to keep them alive and avoid cruelty. The magistrate found that "fed for slaughter" as used in the farming industry meant fattened for slaughter, and held that the defendant, having failed to satisfy him that his poultry were "fed for "slaughter," did not fall within the exemption and, therefore, should have kept records. On appeal against conviction:—

Held, that "fed for slaughter" did not necessarily mean "fattened for slaughter" and, therefore, as the defendant had fed poultry which he sold for slaughter, he was not deemed to be a poultry dealer within the meaning of article 2 (1) and was not required to keep records.

CASE STATED by South Staffordshire stipendiary magistrate.

The defendant, Joseph David Wernick, was charged on an information preferred by the prosecutor, Fredrick Green, that he unlawfully contravened article 3 of the Live Poultry (Movement Records) Order, 1954,[1] made under the Diseases of Animals Act, 1950, in that, being a poultry dealer, he failed to keep a record in which there was correctly entered the particulars

[1] Live Poultry (Movement Records) Order, 1954, art. 2 (1): "'Poultry dealer' means a person "habitually engaged in the business "of buying and reselling poultry or "day-old chicks of poultry but does "not include a person who as "auctioneer sells poultry or day-old "chicks of poultry which are the "property of another person, and a "person shall not be deemed to be a "poultry dealer by reason only that "he sells for slaughter poultry "which he has purchased and fed for "that purpose."

specified in article 3 contrary to sections 78 and 79 of the Act of 1950.

The magistrate found the following facts: The defendant was a person habitually engaged in the business of buying and reselling poultry. The greater part of the poultry he bought was already fattened for slaughter. The expression "fed for "slaughter" as used generally in the farming industry meant "fattened for slaughter." All the poultry purchased was sold by the defendant for slaughter. A substantial proportion of the poultry was retained by the defendant on his premises for only one day before being resold for slaughter. The defendant gave food to poultry on his premises to keep them alive and avoid cruelty. The defendant did not keep records in accordance with the Order of 1954.

It was contended on behalf of the defendant that he was not a poultry dealer within the provisions of article 2 in that he sold for slaughter poultry which he had purchased and fed for that purpose; that the onus of proving him to be a poultry dealer within article 2 lay on the prosecutor; and that the article should be strictly construed and the word "fed" given its ordinary natural meaning.

It was contended on behalf of the prosecutor that in the definition of "poultry dealer" in article 2 (1) the emphasis was on the word "only"; that to escape liability the onus was on the defendant to show that purchasing and feeding for slaughter was his only occupation in connexion with poultry dealing, and if he strayed at all from that conception, he could not claim the protection of the exemption; that the onus was on the defendant to satisfy the court that he came within the exemption and he had not done so; that "fed," although it had to be given its ordinary meaning could not be taken out of its context, and had to be read in conjunction with the qualifying words "for that purpose" that was "for slaughter," and that, accordingly, "fed for that "purpose" meant "fed for slaughter"; that the purpose of the exemption in the proviso was to protect poultry keepers, namely, persons who eventually sold for slaughter poultry which they had purchased (as opposed to hatched) and had also fed for slaughter; that the same definition was used in the Live Poultry (Restrictions) Order, 1954, in regulation 5 of which it was thought necessary, in another exemption, to use the words "immediate "slaughter," which indicated that the word "immediate" was not omitted from the exemption to the definition in the Live Poultry (Movement Records) Order, 1954, by inadvertence; that if the defendant's contention were correct, and if "fed" meant, in its ordinary and natural meaning, merely "the casual provision "of sustenance sufficient to avoid hunger," then the definition could be interpreted as permission to contravene regulation 7 (2) of the Live Poultry (Restrictions) Order, 1954, and would make nonsense of that regulation.

The magistrate was of the opinion that the prosecutor had

1957

WERNICK v. GREEN.

made out a case that the defendant was a poultry dealer within the meaning of the order, unless it could be established that he came within the exemption contained in the definition in article 2 (1). The onus of proving that the defendant came within the exemption to the definition lay on the defendant. In arriving at that opinion the magistrate had regard, among other authority, to section 81 of the Magistrates' Courts Act, 1952. The word "fed" in the exemption could not be taken out of its context and therefore the defendant had to satisfy the magistrate that he had "fed for slaughter," that was, "fed in preparation for "slaughter," or "fattened" the poultry he had purchased, before he resold such poultry. To "feed for slaughter" in relation to poultry meant to fatten. On the facts the defendant did not so satisfy the magistrate, and since he kept no records, in accordance with the order, he committed the alleged offence, and, accordingly, the magistrate convicted the defendant and imposed a fine of £5 and ordered him to pay £8 14s. 9d. special costs.

The defendant appealed.

P. C. Northcote for the defendant.
B. S. Wingate-Saul for the prosecutor.

No cases were cited in argument.

LORD GODDARD C.J. By article 3 of the Live Poultry (Movement Records) Order, 1954, it is provided that poultry dealers shall keep certain records. I have no doubt that that is for the purpose of enabling the inspectors of the Ministry of Agriculture and Fisheries to trace disease, fowl pest, and so on, back to the place where it started. Article 2 (1), having stated that "'Poultry dealer' means a person habitually engaged in the "business of buying and reselling poultry or day-old chicks," exempts auctioneers, but also says "a person shall not be "deemed to be a poultry dealer by reason only that he sells for "slaughter poultry which he has purchased and fed for that "purpose." So if a man is selling poultry for slaughter, he is not a poultry dealer provided that he has fed the birds for that purpose.

The magistrate has construed "fed" as meaning "fattened." He has also found "that all the poultry purchased was sold by "the appellant for slaughter. That a substantial proportion of "the poultry was retained by the appellant on his premises for "only one day before being resold for slaughter." Then: "That "the appellant gave food to poultry on his premises to keep them "alive and avoid cruelty."

I do not think that we are entitled, in a section which creates a criminal offence, to say that "fed" necessarily means fattened because a man may buy poultry for sale but may also buy birds which are already fattened or partly fattened. Why should not

he? If he is buying birds and is going to sell them for slaughter he would not want the birds he buys to get thin, so he would feed them. He may give the birds more food or less food, but he certainly would not let them get thin, and I think that they are being fed for the purpose for which he keeps them because he is going to sell them. If the Ministry of Agriculture want to make an exemption which is not so wide, or to limit it in some way, they must try their hands with some other order; but on the finding that the appellant did feed the poultry I do not think any offence is committed, and for these reasons I would quash the conviction.

DEVLIN J. I agree. If, as Mr. Wingate-Saul submits, the Minister intended that "fed for slaughter" should be equivalent to "fattened"—and that is what the magistrate has found—it is difficult to see why the Minister did not use the word "fattened." It is suggested that if he had used the word "fattened," people might have interpreted that to mean that a bird was not being fattened unless the fat content was increased and the lean content remained stationary. I should have thought the word "fattened" would have conveyed what Mr. Wingate-Saul says the Minister intended it to convey to anybody. But we have to construe the phrase "fed for slaughter," and, like my Lord, I am unable to see why if the bird is given food to prevent it getting thinner that is not just as much "fed for slaughter" as giving it food to fatten it and increase its weight.

For these reasons, I agree with the conclusion my Lord has proposed.

PEARSON J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for Woolley & Co.; Solicitor, Ministry of Agriculture, Fisheries and Food.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

* ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE BOROUGH COUNCIL.

1957
Oct. 16; *Dec.* 2, 13.

Lord Goddard C.J., Donovan and Havers JJ.

Charity—Profession—Nursing—Rates and rating—"Social welfare"—Royal College of Nursing—Claim for rating relief—Two main objects—Whether both charitable—"Advance of nursing as a "profession"—Meaning—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

The Royal College of Nursing, an organization incorporated by Royal charter, claimed to be entitled to rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act,

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

1955, in respect of the premises occupied by the college as hall and offices, as an organization "not established or conducted for profit "and whose main objects are charitable or otherwise concerned "with the advancement of . . . education or social welfare," within section 8 (1). Quarter sessions found (1) that the main objects of the college were those specified in its charter, namely, (*a*) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing, (*b*) to promote the advance of nursing as a profession in all or any of its branches; (2) that the first of those two objects was admitted to be charitable and the second (under (*b*)) was either charitable or otherwise concerned with the advancement of social welfare, as both objects were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself:—

Held, (1) that although there was an ambiguity in the second finding of quarter sessions it could not be read to contradict the first finding, which was clear and unambiguous, and the case must be considered on the footing that there were two main objects.

(2) That "the advance of nursing as a profession" meant to improve the quality and range of the services which nurses gave and therefore to enhance the stature and importance of the nursing profession and the esteem in which it was held; accordingly, object (*b*), on its true construction, was directed to the advance of nursing and not to advancing the professional interests of nurses, and was charitable, and as the object under object (*a*) was admittedly so, the college was entitled to relief under section 8.

General Nursing Council for England and Wales v. *St. Marylebone Borough Council* [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685 distinguished.

Berry v. *St. Marylebone Borough Council* [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677; *Commissioners of Inland Revenue* v. *Forrest* (1890) 15 App.Cas. 334; 6 T.L.R. 456; *Institute of Civil Engineers* v. *Inland Revenue Commissioners* [1932] 1 K.B. 149; 47 T.L.R. 466; and *Geologists' Association* v. *Commissioners of Inland Revenue* (1928) 14 T.C. 271 considered.

CASE STATED by County of London Quarter Sessions Appeals Committee.

On February 11, 1957, the Royal College of Nursing appealed to the County of London Quarter Sessions pursuant to section 4 of the Poor Relief Act, 1743, against the refusal of the St. Marylebone Borough Council to allow them relief against rates prescribed by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of their hall, offices and premises at Henrietta Place, London.

The appeals committee heard the appeal on April 12, 1957, and found the following facts: The college was incorporated by Royal Charter granted on July 28, 1928. The premises were occupied for the purposes prescribed in article II of the charter which was annexed to and formed part of the case. Article II was as follows: "The purposes for which the college is estab- "lished and incorporated are as follows: . . . (B) to promote . . . "the purposes hereinafter set out and in particular:—(*a*) To

"promote the science and art of nursing and the better education "and training of nurses and their efficiency in the profession of "nursing. (*b*) To promote the advance of nursing as a profession "in all or any of its branches. (*c*) To assist nurses who by "reason of adversity ill-health or otherwise are in need of "assistance of any nature. (*d*) To maintain a Roll of Members "of the College. (*e*) To institute and conduct examinations in "all branches of women's work conducive to the efficient conduct "of the nursing profession and to grant certificates and diplomas "to those who pass prescribed examinations: . . . (*j*) To do all "other lawful things as may from time to time be conducive "to the attainment and furtherance of the above objects or any "of them."

Out of a total of approximately 180,000 nurses in the United Kingdom between 42,000 and 43,000 were members of the college. Of the total income in the year ending December 31, 1955, amounting to £85,000 some £40,000 consisted of subscriptions of such members. The activities of the college included (i) the provision of educational facilities designed to improve the knowledge and skill of the nursing profession; (ii) the giving of advice and making of representations to Government Departments on all matters relating to the profession; (iii) the obtaining of good and equitable working conditions for the nursing profession, and (iv) the assistance of nurses who by reason of adversity, ill-health or otherwise were in need of assistance. It was admitted that the college was not established or conducted for profit.

It was contended by the rating authority that each of the objects stated in artice II (B) of the charter under subparagraphs (*a*), (*b*) and (*c*) respectively was a main object of the college. That whereas the objects stated in (*a*) and (*c*) were charitable, that in (*b*) was neither charitable nor concerned with the advancement of social welfare, and that, accordingly, the college was not an organization of the kind contemplated by section 8 (1) (*a*) of the Act of 1955.

It was contended by the college that the purpose stated in article II (B) of the charter under subparagraph (*a*) was the main object of the college and the other purposes stated were ancillary thereto. That the main objects of the college were charitable or otherwise concerned with the advancement of social welfare and that, accordingly, the college was an organization of the kind contemplated by section 8 (1) (*a*) of the Act of 1955.

The appeals committee were of opinion that the main objects of the college were such as to attract the application of section 8 (1) (*a*) of the Act. The rating authority appealed.

On October 16 the Divisional Court remitted the case to the appeals committee to answer the following questions: (1) What is or are the main object or objects of the college? (2) In the case of such object or objects is it (a) charitable, (b) if not, is it otherwise concerned with the advancement of education, (c) is it

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

otherwise concerned with the advancement of social welfare? The answers returned by the appeals committee were: (1) That the main objects of the college were those set out in article II (B) (*a*) and (*b*) of its charter. (2) The objects in article II (B) (*a*) were admitted to be charitable. They were further of the opinion that the object in article II (B) (*b*) was either charitable or otherwise concerned with the advancement of social welfare, for they were satisfied on the evidence, written and oral, that the objects in article II (B) (*a*) and (*b*) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself.

J. P. Widgery for the rating authority.

Michael Rowe Q.C. and *Eric Blain* for the Royal College of Nursing.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

December 13. LORD GODDARD C.J. Donovan J. will read the judgment of the court.

DONOVAN J. The appellants in this case are the St. Marylebone Borough Council, who are the rating authority for the borough. The respondents are the Royal College of Nursing, a non-profit seeking organization. In January last the appellants rejected a claim by the respondents for rating relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The respondents appealed against that refusal to London Quarter Sessions, who allowed the appeal. From that decision the appellants now appeal to this court by way of case stated.

Section 8 provides a measure of rating relief in the case of any hereditament occupied for the purpose of an organization, not conducted for profit, whose main objects are charitable, or are otherwise concerned with the advancement of religion, education or social welfare.

The respondents were incorporated by Royal Charter in 1928, and they occupy for the purposes specified in that charter the hereditament for which they seek rating relief, namely, 1 and 1A, Henrietta Place, London, W. The respondents' charter recites that a petition for incorporation by Royal Charter had been presented to the Sovereign by "The College of Nursing Ltd.," and article I of the charter incorporates the respondents under the title of "The College of Nursing."

Article II then provides as follows: "The purposes for which "the college is established and incorporated are as follows: A. To

"acquire and take over all the assets property possessions effects "and liabilities of the said company. B. To promote, by means "of such assets and otherwise, the purposes hereinafter set "out and in particular (*a*) To promote the science and art of "nursing and the better education and training of nurses and "their efficiency in the profession of nursing. (*b*) To promote "the advance of nursing as a profession in all or any of its "branches."

It is not necessary for the purposes of this case, which is concerned only with the "main objects" of the respondents, to set out any of the other "purposes" specified in article II (B) of the charter, several of which are, in any event, not purposes at all, but simply powers to effect purposes already specified earlier in the article.

The original decision of quarter sessions was in these terms: "We were of opinion that the main objects of the appellants "were such as to attract the application of section 8 of the Act."

Upon the case coming before us we took the view that the findings should be more specific, and the case was returned to quarter sessions for them to state (1) What is or are the main object or objects of the college? (2) In the case of such object or objects is it (*a*) charitable, (*b*) if not, is it otherwise concerned with the advancement of education, (*c*) is it otherwise concerned with the advancement of social welfare?

Quarter sessions have now answered these questions as follows: "(1) We found that the main objects of the college "were those set out in article II (B) (*a*) and (*b*) of its charter. "(2) The objects in article II (B) (*a*) were admitted to be charit-"able. We were further of opinion that the object in article "II (B) (*b*) was either charitable or otherwise concerned with "the advancement of social welfare for we were satisfied on the "evidence, written and oral, that the objects in article II (B) (*a*) "and (*b*) were mutually complementary in that both were "directed to a single end, namely, the raising of the standard "of nursing for the benefit of the community rather than the "promotion of the professional interests of nurses as an end in "itself."

Between the time when the case was sent back to quarter sessions and the further arguments we have now heard on the amplified findings, two cases on section 8 were heard by the Court of Appeal and certain pronouncements made which it will be convenient here to summarize. (1) To qualify for relief under section 8 all the main objects of an organization must be of the kind specified in the section. If one of such main objects is of a different kind, relief is not due: *Berry* v. *St. Marylebone Borough Council.*[1] (2) Where an organization has a written constitution the court should normally resort to that alone to ascertain its objects, though its activities are relevant to an inquiry as to what its main objects are, and this may involve

[1] [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

oral evidence of such activities. But once the main objects of an organisation are ascertained, extrinsic evidence is not admissible to limit the proper meaning of the language by which such main objects are described in the written constitution.

(3) Once the main objects of an organization have been ascertained, and one of them is not of the kind specified in section 8, rating relief under the section cannot be secured by regarding such main object as ancillary to another main object which is of the kind so specified. Ancillary or not, the one object will still be a main object, and if it is outside the scope of the section relief will not be due. "... it may not be useful "or even possible to try and give a primacy to the one purpose "rather than to the other; and all the more, perhaps, should "the attempt be abandoned in the present case, where the "statute speaks of 'main objects' in the plural": *per* Lord Evershed M.R. in *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council.*[2] On the question of treating one object as paramount and the rest subsidiary and subordinate we might perhaps ourselves add without quoting a reference to what Lord Parker of Waddington said upon this point in *Bowman* v. *Secular Society Ltd.*[3]

The rival contentions may now be stated. The appellants say that the object specified in article II (B) (*b*), that is, the advance of nursing as a profession is now found to be one of the respondents' main objects. The language in which this object is expressed is wide enough to cover the advancement of the professional interests of nurses. The respondents in practice do so construe the language, for the exhibits in the case stated establish that they actively concern themselves with the advancement of such interests. Accordingly, the respondents do not qualify for relief under section 8, for the promotion of the professional interests of nurses is neither a charitable object nor an object otherwise concerned with the advancement of social welfare, albeit that one result of pursuing such an object may be the improvement of the standard of nursing generally: *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council.*[4] The respondents, it is said, cannot overcome the difficulty by treating this object as ancillary to some other object, for quarter sessions have found it to be one of the main objects.

The respondents contend that, read as a whole, the finding of quarter sessions really means that there are not two main objects but only one, namely, the raising of the standard of nursing for the benefit of the community. Alternatively, that if there are two main objects, the second is the advancement of nursing as opposed to nurses, and the interests of nurses are looked after simply as a means of attaining this object, not as an end in itself. Whichever view be taken, therefore, of the finding

[2] [1957] 3 W.L.R. 1039, 1044; [1957] 3 All E.R. 685.

[3] [1917] A.C. 406, 443; 33 T.L.R. 376.

[4] [1957] 3 W.L.R. 1039.

of quarter sessions, the respondents are entitled to the relief they seek.

There is no ambiguity about the language of paragraph 1 of the further findings of quarter sessions. It says expressly that the college has two main objects. In paragraph 2, however, they seem to suggest that the college has really one object (it is called "a single end"), namely, the raising of the standard of nursing for the benefit of the community; so that the two main "objects" are means to that one end. It is this language which raises a doubt as to the sense in which quarter sessions use the term "objects" in paragraph 1 of their further findings. Curiously enough, however, their language is very similar to that used by A. L. Smith L.J. in *Art Union of London Ltd.* v. *Overseers of the Savoy*[5]: "If the other object be only a means "to the one end . . . then the society has a sole and exclusive "object, and not another object subsidiary thereto." (It should be said that this was a dissenting judgment but on a quite different point, namely, whether subscriptions to the Art Union were voluntary contributions. A. L. Smith L.J. thought not, and the House of Lords[6] afterwards unanimously upheld him.) In the face, however, of the clear finding that the college has two main objects we do not feel able to read the second paragraph of the further finding in such a way as to contradict the first. We think we should consider the case on the footing that the respondents have the two main objects found by quarter sessions.

The question then becomes this: Is the second main object, as expressed in the charter, charitable or otherwise concerned with the advancement of social welfare? We have already stated the appellants' contention on this point. It is reinforced by Mr. Widgery in this way. He says it is not right to treat this object as being simply the advance of nursing by means of improving the lot of nurses so as to make them more efficient, for that is already covered by the terms of the first object; and if that were all that was contemplated the second object would be unnecessary.

This argument is cogent, but not, by itself, conclusive. For in documents setting out the objects or purposes of an organization tautology is unfortunately the rule rather than the exception. Things are constantly being expressed as "purposes" or "objects" when they are really no more than powers, or means to effect a purpose or object already expressed. There are several "purposes" in article II which are really no more than powers. Article II (B) (*j*) is perhaps the clearest example. Furthermore, the opening words of article II are apparently intended to be read together with paragraphs (B) (*a*) and (*b*); and so read, the result is this: "The purposes for which the college is established and "incorporated are to promote the purpose of promoting the "science and art of nursing . . . and to promote the promotion

[5] [1894] 2 Q.B. 609, 627; 10 T.L.R. 576.

[6] [1896] A.C. 296; 12 T.L.R. 377.

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

"of the advance of nursing as a profession . . . ," which is hardly the best example of the draftsman's art, and affords no inducement to construe article II as though it were a work of precision with no overlapping at all between its various sub-paragraphs.

Finally, upon this point, the language of article II (B) (*b*) enables the college to take appropriate steps to increase the numbers of those taking up the vocation of nursing, a very necessary thing, but which, on a strict construction, might be thought to be outside the scope of the language of article II (B) (*a*). We are not able, therefore, to treat the appellants' argument on this point as decisive.

Mr. Widgery also contended that article II (B) (*b*) is not only wide enough to cover the advancement of the professional interests of nurses, but is so construed by the respondents in practice. He referred to exhibit C to the case, a publication entitled "Royal College of Nursing. Observations and Objec- "tives." It states under the heading: "Conditions of Service: "The Royal College of Nursing, the largest and most repre- "sentative professional organization for nurses, takes a leading "part in obtaining for them good economic and social conditions. "It does so in the spirit of its Royal Charter: 'to promote "'the advance of nursing as a profession in all or any of its "'branches.'" And: "The College takes a leading part in "obtaining good and equitable working conditions for the profes- "sion, both in the interests of nurses themselves and their service "to the community."

But this work is bound to be done whichever of the rival constructions of article II (B) (*b*) is correct. If the objective is the advancement of the professional interests of members, then obviously these activities are the working out of that purpose. If, on the other hand, the objective is the advance of nursing as an art, the same work still has to be done because the art of nursing cannot be advanced by an insufficient force of drudges. At any rate that is a reasonable view. Accordingly, one cannot draw a safe conclusion in this case merely by considering these particular activities, for they are consistent with the contentions of both sides.

We return, therefore, to the actual language of the article. If it simply read "to promote the advance of nursing in all or "any of its branches," then the object would be clearly and admittedly charitable. It would be a purpose beneficial to the community and entirely analogous to the charitable objects specified in the preamble to the Statute of Elizabeth. It is the addition of the words "as a profession" which cause the difficulty in the present case and give rise to the dispute.

There have been similar controversies before. The Charter of the Institute of Civil Engineers, for example, states its object to be: "The general advancement of mechanical science, and "more particularly for promoting the acquisition of that species

"of knowledge which constitutes the profession of a civil "engineer."

The institute held examinations, awarded prizes, maintained a library of great advantage to consulting engineers, laid down rules of professional conduct, and gave members the exclusive right to use distinguishing letters after their name. The institute appealed to the Special Commissioners of Income Tax against the refusal of the Commissioners of Inland Revenue to afford it exemption from income tax as a body of persons established for charitable purposes only. Before the Special Commissioners there was evidence that the expectation of professional advantage probably prompted engineers to join the institute. The report of the council of the institute for 1926–1927 also contained this passage: "The protection of the interests of members of the "institute is engaging the council's earnest attention. . . . The "council wish to assure the members of their intention to resist "to the utmost any impairment of the liberty of professional "practice now enjoyed by members."[7]

The Special Commissioners, and on appeal Rowlatt J., decided that one object of the institute was to benefit its members, and accordingly it was not established for charitable purposes only.[8] The Court of Appeal reversed this decision.[9] Reference was made to an earlier case, *Commissioners of Inland Revenue* v. *Forrest*,[10] where the House of Lords had held that the institute was relieved from duty upon annual value under the Customs and Inland Revenue Act, 1885, as being a body corporate whose property was appropriated and applied for the promotion of . . . science, and not for the benefit of civil engineers. There too it had been contended unsuccessfully against the institute that its main purpose was to promote the interests of civil engineers. Dealing with this Lord Macnaghten said in *Forrest's* case[11]: "The question at issue may be stated shortly. Is the property "of the Institution of Civil Engineers legally appropriated and "applied for the promotion of the science of civil engineering, "or is it legally appropriated and applied for the benefit of civil "engineers in order to enable them to practise their profession to "greater advantage?" The majority of the House had answered the first of these questions in the affirmative and the second in the negative.

The Court of Appeal in *Institute of Civil Engineers* v. *Commissioners of Inland Revenue*[12] held that the position was still the same. Lord Hanworth M.R. and Lawrence and Romer L.JJ. applied the same test as that laid down by Lord Macnaghten[13] and held that the purpose of the institute was the promotion

[7] *Institute of Civil Engineers* v. *Commissioners of Inland Revenue* (1932) 16 T.C. 158, 165.

[8] 16 T.C. 158.

[9] [1932] 1 K.B. 149; 47 T.L.R. 466; 16 T.C. 158.

[10] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[11] 15 App.Cas. 334.

[12] [1932] 1 K.B. 149; 47 T.L.R. 466.

[13] *Commissioners of Inland Revenue* v. *Forrest*, 15 App.Cas. 334, 354.

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

of the science of civil engineering and not the interests of civil engineers. It was true that civil engineers benefited professionally from their membership, but that was simply a consequence of the way in which the institute pursued its charitable purpose.

In 1952 the House of Lords had to decide whether the Royal College of Surgeons of England was a charity.[14] The objects of the college were not set out separately in its charter; they had to be extracted from a recital in it. The relevant words were these: "The due promotion and encouragement of the study and "practice of the said art and science," that is, of surgery. The House of Lords, reversing the decision of the Court of Appeal, held that the words did not include the promotion of the professional interests of surgeons. If those interests were benefited, that was simply a consequence of the work done by the college which was the promotion of the art and science of surgery by education both practical and theoretical. It is right to say that Lord Cohen[15] took a different view, namely, that the disciplinary and "defence" activities of the college were themselves "objects" of the college not ancillary to the main charitable object, and that the appeal of the college ought therefore to fail.

For present purposes the decision is material in that the House of Lords tacitly approved the decision of the Court of Appeal in *Institute of Civil Engineers* v. *Commissioners of Inland Revenue*,[16] and that Lord Morton regarded it as important that nowhere in the charter of the College of Surgeons could one find a statement that one of the objects of the college was the promotion of the interests of individuals carrying on the profession of surgeons.

Commissioners of Inland Revenue v. *Yorkshire Agricultural Society*[17] was also cited to us, but need not be dealt with at length. The Crown's allegation in that case that one of the society's objects was to benefit its members rested not upon the language in which its objects were set forth but upon the rules of the society and the privileges provided for members pursuant to them. A passage from the judgment of Atkin L.J. is, however, of importance. He says[18]: "There can be no doubt that a "society formed for the purpose merely of benefiting its own "members, though it may be to the public advantage that its "members should be benefited by being educated or having their "aesthetic tastes improved or whatever the object may be, would "not be for a charitable purpose, and if it were a substantial "part of the object that it should benefit its members I should "think that it would not be established for a charitable purpose "only. But, on the other hand, if the benefit given to its mem-"bers is only given to them with a view of giving encouragement "and carrying out the main purpose which is a charitable purpose, "then I think the mere fact that the members are benefited

[14] *Royal College of Surgeons* v. *National Provincial Bank Ltd.* [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[15] [1952] A.C. 631, 675.

[16] [1932] 1 K.B. 149.

[17] [1928] 1 K.B. 611; 44 T.L.R. 59.

[18] [1928] 1 K.B. 611, 631.

"in the course of promoting the charitable purpose would not "prevent the society being established for charitable purposes "only. That I imagine to be this case."

This was followed in 1928 by *Geologists' Association* v. *Commissioners of Inland Revenue*.[19] The actual decision, namely, that it was an association for the benefit of its members, which advanced the science of geology only incidentally, is not of importance for present purposes. But in the course of his judgment in the Court of Appeal Greer L.J. said this[20]: "It was "interesting to note how those who argued the case for the "appellants found it necessary to contend that there can in law "be only two kinds of society, one a society whose object was "the cultivation of the interests of its members and another a "society whose sole object is of a public or charitable object. It "seems to me that there may be associations in between these "two, associations with two objects, one being the promotion of "an object which is charitable and the other being the promotion "of the interests of the individual members of the association. "Then it becomes a question which is one of some degree. There "may be a question of fact, or it may be a question of law upon "the evidence given, as to whether the benefits conferred upon "the members of the society are only incidental to the public "objects of the society, or whether, on the other hand, they are "largely intended, or mainly intended, for the benefit of the "members. If you come to the conclusion, as you may in many "cases, that one of the ways in which the public objects of an "association can be served is by giving special advantages to the "members of the association, then the association does not cease "to be an association with a charitable object because incidentally "and in order to carry out the charitable object it is both necessary and desirable to confer special benefits upon the members. "That is the view expressed by Atkin L.J. in the case of *Inland "Revenue Commissioners* v. *Yorkshire Agricultural Society*,[21] "and it is a view with which I entirely agree."

Here Greer L.J.[22] is contemplating two objects, one of which is to give benefit to members of the organization, and he appears to say that if that is done simply as a necessary and desirable way of carrying out the charitable object, then the organization would not cease to be an association with a charitable object. In this context of income tax that would mean "a charitable "purpose only."

Bearing all these matters in mind, the question we have to answer is this: Is the second object of the respondents as expressed in article II (B) (*b*) of its charter the advancement of nursing or the advancement of the interests of nurses? This is purely a question of construction of the language used. In favour of the respondents' construction this may be said, namely, that the actual words are "the advancement of nursing." But they

[19] (1928) 14 T.C. 271.
[20] Ibid. 283.
[21] [1928] 1 K.B. 611, 631.
[22] 14 T.C. 271, 283.

1957

ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE BOROUGH COUNCIL.

are followed by the words "as a profession," and the problem really narrows down to the effect of these words.

What is meant by the advance of some particular calling as a profession? If, for example, one says that in the last 50 years there has been a striking advance in the profession of accountancy, what idea is conveyed? Presumably this, that the profession has greatly increased in stature, importance, membership and general esteem, not simply that the fees have gone up, although that might be assumed as a consequence. How, then, is a profession to be "advanced" in this sense? The answer is, by service. Demands for more pay and better conditions for those engaged, however loud and persistent, and even successful, will not "advance" the profession in the sense we have defined. But improvement in the quality and range of services rendered, and the spectacle of constant endeavour to do better, will certainly have that effect. If, then, one finds an organization one of whose objects is to advance nursing as a profession, there is no great difficulty in interpreting this as meaning to improve the quality and range of the services which nurses give and so to enhance the stature and importance of the nursing profession and the esteem in which it is held. It may well be, of course, that in order to improve nursing services you must attract more entrants into the profession, which in turn will mean improvements in pay and conditions. But such improvements will be means, not ends.

One may look at the matter, perhaps, from another angle also. Suppose that the draftsman had submitted article II (B) (*b*) to the respondents in a form which read "To promote the advance "of nursing in all its branches," and no more, he might reasonably have been asked: "Is this language enough to enable us "to look after the conditions under which nurses work, for to "improve their conditions is one of the most important ways in "which nursing can be advanced?" And to that he might reasonably have answered: "Well, I will add the words 'as a "'profession,' which will be wide enough to cover the point." In such circumstances the object would still be the advance of nursing.

On the other hand, if the respondents' object were to advance the professional interests of nurses, they might well say: "Why "do we wish to speak about the advance of nursing? Let us "simply say 'To promote the interests of all those in the nursing "'profession.'" There is no avowal here in such clear terms of such an object, as there was not in the case of the *College of Surgeons*, a fact to which Lord Morton drew attention.[23]

If the article now in question is to be regarded as ambiguous, so that surrounding circumstances may be looked at to help to resolve the ambiguity, then two matters would seem to be

[23] *Royal College of Surgeons* v. *National Provincial Bank Ltd.* [1952] A.C. 631, 655.

important: (1) that the respondents are a college giving full time education in the art and science of nursing, and are not an organization called into being simply to protect and improve the pay and working conditions of nurses; and (2) that quarter sessions seem to have found that under the article in question the activities of the respondents are directed to the raising of the standard of nursing, rather than to the promotion of the interests of nurses as an end in itself.

The problem here presented is one where no doubt there is room for two views, and in most of the cases we have referred to there was a divergence of judicial opinion. The present case, however, is a somewhat special one, and in the end we have come to the conclusion that upon its true construction article II (B) (*b*) is directed to the advance of nursing, and not to the advance of the professional interests of nurses. That means that this second main object of the respondents is charitable.

If that be right, there is no conflict between this decision and the recent decision of the Court of Appeal in *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council.*[24] On different facts it was there held that the professional benefit of nurses was a main object of the council. For the reasons we have given we do not think it is so in the case of the respondents.

Having arrived at this conclusion, we may mention, although the fact is not referred to in the case, that both sides informed us that ever since 1936 the respondents have been regarded by the Commissioners of Inland Revenue as a body of persons established for charitable purposes only, and so exempt from income tax. In 1936 the same point as has now come before us was argued out before the Special Commissioners, who took a similar view to that we have now taken about article II (B) (*b*), and the Crown acquiesced in this decision and have done so ever since. We have not been influenced by this in coming to our own view, but we cannot help thinking that the college would have been well advised, after the challenge in 1936, suitably to amend the article in question so as to make its meaning clear. Perhaps their failure to do so is another piece of evidence showing that the respondents do not have as one of their main objects the promotion of the interests of their members as an end in itself. We dismiss the appeal.

Appeal dismissed.
Leave to appeal granted.

Solicitors: *Sharpe, Pritchard & Co.; Charles Russell & Co.*

E. M. W.

[24] [1957] 3 W.L.R. 1039.

[COURT OF APPEAL.]

C. A.

1957
Dec. 9.

Lord Evershed M.R., Romer and Ormerod L.JJ.

* HAREWOOD HOTELS LTD. *v.* HARRIS.

[Plaint No. L. 129.]

Landlord and Tenant—Business premises (Security of tenure)—Terms of new tenancy—Rent—Hotel—Rent at which holding might "reasonably be expected to be let in open market by willing lessor"—Evidence as to hotel's profits in previous years—Admissible as indication of earning capacity to potential lessee — Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 34.

Landlord and Tenant—Business premises (Security of tenure)—Costs—Application to county court to settle terms of new tenancy—Discretion.

At the hearing of an application by the tenants of an hotel for the grant of a new tenancy under the provisions of the Landlord and Tenant Act, 1954, the only matters in dispute were the length of the term and the rent which the tenants should pay. The landlord had offered a grant at £750 a year for a term of seven years and the tenants had offered to pay £450 a year for a term of 14 years. The county court judge found for the landlord on the first issue and ordered a grant for seven years; but he directed that the rent payable should be £450 for the first three years and £500 for the remainder. The landlord appealed, contending that in fixing the rent the judge had wrongly admitted evidence of the trading accounts of the hotel during the previous five years, and further that he had misdirected himself in awarding to the tenants half of their costs:—

Held, dismissing the appeal, (1) that in fixing the rent in accordance with section 34 of the Landlord and Tenant Act, 1954,[1] the evidence of the trading accounts was rightly admitted and given weight as an indication of the earning capacity of the hotel to a potential lessee, but it would not be admissible for any other purpose in estimating at what rent the property might be let in the open market.

(2) That although the length of the term which the judge ordered was less than that suggested by the tenants, who had, therefore, to that extent been unsuccessful, the rent payable was much nearer to their figure than that offered by the landlord, and the judge had not misdirected himself in awarding them half of their costs.

Le Witt v. *Brookes* [1956] 1 W.L.R. 1438; [1956] 3 All E.R. 676 distinguished.

[1] Landlord and Tenant Act, 1954, s. 34: "The rent payable under a "tenancy granted by order of the "court under this Part of this Act "shall be such as may be agreed ". . . or as, in default of such agree-"ment, may be determined by the "court to be that at which, having "regard to the terms of the tenancy "(other than those relating to rent), "the holding might reasonably be "expected to be let in the open market by a willing lessor, there being "disregarded (*a*) any effect on rent "of the fact that the tenant has or "his predecessors in title have been "in occupation of the holding, (*b*) "any goodwill attached to the hold-"ing by reason of the carrying on "thereat of the business of the ten-"ant. . . . (*c*) any effect on rent of "any improvement carried out by the "tenant . . ." (*d*) [relates to licensed "premises].

APPEAL from Judge Glazebrook sitting at Tunbridge Wells County Court.

On April 20, 1955, Harewood Hotels Ltd. applied to the Tunbridge Wells County Court for a new tenancy under the provisions of Part II of the Landlord and Tenant Act, 1954, of the premises which they occupied as hoteliers. The premises, which were known as the Harewood Hotel, comprised three adjacent individual structures—Nos. 30, 31 and 32, London Road, Tunbridge Wells—in a row of six. All six had originally been comparable properties, built probably as private dwellings, but the middle properties had been knocked into one to form the hotel and an addition had been made at the back of part of that property. Harewood Hotels Ltd. (hereinafter called "the "tenants") were in occupation of the combined hotel structure under a lease dated August 1, 1935, for 19 years 6 months, expiring February 1, 1955, at a rent of £300 a year. The landlord, Horatio Harris, served a notice on December 20, 1954, terminating the continuance of the tenancy on June 24, 1955. The tenants proposed a new lease for a term of 14 years at a rent of £400 a year, or £450 if the liability to do painting was transferred to the landlord. The landlord did not oppose the grant of a new tenancy but he contended that the term should be for seven years, and that the rent should be £750 a year.

At the hearing before the county court judge the evidence was in three categories. The tenants' managing director in the course of his evidence put in, and referred to, the trading account of the hotel showing the financial results of his operations as a hotelier in the premises during the preceding five years. Secondly, there was expert evidence given by two surveyors on behalf of the tenants as to what in their opinion would be a fair rent that a willing lessor would accept in the open market in the circumstances. Thirdly, there was evidence of actual offers received by the landlord for the other premises in the row, but not for all three together. The county court judge gave judgment for the landlord on the issue of the length of the term and ordered a grant for seven years. He ordered that the rent should be £450 for three years (the painting obligations being transferred to the landlord), rising to £500 for the next four years.

The landlord appealed.

M. A. King-Hamilton Q.C. and *N. E. Wiggins* (with him *Aron Owen*) for the landlord.

Dudley Collard for the tenants.

In addition to the case referred to in the judgment, the following were cited in argument: *In re* 52/56, *Osnaburgh Street, and In re* 23/43, *Longford Street, N.W.*1 [2]; *Weinbaum* v. *Klein* [3]; *Kay (John)* v. *Kay*.[4]

[2] (1957) 169 E.G. 656.

[3] 66 T.L.R. (Pt. 1) 414; [1950] 1 All E.R. 353.

[4] [1952] 2 Q.B. 258; [1952] 1 T.L.R. 766; [1952] 1 All E.R. 813.

C. A.
1957
HAREWOOD HOTELS LTD. v. HARRIS.

LORD EVERSHED M.R. stated the facts and said: The judge undoubtedly took account of all the three heads of evidence in reaching his conclusion. If the extent of the emphasis which he gave to any one of them be measured by the mere number of lines used, it may be said that he paid more attention to the evidence about the experience of the tenants' managing director than to some of the other matters. He undoubtedly did take account of what those figures showed. For what purpose he took account of them, I will say presently. He also clearly took account of the third matter, namely, the offers received for the other premises. Finally, he took account (and I think for myself that in the end of all he placed perhaps most reliance upon this) of the expert evidence, and expressed in this regard a preference for the tenants' experts to the landlord's experts, whom he described as optimistic, but not in fact so well-acquainted with this particular type of subject-matter.

The challenge has been first (and this is the really significant question that we have to decide) upon the admissibility at all of the first item of evidence. Before I read the relevant parts of the section and consider that matter, it is, I think, as well to bear in mind that, this being an appeal from a county court judge's decision, the matter is covered, and the extent or scope of the appeal is limited, by the terms of section 105 of the County Courts Act, 1934, save so far as it is amended and altered by section 12 of the Act of 1955. In my judgment, it is tolerably plain from those sections that it is not open to an appellant, upon such a matter as this, to complain merely of the weight which the judge attached, in arriving at a conclusion, to individual matters or subjects of evidence themselves admissible. It is not, in other words, like an appeal, say, from a High Court upon a matter of fact, where the real case is that the conclusion turns out to be against the proper weight of the evidence. As I understand these sections, it is incumbent upon Mr. King-Hamilton to show—and he has indeed assumed the burden of showing—that there was here some misdirection of himself by the judge amounting to an error in law. That, indeed, is the burden of this first point which I have already indicated, namely, that the judge did misdirect himself by giving weight to matters of fact which were in truth wholly inadmissible.

[His Lordship read section 34 as set out above and continued:] It has been Mr. King-Hamilton's main argument that the terms of paragraph (*a*), upon their ordinary sense, must exclude any evidence at all about the occupation of the tenant; because its only possible admission could be to affect the rent; and it is said, according to the argument, that one cannot allow the quantum of rent to be affected in any way by considerations derived from the tenant's occupation. If that argument is right, then I think it would follow that the judge here must be treated as having in that regard misdirected himself; and even though, in the end of all, the right sum should turn out not to be very

different from that awarded, still, I think that Mr. King-Hamilton would be entitled to have the matter remitted for reconsideration. But I am not for my part able to go as far with Mr. King-Hamilton as to produce a total exclusion of any evidence based upon or derived from the tenant's previous occupation.

In the course of his reply, Mr. King-Hamilton referred us to a passage in Woodfall on Landlord and Tenant, second permanent supplement, 1957, Vol. 1, at p. 71, where the author, having cited this paragraph, says: "This seems to dispose equally of "any accretion to the rent attributable to such occupation (the "premises have to be envisaged as empty premises in the market) "and of the 'sitting tenant' concession which was sometimes "allowed for in assessing a 'reasonable' rent under the Act of "1951." I am entirely willing to accept that passage; but it does not seem to me to serve the purpose for which Mr. King-Hamilton invokes it. If the evidence was led for the purpose of showing that these tenants ought to be granted some concession because of some particular hardship that they had suffered, that might be another matter; and I agree also that the terms of the paragraph serve to exclude the consideration that a tenant might be expected to be willing to pay rather more than an outsider because he would not wish to be disturbed in his occupation. But, in my judgment, it is plainly legitimate for a judge to hear evidence which bears upon the question which he has to decide, namely: what would the particular holding reasonably be expected to be let at in the open market? Plainly, I should have thought, in arriving at a conclusion upon that question, it is legitimate to hear evidence of what similar premises which are being let for a particular purpose (as the one in suit is) can be expected to earn for a potential lessee in the market in the place where the premises are; and, if so, then similar evidence is, in my judgment, admissible for proving the same point about the premises in suit. In other words, if the purpose of the evidence of the figures was for that limited objective, then I think for my part that they were perfectly admissible and that no objection can be made to them.

It is significant that the landlord himself sought before the trial to see the figures; and if it had turned out that the business of letting this sort of accommodation in Tunbridge Wells was there shown by that evidence to be a very profitable one—that is to say, if it was proper to infer from such evidence that letting rooms of this kind in Tunbridge Wells was a profitable business—then it would be, I should have thought, proper for the judge to infer that in the open market a person seeking to take a lease of premises for this purpose would be expected to pay an appropriately large rent.

In this particular case it appears that the letting of the Harewood Hotel during the last five years was not particularly profitable. As appears from what the judge says, the kind of

C. A.
1957
HAREWOOD HOTELS LTD. v. HARRIS.
Lord Evershed M.R.

persons who will take the rooms are largely people who have retired. Apart from some who go there during certain special seasons, they are not, therefore, the class of persons from whom high rates can be taken. The judge also was able to draw attention to the physical circumstances of the hotel, for he visited it with the consent, and indeed in the company, of counsel for both sides. He pointed out that it was one which was somewhat old-fashioned: its furnishings were old-fashioned, and it had no lift. It seems to me that the purpose for which the judge used this evidence was just that which I have tried to indicate, namely, to enable him to form a conclusion, based on the experience of these particular premises, of what sort of rent this kind of property, let as a hotel in Tunbridge Wells, would in the open market bring to a willing lessor.

The judge said: "Accounts could not be of any value unless "I was satisfied the place was properly run"; and he went on to say that so far as he could judge it was properly run. He said that it was old-fashioned. Then he dealt with the custom, which I have already mentioned. "Tunbridge Wells is a place retired "people tend to come to." Then he said: "Solution from an "economic point of view may be that residents are under-"charged"—unless you put up the price to residents you cannot put up the price to visitors; and that limits the type of service which can be provided. The judge said that it was a difficult kind of place to run, with three staircases and all the extra cleaning, and after referring to the fall in the value of money, he came, as being relevant to the same question, to the evidence with regard to the other houses, 28, 29 and 33. In that context, I am not prepared to say that the judge used this material in any way illegitimately. I think that he was simply trying to find out what property of this kind in Tunbridge Wells, offered to a potential lessee for a hotel, would be likely to fetch in the open market. It is true that he used the conclusion which he reached as to the amount of profit such a person could make as supporting the view he took of preference for the experts called by the tenants; but that again, I think, was a legitimate use of it.

I, therefore, am not persuaded that, in referring to these figures for the purpose for which he did, and in the way in which he did, the judge did that which paragraph (*a*) of section 34 told him he was not entitled to do. That ground, therefore, seems to me not to suffice. I add that if paragraph (*a*) has the wide significance for which Mr. King-Hamilton contends, then paragraph (*b*) at any rate would appear to be otiose.

Then Mr. King-Hamilton placed (and naturally placed) considerable emphasis on the third head of evidence which I have mentioned—the actual offers for the other premises, 28, 29 and 33. There is no doubt that that evidence, on the face of it, is impressive. Putting it quite briefly, but not inaccurately, it may be summarized in this way: that the landlord was receiving, in answer to his advertisements, offers, in respect of a single one

of these houses in the row—and a house which provided less accommodation in fact than two of the three which comprised the Harewood Hotel—at figures of £250 a year or thereabouts (rising after a certain period); from which it might well be said that one could and should treble that figure at least if the offer was not for one single house but was for three combined to constitute one hotel.

I will say at once that, so far as I am able to form an opinion without having seen or heard the witnesses, I get the impression that the figure which the judge eventually hit upon—£450—strikes me as being on the low side, particularly in the light of what I may call these other comparable offers. But it would be, I think, a fallacy to suppose that if £X per annum is offered for No. 28, at least X multiplied by three would be a fair figure to fix for the Harewood Hotel. It may be that, for one reason or another, the smaller premises are more attractive; but in any case that is a matter not of error of law, I think, but of weight. The judge heard, on the other side, the strong view of the surveyors who gave evidence for the tenants that these figures which apparently had been offered—and there is no doubt of the genuineness of the offers—were, for some reason or another, surprising and extraordinary; and neither of these surveyors would, according to their own view, have advised any client of theirs to make such an offer. However, the result is that the judge, although he took account of those offers, did not feel, in the light of everything else that he had put before him, that they ought to be the final arbiters, so to speak, of the figure to be arrived at. At the end of his judgment he expressed his difficulty: "I find it difficult to make up my mind, bearing in mind the "terms of the section and what I have to put out of my mind" —a phrase which seems to me to indicate that he had well in the forefront of his mind the excluding words of the paragraph in section 34. Having so instructed himself, he came to the conclusion that £450 for this property, in this place, was the sum which the holding might reasonably be expected to let for in the open market by a willing lessor. If I am right in the view that I take as to the matters of law, the only criticism that can be made is that, as a matter of fact, as a mere question of weight of evidence, that figure might be criticized as being too low; but such a criticism, if valid (and I am not saying that it is) is not one which is available in this court to the landlord.

That being so, the only other matter is that of costs. After stating his conclusion in the passage which I have reached in the judgment, the judge then ordered the landlord to pay half of the tenants' costs. It is, of course, too well known to need anything more than mere statement that the question of costs prima facie is one entirely within the discretion of the judge. But Mr. King-Hamilton argued that such an award must have been a non-judicial exercise of the discretion—that £450 for seven years was

C. A.
1957
HAREWOOD HOTELS LTD. v. HARRIS.
Lord Evershed M.R.

something very different from that which the tenants had themselves offered, which was £400, possibly £450 (with the painting obligations transferred), not for seven years but for 14 years, a period twice as long. We were referred to *Le Witt* v. *Brookes*,[1] in which this court had set aside a county court judge's award in the matter of costs: but in that case it was made quite plain that what the judge had done was to say that if a landlord's offer turned out to be less favourable than that which the court awarded, then the tenant prima facie was entitled to the costs as though the landlord had paid into court, in an action for damages against him, a sum less than the figure ultimately awarded; and the court had little difficulty in saying that that principle was quite inapplicable. As Denning L.J. pointed out in his leading judgment, it was a question for the county court judge to consider in the exercise of his discretion to what extent the offers made on the one side or the other were reasonable approaches to his conclusion.

In this case I am quite unable to say that there has been any misdirection in the matter: the judge has, in the exercise of his discretion, applied for himself the proper test. It is clear from what I have said on this matter of rent that he took the view that the tenants' evidence was a far nearer approximation to the right result than that of the landlord. It is quite true that the judge rejected the tenants' claim for a 14 years' lease as against seven years; but I think that that is reflected in the circumstance that he did not give the tenants all their costs but only half of them. In the circumstances, I am quite unable to see any grounds upon which this court ought to review the order which the judge made as to costs.

For the reasons which I have given, I think that this appeal must be dismissed.

ROMER L.J. I agree; and I only want to add a very few words on one aspect of this case which appears to me to be the only point of any general importance that has arisen. It arises out of Mr. King-Hamilton's submission that the judge was in error in looking, for any purpose, to the accounts of this hotel company which were placed before him in the quest which he was undertaking for the proper rent to be fixed under section 34 of the Act of 1954. Mr. King-Hamilton's contention is that the accounts of the company were, by inference, barred from consideration as irrelevant under paragraphs (*a*) and (*b*) of section 34. I cannot take that view of the matter at all. It seems to me that paragraphs (*a*) and (*b*) are really directed to saying that (for example) the fact that the sitting tenant has been in occupation for some time past and has built up a goodwill is to be disregarded in assessing the rent which he is to pay under his new lease. Normally, of course, a man who is in the position of sitting tenant and has built up a business and been there for some years

[1] [1956] 1 W.L.R. 1438; [1956] 3 All E.R. 676.

and established himself would be prepared to pay a higher rent than anybody else then coming in for the first time. It is that kind of thing, in my view, to which paragraphs (*a*) and (*b*) are directed. But I cannot find anything in the language of those provisions which renders it irrelevant to look at such material as the accounts of this company as part of the material on which the judge must make up his mind as to what rent might reasonably be expected to be obtained for the premises in the open market. I should have thought that one of the first things that anybody who was going to set up a hotel business in this type of premises in this locality would want to know would be what prospects he had of making a good thing out of it, and, therefore, what rent he would be prepared to pay for the premises—if, indeed, he decided to take a tenancy of the premises at all. I cannot see any ground, either on common sense or the language of the section, upon which that consideration should be relegated to the realm of the irrelevant. I do not think that the judge would be entitled to look at the accounts for the purpose of seeing what the company could afford to pay. Mr. King-Hamilton suggested that that really was what the judge did in the present case—that he looked to see what profit they made in one year and what loss they made in another year, and so on, and said that this company, having regard to those figures, ought not to be expected to pay more than a particular rent. I should be disposed to agree that that was wrong, if the judge did it; but I do not think that he did it at all. He came to the conclusion that this hotel was being run efficiently; he came to the conclusion—and indeed it was agreed on all hands—that the premises could only be used as an hotel, and then, for the purpose which I have mentioned of seeing what a new person, an outsider, would pay as rent for these premises, he looked into the question of what kind of prospects, having regard to the law of supply and demand, this hotel would have. I am quite in agreement with the Master of the Rolls that the judge was justified in looking at the accounts for that purpose. It is not suggested that he dismissed all other considerations from his mind. He shows in the judgment that he did take into account other matters—the evidence of the experts and the offers which had been made for the adjoining property, which, although comparable in some sense, could hardly be described as completely comparable, and were certainly not offers in relation to these premises themselves. The weight which the judge should attribute to those respective considerations—so long as he bore them all in mind—appears to me to be primarily a matter for him; and I cannot see that he went wrong on any point of law in this case either in disregarding matters which he ought to have regarded, or in having regarded matters of which he ought to have taken no notice at all.

I agree with the Master of the Rolls in thinking that this appeal fails; and I have nothing to add to what he has said on

C. A.
1957
HAREWOOD HOTELS LTD. v. HARRIS.

the various other points, including that of costs, which were argued before us.

ORMEROD L.J. I agree.

Appeal dismissed.

Solicitors: *Dod, Longstaffe & Fenwick; Templer, Thomson & Passmore, Tunbridge Wells.*

E. D.

[CHANCERY DIVISION.]

1957
Nov. 22, 26, 27.
Harman J.

*COUTTS & CO. *v.* DUNTROON INVESTMENT CORPORATION LTD. AND ANOTHER.

[1957 C. 2131.]

Mortgage—Interest restriction—Interest in arrear for more than 21 *days —Arrears subsequently paid—Whether statutory protection revived —Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 7 (*a*).

Mortgage—Interest restriction—Apportionment of principal money—Division of dwelling-house into six flats — Meaning of "other "lands" in Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (5).

Landlord and Tenant — Rent restriction — Premises within the Acts — Dwelling-house subsequently divided into six flats—Date for assessing rateable value—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7.

By a registered charge, dated July 9, 1947, a dwelling-house divided into six flats was charged with the payment of £10,000 with interest payable at six-monthly intervals. The dwelling-house had originally been a single private house but was divided in or before 1947 into the said six flats, each being separately rated, of which four, by reason of their rateable value, fell outside the protection of the Rent Restriction Acts. In 1956 the mortgagees served notice to apportion the principal moneys between those flats which were and those which were not within the protection of the Acts: £2,206 being the sum apportioned to the protected flats and £7,794 to those unprotected. Arbitration subsequently confirmed the apportionment.

Notice was served under section 12 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that "When a mortgage comprises one or more dwelling-houses to which "this Act applies and other land . . . the mortgagee may apportion "the principal money secured by the mortgage between such "dwelling-houses and such other land. . . ." On July 12, 1957, notice was given calling in the apportioned sum of £7,794, and on the same day the mortgagees issued an originating summons claiming payment of the said £7,794. There was on July 9, 1957, a payment of interest due on the whole principal sum, and this the mortgagor failed to pay within 21 days; it was subsequently paid on July 31, 1957, and acknowledged as payment on account by the mortgagees, who on the same day gave notice calling in the entire principal

---

[Reported by JENNIFER L. WEST, Barrister-at-Law.]

sum on the ground that there had been default of 21 days in payment of interest and, therefore, the Rent Restriction Acts no longer prevented the enforcement of the mortgage. On September 13, 1957, the originating summons was amended to claim £10,000, and in the alternative £7,794 with interest in each case:—

Held, (1) that the mortgagees were entitled to enforce the whole of their security since the interest on the principal sum having once been 21 days in arrear the protection of the Rent Restriction Acts was removed and could not thereafter be restored by any subsequent payment of the interest.

Dictum of Russell J. in *Evans* v. *Horner* [1925] Ch. 177 at p. 178 applied.

Nicols v. *Walters* [1954] 1 W.L.R. 1; [1953] 2 All E.R. 1516 followed.

Wallace v. *Fogarty* [1926] 1 I.R. 255 not followed.

(2) In the alternative, that "other land" referred to in section 12 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, meant property comprised in the mortgage not being dwelling-houses to which the Act applied, so that the mortgagees were entitled to claim payment of £7,794 in respect of the four flats not within the protection of the Rent Acts. Further, the arbitrator was justified in finding as a fact that four of the flats were outside the protection of the Acts, the first rating assessments having been made in 1947, and that being the correct date for consideration under section 7 of the Rent and Mortgage Interest Restrictions Act, 1939.

(3) That the amendment of the originating summons on September 13 was defective since the interest was not on July 12, when the summons was issued, 21 days in arrear, and the plaintiff could not by amendment claim a remedy not available at the date of the issue of the originating summons, but, no objection having been taken and evidence having been filed, the mortgagees must be treated as having issued a fresh summons on September 13 for the full amount.

Originating summons.

The plaintiffs, Coutts & Co., claimed as mortgagees by originating summons that the first defendants, Duntroon Investment Corporation Ltd., the mortgagors, and the second defendant, Donald Robert Ivor Campbell, the surety for the mortgagors, should pay to the mortgagees the principal sum of £7,794 secured by a registered first legal charge upon the property known as 4, Holland Park, Kensington, and apportioned upon June 4, 1957, by an arbitration award together with interest at the rate of $3\frac{3}{4}$ per cent. per annum from July 9, 1957, until payment. The summons was issued on July 12, 1957, and was amended by leave of the master on September 13, 1957, to claim payment of £10,000 (the whole principal sum secured by the mortgage) or, alternatively, the payment of £7,794 (the aforesaid apportioned sum).

The facts, as found by his Lordship, were that there was a registered charge, dated July 9, 1947, upon the property, which was at that date divided into six flats, to secure the payment of £10,000 with interest thereon at $3\frac{3}{4}$ per cent. per annum payable at six monthly intervals on January 9 and July 9. The first defendants became the registered proprietors of the property on September 2, 1947.

1957

COUTTS & Co. v. DUNTROON INVESTMENT CORPORATION LTD.

On May 17, 1956, the mortgagees served notice on the first defendants under section 12 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to apportion the sum of £10,000 between the six flats, £2,206 being apportioned to the flats to which the Act applied, and £7,794 to the four flats outside the Act. The flats had previously been assessed for rates at figures which put the four flats outside the scope of the Act, the whole property having previously been rated at the sum of £288. The apportionment was objected to by the mortgagors but the arbitrator, to whom reference was then made, gave his award on June 4, 1957, agreeing with the principles upon which the apportionment had been made.

On July 12, 1957, notice was given calling in the apportioned sum of £7,794 and the originating summons was issued to enforce the covenant to pay in respect of the said principal sum. On July 9, 1957, three days before, an instalment of interest became due and remained in arrear for a period exceeding 21 days. It was subsequently paid on July 31, and acknowledged by the mortgagees as a payment on account.

On July 31, also, the mortgagees gave notice calling in the principal sum of £10,000 on the grounds that there had been default for 21 days in the payment of interest and the Rent Restriction Acts, therefore, no longer prevented the enforcement of the mortgage. On September 13 the originating summons was amended in order to include the second claim.

S. W. Templeman for the mortgagees.

N. C. Tapp and *D. H. Farquharson* for the defendants.

Cases cited in argument and not referred to in the judgment: *Martin* v. *Watson and Egan*[1]; *Glasgow Iron and Steel Co.* v. *Dickson*[2]; *Temple* v. *National Mutual Life Association of Australasia Ltd.*[3]; *Benninga (Mitcham) Ltd.* v. *Bijstra*[4]; *Woozley* v. *Woodall Smith.*[5]

HARMAN J. (having stated the facts) continued: On September 13, the originating summons was amended in order to include the second claim and it seems to me that in that the mortgagees were clearly wrong. At the date when they issued their summons there was admittedly no claim to the whole £10,000. No interest was 21 days in arrear. But supposing it to be true—and I think it is—that there was 21 days' default by August 1, the right course was to issue a fresh summons in respect of that. An amendment cannot be made to include a right which was not a right existing at the date of the issue of the writ, and I see no difference between an originating summons and a writ for

[1] [1919] 2 I.R. 534.

[2] [1925] A.C. 790; 41 T.L.R. 644.

[3] [1955] 2 Q.B. 461; [1955] 3 W.L.R. 264; [1955] 2 All E.R. 758.

[4] [1946] K.B. 58; 61 T.L.R. 519: [1945] 2 All E.R. 433.

[5] [1950] 1 K.B. 325; 66 (Pt. 1) T.L.R. 99; [1949] 2 All E.R. 1055.

this purpose. It is not right to say—and it is not the fact—that at the date when the summons was issued on July 12 this right had accrued to the mortgagees. Consequently, that is at least a technical defect, but no objection was ever taken to the amendment, and evidence has been filed and the matter has gone forward without notice being taken of that defect, which is nevertheless a real one. If necessary I propose to treat the mortgagees as having issued a fresh summons for the amended amount on September 13, the date when they amended their original originating summons. I think this matter only goes to costs.

But there are other points taken by the mortgagors. The first point is this: that at the date when the summons was amended, namely, September 13, no interest was due—it had been paid on August 1. The Act therefore if it ever did cease to apply to the mortgagors, had become applicable to them again, and the statute accordingly prevents the enforcement of the mortgage. That argument depends on section 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says: "It shall not be lawful for any mortgagee under a mortgage "to which this Act applies, so long as (*a*) interest at the rate "permitted under this Act is paid and is not more than 21 days "in arrear . . . to call in his mortgage or to take any steps for ". . . enforcing his security or for recovering the principal money "thereby secured." The mortgagor says that it was not true that on September 13 any interest was more than 21 days in arrear and the claim, therefore, did not lie.

The mortgagees, however, rely on old authority, the decision of Russell J. in *Evans* v. *Horner*.[1] The headnote is: "Section 7 "of the Increase of Rent and Mortgage Interest (Restrictions) "Act, 1920, suspends the rights of the mortgagee during one "continuous period, which lasts as long as the conditions of the "section are complied with. When once those conditions are "broken a subsequent compliance with them does not revive the "protection given by the section." In that case the interest fell due on May 19, and was still not paid on June 11, when the summons to enforce the mortgage by foreclosure was issued. On June 14, three days after the summons, a cheque for the interest was sent and accepted on account generally, as was the position in the present case. It was argued that even though the mortgagee was right to start his proceedings when he did, those proceedings were bad when the condition ceased to be unsatisfied, but Russell J. would not agree to that, saying as the headnote states, that[2]: "the section only suspends the rights of the "mortgagee during one continuous period," according to certain conditions, "and that when those conditions are broken a "subsequent compliance with them does not revive the pro-"tection given by the section." That decision is not binding here, because here compliance with the payment of interest was made before the date when the proceedings were issued. But the

[1] [1925] Ch. 177.

[2] Ibid.

1957

COUTTS & CO. v. DUNTROON INVESTMENT CORPORATION LTD.

Harman J.

reasoning of Russell J. would cover this case since he speaks of one continuous period, and the protection, therefore, only lasts so long as all the conditions are complied with, and directly one of them is broken the protection is gone, and gone for ever. That case was mentioned with approval by the Court of Appeal in *Nichols* v. *Walters*.[3] In that case also there had been arrears, and there were arrears at the date of the issue of the summons. It was held that subsequent payment did not put the matter right or recreate the area of security afforded by the Act. Sir Raymond Evershed M.R. expressly approved of what Russell J. had said.

My attention was, however, called to an Irish case of *Wallace* v. *Fogarty*,[4] where a contrary view was taken, but there the circumstances were rather different in that there was no right of action at the date when the proceedings were started. The Irish Act of 1923, is exactly equivalent to the English Act of 1920, in this respect. Meredith J. said that the Act applied because though the mortgagor had been in arrears he had paid up before the proceedings were brought, and he said he did not approve of Russell J.'s view on the matter. That does not absolve me from following the Court of Appeal in any matter binding on me. Although there is a difference between the case before the Court of Appeal case and this case, and although I rather sympathize with the view that the Irish judge took, I feel I am bound and that it must be taken that the period relevant there to call in a mortgage is one continuous period as Russell J. said which, once broken, can never be restored. Consequently I do not think the fact that the mortgage interest was paid, even though it was paid before the proceedings were started, would recreate in favour of the mortgagor the protection which section 7 had hitherto afforded him. Subject to the technical point, therefore, I think that the mortgagees were entitled on September 13 to enforce the whole of their security and therefore were entitled to an order for the repayment of the entire sum.

If that be so, strictly speaking it is not necessary to consider the alternative claim which is a claim as originally made to the £7,794, but as this case I suppose, like many Rent Restriction Acts cases, may go further, I feel I must say something about it. This turns on section 12 (5) of the Act of 1920, which begins by providing: "When a mortgage comprises one or more dwelling-"houses to which this Act applies and other land, and the "rateable value of such dwelling-houses is more than one-tenth "of the rateable value of the whole of the land comprised in the "mortgage, the mortgagee may apportion the principal money "secured by the mortgage between such dwelling-houses and such "other land. . . ." This apportionment was made on the footing that that section applied and that therefore the mortgage did comprise one or more dwelling-houses to which the Act applied,

[3] [1954] 1 W.L.R. 1; [1953] 2 All E.R. 1516.

[4] [1926] 1 I.R. 255.

that is to say the two flats which were below £100 in rateable value and other land, namely, the four flats which were outside the protection of the Act. The mortgagors' first argument was that "other land" where it is used in this subsection must mean land other than dwelling-houses. It says "one or more "dwelling-houses and other land" and the argument was that there is a contrast between "dwelling-houses" and "land," and "land" means land without dwelling-houses on it and the apportionment could only be made where for instance there is a house and a park. The mortgagees' claim is that "land" means or includes "dwelling-houses" having regard to the terms of the Interpretation Act, 1889, and that "other land" means any property comprised in the mortgage other than the dwelling-houses to which the Act applies. In my judgment that is the right interpretation, because the section goes on to deal with the value "of the whole of the land comprised in the mortgage." It is clear that the word "land" here covers the mortgaged dwelling-house, and I cannot believe that it means something different where it appears in the same section within two or three lines. Therefore "other land" means property comprised in the mortgage, not being dwelling-houses to which the Act applies. I think, therefore, prima facie the section is applicable.

Another point is taken, namely, that these were all dwelling-houses to which the Act applies because for the purposes of the Act one must look, not at what the rating authority did in 1947 when this house was turned into six flats, but to the original rateable value when it was one single dwelling-house and had a rateable value of £288. That depends on the Rent and Mortgage Interest Restrictions Act, 1939, section 3 of which recontrolled a number of houses which had been controlled before and decontrolled, and also brought new property into control. For this purpose it is necessary to find out what was the rateable value on the appropriate date, that was April 6, 1939, so far as London was concerned. If under section 7 (2) there was no separate assessment on the appropriate date, then for the purpose of finding out whether the house would be in the Act or not, it is necessary to assess on the original rateable value on the appropriate day, which here was £288. If, on the other hand, the dwelling-house in question was first assessed after the appropriate day, then it must be treated for the purpose of ascertaining the rateable value as having been assessed when it was in fact first assessed. Here these assessments, as I understand it, were made in 1947, when for the first time this house, which had been a single dwelling-house, became six dwelling-houses to each of which the Act could apply, and they were rated accordingly upon that footing. It seems to me that it would be necessary to prove that those ratings were not ratings which should be considered for the purposes of the Act. It is said that there is no evidence that the entities created in 1947 made the house any different from

1957

COUTTS & Co. *v.* DUNTROON INVESTMENT CORPORATION LTD.

Harman J.

what it had been before, and *Morelle Ltd.* v. *Wakeling*[5] was cited to show that though two flats had been held together, when they were separated that did not create two new hereditaments, but they were to be for the purposes of the Act dealt with as they were before the separation. There, however, the facts were quite different: the property had been originally built as flats and two flats were knocked into one, and were afterwards separated again. That is an entirely different case and not one which really is of very much assistance to me here, although it bears some superficial resemblance. I hold that the arbitrator, who found as a fact that there were six flats, four of them outside the Act and two of them within it, was amply justified in so finding, and no attempt was made, as far as I can see, to contest that finding on the basis that he was not entitled to find it. If he was entitled to find it, it seems to me that there was plenty of evidence on which he could do so. I am of opinion, therefore, that the conditions to bring section 12 (5) of the Act of 1920 into operation did apply and that the mortgagee was entitled to make the apportionment he did.

That apportionment was disputed, and under the section the matter went to a single arbitrator who was properly appointed, and he has confirmed the apportionment. In my opinion there was no answer, quite apart from the interest point, to the summons so far as it claims the payment of £7,794 resulting from the apportionment. As in my judgment, however, the mortgagees are entitled to the larger relief. I will make an order for the payment by the defendants of the principal money of £10,000 secured by the charge, together with interest.

Order accordingly.

Solicitors: *Dawson & Co.; Charles Ross & Co.*

[5] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708.

[CHANCERY DIVISION.]

1957
Dec. 3, 5, 6.

Upjohn J.

*RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES).

SAME *v.* INLAND REVENUE COMMISSIONERS.

YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD.

INLAND REVENUE COMMISSIONERS *v.* SAME.

Revenue—Income tax—Expenses—Racecourse Betting Control Board—Operation of totalisator on racecourses—Totalisator fund—Expenditure prescribed by statute for benefit of owners of racecourses and racehorses—Board carrying on trade—Whether deductible expenses

—*Whether improvements to racecourses capital expenditure—Racecourse Betting Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 41), *s.* 3—*Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 18 (5)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 137 (*a*) (*f*) (*g*).

The Racecourse Betting Control Board was a corporation set up under the Racecourse Betting Act, 1928, to operate a totalisator on approved racecourses. The board established the totalisator fund pursuant to section 3 (4) of the Act from a percentage of the moneys staked on the totalisator. Under section 3 (6) the board applied this fund in accordance with schemes prepared by them and approved by the Secretary of State for purposes conducive to the "improvement of breeds of horses or the sport of horse racing" but subject to the payment thereout of "all taxes, rates, charges, and working expenses," and "the retention of . . . any sums . . . "to meet contingencies . . ."

For the year ending December 31, 1953, the board authorized the following expenditure: (1) to racecourse executives from the racecourse fund, £230,977, which was divided among the racecourses approximately in proportion to the cost of maintenance of each racecourse as a fraction of the total cost of maintaining all racecourses, and was normally used for improvement to the racecourse itself; (2) to owners and trainers in reduction of the cost of travelling racehorses to race meetings, £168,555; (3) runners' allowance, attributable to 1954, £3,087, a sum of £1 per runner being paid as an additional allowance to owners of horses who ran their horses in any race; (4) towards the administrative expenses of the Jockey Club and National Hunt Committee and the cost of the race finish recording camera, £62,050; (5) amount paid for assistance of point-to-point meetings, £24,233; (6) for the assistance of racing under the rules of the Pony Turf Club, £1,975. All the items except (3) were included in schemes under section 3 (6) of the Act, item (3) being included in the board's working expenses.

It was conceded that the board was carrying on the trade of totalisator operator. The Special Commissioners held that items (1) to (6) were deductible as expenses laid out for the purposes of the board's trade as such totalisator operator within the meaning of section 137 (*a*) of the Income Tax Act, 1952; with the exception of certain payments which were reimbursements of expenditure on the provision of certain physical installations on racecourses which they held were of an enduring advantage to the board and were expenses of a capital nature and not deductible.

On appeal by the Crown and cross-appeal by the board:—

Held, (1) that taxes and working expenses having already been deducted from this fund, it had at this stage finished with trading activities; the money was laid out in this manner because the board were required by section 3 (6) of the Act of 1928 to do so, and the expenses had nothing whatever to do with their trading activities.

(2) That "working expenses" in section 3 (6) meant the ordinary expenses connected with working a totalisator, and the deduction of this sum for runners' allowances as "working "expenses" was ultra vires the powers of the board; and even if it were a working expense, it was not a proper deduction for the purposes of income tax.

Semble, that if the expenditure on installations at racecourses was a deductible expense, it would be difficult to treat it as an expense of a capital nature within the type envisaged by Lord Cave in *British Insulated and Helsby Cables Ltd.* v. *Atherton* [1916] A.C. 205; 42 T.L.R. 187; 10 T.C. 188.

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

APPEALS from the Commissioners for the Special Purposes of the Income Tax Acts and cross-appeals.

These four appeals fell into two groups. The first group contained an appeal by the Commissioners of Inland Revenue and one by the inspector of taxes against the Racecourse Betting Control Board relating to assessments made upon the board for 1953–1954 and 1954–1955. Both appeals raised the same point, one being directed to income tax and the other to profits tax. They were accordingly considered as one appeal. The second group of appeals was by the Racecourse Betting Control Board, in the one case against the inspector of taxes and in the other against the commissioners, also relating respectively to income tax and profits tax; and the same point arose in each, namely, whether a certain expenditure was of enduring capital benefit which ought to be treated as capital and not as a revenue expenditure.

The Racecourse Betting Control Board carried on the trade of running totalisators at a large number (some 72 or 73) racecourses in England. It was set up in 1928 by the Racecourse Betting Act, 1928,[1] which was entitled: "An Act to amend the Betting

[1] Racecourse Betting Act, 1928, s. 1: "(1) Nothing contained in the "Betting Act, 1853, shall apply to "any approved racecourse . . . "(2) . . . it shall be lawful on any "approved racecourse . . . (*a*) for the "Racecourse Betting Control Board ". . . to set up and keep a totalisa- "tor; (*b*) for the Board . . . to "operate, . . . for the purposes of "effecting betting transactions on "horseraces only, a totalisator. . . ."

S. 2: "(1) For the purposes of "this Act there shall be established a "Racecourse Betting Control Board ". . . (2) The board shall be a body "corporate . . ."

S. 3: "The Racecourse Betting "Control Board—(1) may for the pur- "poses of this Act issue (subject to "such conditions as they may impose) "and at any time revoke certificates "of approval in respect of race- "courses and ground adjacent there- "to; (2) shall make it a condition "of the grant of a certificate of "approval of any racecourse that the "persons having the management of "such racecourse shall provide a "place, whether in a building or "not, where bookmakers may carry "on their business and to which the "public may resort for the purpose "of betting, and that the charge to a "bookmaker and to any assistant "accompanying him, for admission "to an enclosure on the racecourse "for the purpose of the bookmaker's "business shall, in the case of a "bookmaker, not exceed five times "the amount, and in the case of an "assistant not exceed the amount of "the highest charge made to mem- "bers of the public for admission to "the enclosure; (3) shall distribute "or cause to be distributed the whole "of the moneys staked by means of "a totalisator on any race among "the persons winning bets made by "means of the totalisator on that "race, after deducting or causing to "be deducted such percentage of "those moneys as the Board may "from time to time determine either "generally or with respect to any "particular racecourse; (4) shall "establish a fund known as the "totalisator fund, into which shall "be paid the percentage deducted as "aforesaid of moneys staked by "means of the totalisator, and any "other moneys received by the "Board; (5) may, for the purposes "of this Act, borrow money upon "the security of such fund or other- "wise, and lend money for the "purpose of setting up or operating "totalisators in accordance with the "provisions of this Act; (6) shall "(subject to the payment out of the "totalisator fund of all taxes, rates, "charges, and working expenses, "and to the retention of such sums "as they think fit to meet contingen- "cies, and to the payment out of the "said fund of such sums as they "think fit to charitable purposes) "apply the moneys from time to

"Act, 1853, to legalize the use of totalisators on certain race-"courses, and to make further provision with regard to betting "thereon."

The case stated, so far as relevant, provided: 2. For the purposes of the appeal it was admitted on behalf of the board that it carried on the trade of totalisator operator, and the question for decision was whether it was entitled, in computing its profits of such trade, to deduct as expenses certain payments, details of which were thereinafter set out. The answer to such question depended on two issues: first, whether such payments were wholly and exclusively laid out or expended for the purposes of the trade, within the meaning of section 137 (*a*) of the Income Tax Act, 1952,[2] and secondly, whether such payments or any of them were of a capital nature whose deduction would be prohibited by sub-paragraphs (*f*) or (*g*) of the same section.

3. The following facts were proved or admitted: . . . (b) Briefly stated the operation of a totalisator consisted in the acceptance of bets at a building on the course from members of the public. When the race was decided the whole of the money staked was, in accordance with section 3 (3) of the Act of 1928, distributed to persons who had won their bets on that race, after deducting such percentage of the money staked as the board might determine. In practice the board only deducted a percentage from the money staked on losing horses except as to special pools accounting for only some 17 per cent. of all money staked, when the percentage deduction was calculated on the whole pool. For the purpose of setting up buildings on racecourses in which the totalisator was to operate, the board entered

"time comprised in the totalisator "fund in accordance with a scheme "prepared by the Board and approved "by the Secretary of State for "purposes conducive to the improve-"ment of breeds of horses or the "sport of horse racing; (7) may do "all such things as are incidental to "the foregoing matters; (8) shall "submit annually to the Secretary "of State a report of their proceed-"ings, together with an account, in "such form as may be prescribed by "the Secretary of State, of the "moneys received and expended by "them during the year, and such "report and account shall be laid "by the Secretary of State before "both Houses of Parliament."

Betting and Lotteries Act, 1934, s. 18: "(5) The purposes for which "the Racecourse Betting Control "Board, acting under paragraph (6) "of section three of the Racecourse "Betting Act, 1928, may, in accord-"ance with a scheme approved by "the Secretary of State, apply "moneys comprised in the totalisa-"tor fund shall include purposes "conducive to the advancement and "encouragement of veterinary science "and education.'

[2] Income Tax Act, 1952, s. 137: "Subject to the provisions of this "Act, in computing the amount of "the profits or gains to be charged "under Case I or Case II of "Schedule D, no sum shall be "deducted in respect of—(a) any "disbursement or expenses, not being "money wholly and exclusively laid "out or expended for the purposes "of the trade, profession or voca-"tion . . . (*f*) any capital withdrawn "from, or any sum employed or "intended to be employed as capital "in, such trade, profession or voca-"tion; (*g*) any capital employed in "improvement of premises occupied "for the purposes of the trade, "profession or vocation. . . ."

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

into agreements with racecourse owners providing (inter alia) for the demise to the board of the sites of such buildings.

(c) The board had thus left in its hands the above-mentioned percentage of the bets made, and such percentage was, by section 3 (4) of the Act of 1928, termed the totalisator fund. Out of such fund the board paid the working expenses of running the totalisator and such other administration expenses as were necessary. From time to time, and in particular during the years material to this appeal, the board had made certain voluntary payments to the owners of racecourses, to the owners of racehorses entered for races, to the Jockey Club and the National Hunt Committee, to the Pony Turf Club, and to the organizers of point-to-point meetings. It was these payments which the board sought to deduct in computing its profits.

[Details of the amounts of such payments (hereinafter referred to as the "aforesaid payments") for the years ended December, 31, 1952, December 31, 1953, and December 31, 1954, were set out in a schedule as deductions in income tax computations. The facts relating to the payments for the year ending December 31, 1953, were as follows.—]

(d) (i) "*To Racecourse executives from the Racecourse "Fund*—£230,977." In 1947 the board established a fund then termed the Central Racing Reserve Fund but now termed the Racecourse Fund, and allocated each year a round sum to such fund. Each of the 73 racecourses at which the board operated totalisators was allocated a proportion of such sum, the proportion being determined by the post-war cost of maintenance of each racecourse as a fraction of the total cost of maintaining all the racecourses. The owner of each racecourse was invited to put forward proposals to the board as to how it was proposed to expend the amount allotted to it. Such proposals were considered first by the Jockey Club or the National Hunt Committee, as the authority concerned with horse racing, and then they were considered by the board and finally approved by the Home Secretary. When the racecourse owner had paid the sum in question he applied for reimbursement out of the racecourse fund. If the racecourse owner so desired the amount credited to him in the racecourse fund might be carried forward from year to year until it incurred approved expenditure. For the first few years the amount allotted was normally utilized by the racecourse concerned in the rehabilitation of its buildings and amenities consequent upon their deterioration due to the war, and in the provision of further amenities, such as a new stand or restaurant. In 1952, however, the board, impressed by the difficulty of getting owners to run horses in races, gave a general authority to the racecourses to use up to 25 per cent. of the total amount appropriated to each racecourse for the purpose of augmenting the prize money which was provided for the races. The prize money for a race was constituted in part by funds made available by the racecourse proprietors, and in part out of

the entrance moneys paid by the owners of horses running in the races. In 1954 the amount which could be so used for prize money was increased to 50 per cent. of the grant to each racecourse from the racecourse fund.

(ii) "*To owners and trainers in reduction of the cost of travelling racehorses to race meetings*—£168,555." The cost of maintaining a racehorse had, even before the war, largely exceeded any amount that on an average was obtained by an owner in prize money, and the excess of such cost over the prize money had very largely increased in the years with which the appeal was concerned. In order to assist racehorse owners in meeting the expenses of bringing their horses to racecourses, the board made grants to such owners. A contribution towards such expenditure was also made by the racecourse owners . . . The amount contributed by the racecourse owner varied with each course, but the amount paid by the board was based entirely on a mileage basis. It was hoped by this means to increase the number of runners in the various races, since it was felt that owners would be prevented by the heavy expenditure involved from taking their horses to racecourses some distance from where the horse was kept. . . .

(iii) "*Runners allowance, amount attributable to* 1954—£3,087." In 1954 the board introduced an additional allowance to owners of horses who ran their horses in any race, the amount being a fixed one of £1 per runner. The object of this allowance was the same as that of the travelling allowance mentioned in the last preceding sub-paragraph, namely, to induce owners to enter and run their horses in races.

(iv) "*Towards the administrative expenses of the Jockey Club and National Hunt Committee, and the cost of the race finish recording camera*—£62,050." These payments were made by the board to the Jockey Club and the National Hunt Committee. They were used to meet the salaries of racing officials, starters, judges and clerks of the course, who were provided by the Jockey Club or the National Hunt Committee to supervise the racing at flat races and point-to-point meetings respectively. If this amount had not been paid by the board it would have had to be paid by the racecourse owners or the hunts which organized the point-to-point meetings. The supervision by officials of the Jockey Club and the National Hunt Committee ensured that the racing was properly conducted.

(v) "*Amount paid for assistance in* 1953 *of point-to-point meetings*—£24,233." The board operated totalisators at some point-to-point meetings, and these payments, which amounted to 5 per cent. of the turnover of the totalisator at such meetings, were made to the hunt which ran such meetings, usually once a year, because without such a subvention the hunt might not have been able to run meetings at all. Some of the meetings were profitable to the board and some were not.

(vi) "*For the assistance of racing under the rules of the Pony*

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

Turf Club—£1,975." The Pony Turf Club ran only two meetings in the years under consideration and neither meeting was a financial success. The board operated totalisators at these two meetings and gave the subvention in question to the club to try to ensure that such meetings should not be discontinued, but in fact pony-racing thereafter ceased, so that the board lost the receipts from totalisators at Pony Club Meetings.

(e) The facts relating to the payments in the years ended December 31, 1952 and 1954, were similar to those relating to the year ended December 31, 1953.

4. It was the experience of the board that the amount of money staked with the totalisator on any race increased with the number of runners in such race. For example, the board's average revenue from a race with only two runners was £76, but from a race with ten runners it was £827. It was thus very much in the interests of the board, considered as a trader, that the number of horses running in any race should be as high as possible. It was also in the board's interests as a trader that as many members of the public as possible should attend a race-meeting, since the receipts of the totalisator would usually be thereby increased. The board obtained its funds principally from the large racecourses and racecourses near populous areas, particularly around London. Approximately two-thirds of the total bets laid with the totalisator were made "on course," and one-third were made "off-"course." . . . It was in the board's interest that the buildings and other amenities of a racecourse should be as attractive as possible, and that the racing public should have confidence in the fair and proper conduct of the racing and in the accuracy of the official results of races. The supervision of racing by officials of the Jockey Club, National Hunt Committee and of the Pony Turf Club, and the provision of a race finish recording camera, ensured so far as possible such fair and proper conduct and such accuracy.

In those respects the interests of the board coincided with the interests of the bookmakers who also benefited by increased attendances, improvements of amenities and proper supervision of racing.

5. . . . All the payments now in question were included in schemes prepared by the board in accordance with the provisions of section 3 (6) of the Act of 1928 and approved by the Secretary of State, with the exception of the "runners allowances" referred to in paragraph 3 (d) (iii) and certain other payments which were included among the board's working expenses in its accounts. The "runners allowances" were included by the board in their accounts as working expenses and not included in any scheme prepared under section 3 (6) in order to test the question whether inclusion in such a scheme was material for tax purposes. The amounts included in such schemes were the amounts set aside each year for that purpose out of the totalisator

fund whereas the amounts now claimed as deductions were (except as regards assistance to point-to-point meetings) the amounts actually expended in succeeding years.

. . . . . .

6. If the board had not made contributions (as above shown) to the prize-money paid by the racecourses, and had not paid rent and admission fees for its staff to enter the racecourse (as it did) the total profits for the year 1954 made by 72 racecourses would have dropped from £275,130 to £58,062, the total profits of 9 racecourses where profits exceeded £10,000 would have dropped from £159,800 to £108,850, and the total profits of the 63 racecourses whose profits were below £10,000 would have been turned into losses totalling £50,788. The average attendance at race-meetings had dropped from 10,219 per day in 1948 to 8,425 per day in 1953 and the net amount received by racecourses (i.e. the admission fee less entertainment tax) had only increased between 2d. and 9d. On the other hand the expenses of racecourses were estimated to have increased by two or three hundred per cent. It was the opinion of two witnesses who gave evidence before them that putting up the admission fees by racecourse owners would result in a drop in attendance, and the diminution of prize-money would result in less runners and consequently a diminution in the attendances.

7. The commissioners were satisfied on the evidence that all the aforesaid payments were made by the board with the object of increasing the receipts of its totalisators, although such payments might and in all cases did (in the words of section 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure.

8. Under the provisions of section 3 (6) of the Act of 1928 the board was empowered to make payment out of the totalisator fund for charitable purposes. By a deed of covenant and trust made on September 1, 1950, the board covenanted to pay to certain trustees annually sums which after deduction of tax would be equal to 8 per cent. of the totalisator fund after paying expenses, rates and taxes (including income tax), and providing for contingencies and repaying borrowed moneys. . . . The board had each year directed the application of the trust fund for purposes conducive to the improvement of the breeds of horses, for the advancement of veterinary science and education, and for various other charitable purposes, but the societies to which donations were made concerned themselves with the breeding of horses other than racehorses.

. . . . . .

10. It was contended on behalf of the board that all the items of expenditure set out above were proper deductions in computing the profits of its trade.

11. It was contended on behalf of the Inspector of Taxes that none of such items of expenditure was so deductible because

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

none of them was wholly and exclusively expended for the purposes of the trade, and such of them as resulted in the creation of enduring assets, e.g., new buildings on racecourses, were of a capital nature.

12. The commissioners gave their decision in writing on December 5, 1955, as follows:

"1. It is admitted on behalf of the Racecourse Betting "Control Board . . . that its activities constitute the carrying "on of a trade within the meaning of that word in the Income "Tax Acts.

"2. We are concerned with certain items of expenditure by "the board [the aforesaid payments] which it claims are proper "deductions in computing the profits of such trade for the "purposes of income tax. For this claim to succeed it must be "shown firstly that such expenditure was made wholly and "exclusively for the purposes of the trade and secondly was not "of a capital nature.

"3. We do not consider that the terms of the two Acts setting "up the board and regulating its activities, and in particular "section 3 (6) of the Act of 1928, are at all conclusive in deter-"mining the two questions at issue; nor do we think it proper "to conclude that the balance of the totalisator fund after "deduction of the items set out in brackets in that subsection "corresponds with the profit of the trade which is to be taxed. "The Act does not purport to be concerned with taxable profits, "and one of the items in the bracket, namely, payment to "charitable purposes, would only in exceptional circumstances "form a proper deduction in computing the profits of a trade.

"4. We consider that in this as in other cases we have to "determine whether the disputed payments were made wholly "and exclusively for the purposes of the board's trade upon the "evidence of the witnesses called before us, and an examination "of the documents placed before us. Upon a full consideration "of such evidence and documents we find that all the [afore-"said payments] were paid wholly and exclusively for the "purposes of such trade.

"5. We find, on the other hand, that certain of the payments "in question were reimbursements of expenditure upon the pro-"vision of certain physical installations on racecourses . . . Such "installations were of enduring advantage to the board and we "therefore hold that such payments were of a capital nature and "not proper deductions in arriving at the board's profits: see "*Coalville Urban District Council* v. *Boyce*.[3]"

F. N. Bucher Q.C., *Alan Orr* and *J. G. Monroe* for the Crown.

F. Heyworth Talbot Q.C. and *Desmond Miller* for the Racecourse Betting Control Board.

Cases cited in argument not referred to in the judgment:

[3] (1934) 18 T.C. 655.

Morgan v. *Tate & Lyle Ltd.*[4]; *Edwards* v. *Bairstow*[5]; *Marshall Richards Machine Co. Ltd.* v. *Jewitt*[6]; *Newsom* v. *Robertson*[7]; *Bentleys, Stokes & Lowless* v. *Beeson*[8]; *Odhams Press Ltd.* v. *Cook.*[9]

UPJOHN J. having referred to the issues and to sections 1, 2 and 3 of the Racecourse Betting Act, 1928, continued: The general scheme of section 3 of the Racecourse Betting Act, 1928, is clear enough. The board might issue certificates of approval of racecourses and set up totalisators thereon, but it was to be a provision or a condition of any certificate of approval that there should be a place where bookmakers might carry on their business, though they might have to pay higher charges than were formerly permissible; and then there are the provisions as to what is to happen to the fund created by the deduction of a percentage from the proceeds of a totalisator stake.

From its inception to the year 1954, the general method of procedure was this: the totalisator fund was, each year, a very substantial fund, and in each year with which I am concerned the total amounts invested with the totalisator were, broadly speaking, about £25 million and the dividends paid out were £22 or £23 million. There were the expenses of management and so forth, which left for application each year in accordance with schemes prepared by the board and approved by the Secretary of State something over £500,000.

Those schemes have been set out very fully in the case stated, and I need do no more than attempt a very brief recital of them. In each of the years ending 1952, 1953 and 1954, the surplus went in this kind of way. About a quarter of a million pounds went to a fund set up by the board called the Racecourse Fund, and that sum was divided amongst the racecourses, approximately speaking, in proportion to the cost of maintenance of each racecourse as a fraction of the total cost of maintaining all racecourses. That fund could only be expended by the racecourses in accordance with proposals approved by the board, and that was normally for improvements to the racecourse itself—buying additional land, improving the grandstands, and many other ways of improvement which were set out in the case.

In 1952, such I suppose were economic difficulties that it was difficult to get owners to run horses in races, and the board gave a general authority to racecourses to use up to 25 per cent. of the total amount appropriated to each racecourse for the purpose of augmenting prize money, to attract more entries and, no doubt, of a better quality.

[4] [1955] A.C. 21; [1954] 3 W.L.R. 85; [1954] 2 All E.R. 413; 35 T.C. 367.

[5] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 220.

[6] (1956) 36 T.C. 511.

[7] [1953] Ch. 7; [1952] 2 T.L.R. 636; [1952] 2 All E.R. 728; 33 T.C. 452.

[8] [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82.

[9] (1940) 56 T.L.R. 704; [1940] 3 All E.R. 15; 23 T.C. 233.

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

Upjohn J.

Then another class of expenditure in view of economic difficulties was that travelling allowances were made to owners and trainers to meet the cost of travelling racehorses to race meetings; and in 1952 some £168,000 was so expended.

The scheme was expanded in 1954 by a runner's allowance, and it was then decided to give every owner whose horse ran in a race £1 for doing so; and in the accounts for 1954 the provision of £42,000 under the heading of operating expenses was made for this allowance.

Then the next class of expenditure was towards the administrative expenses of the Jockey Club and the National Hunt Committee and of the Race Finish Recording Camera. In 1952 those apparently amounted to some £60,000, and the sums so applied were used to meet the salaries of racing officials, starters, judges, clerks of the course and others, expenses which, had they not been contributed to by the board, would have had to be paid by the racecourse owners or hunts which organized point to point meetings.

Then about £25,000 was paid for the benefit of point to point meetings, and, finally, a small sum was devoted to the Pony Turf Club, but that seems to have come to an end, because they have ceased to have pony racing.

It is fair to say that the board has been a great benefactor to the sport of racing.

There is no doubt that, at any rate, one of the reasons why those payments were made was that it was in the interests of the board as a trader, for the very simple reason that the more people who can be persuaded to attend a race meeting, the more people are likely to come and bet on the tote. Some of them, of course, will bet with the rivals who have to be accommodated, the bookmakers. But some of them will bet on the tote, and so, to increase the turnover of the tote, one wants to increase the attendance at race meetings; and one way of doing that is to improve the racecourse so that it is more attractive to members of the public. Another way of doing that, of course, is to try to increase the number of horses running and the quality of the horses running. That is done by making travelling allowances and by increasing the prize money; for this was established without a shadow of doubt, that the more horses there are in any given race, the more money is placed on the tote in respect of that race. So these payments were in fact very much to the benefit of the board itself, and, as was pointed out in the case, in these respects the interests of the board coincide with the interests of the bookmakers, who also benefit by increased attendances, improvements of amenities and proper supervision of racing.

Until 1954, those appropriations were made by way of schemes approved by the Secretary of State, and the totalisator fund was operated in this way: the fund, after paying, of course, the dividends to winners of races, was paid to an account and,

out of that, the operating expenses and headquarters expenses were deducted. Then the balance was ascertained. Upon that, income tax was paid in the usual way. The surplus, amounting as I have said to something over £500,000 for each of the relevant years, was then dealt with by way of scheme in the manner I have described. In 1954, however, a different attitude was adopted, quite properly, by the board. I can best explain that by reading an extract from the report of the board to the Secretary of State for the year 1954, and I can begin at paragraph 3 (ii): "Shortly after their establishment in 1928 the "board took up with the authorities, at the highest level, the "question of their liability to tax and took advice on the matter. "The outcome was that up to the present, the board have been "treated as carrying on a trade for taxation purposes and, on the "basis of the advice tendered to them, have accepted this "treatment. On this footing, the board's taxable profits have "been regarded, by the Inland Revenue, as being the balance in "the totalisator fund after meeting rates and working expenses "(interpreting the words 'working expenses' in their narrowest "sense) with the result that *all* expenditure incorporated in "schemes approved by the Secretary of State under the Act, has "been treated as having been paid out of taxed profits. (iii) The "board have now been advised by counsel that—if a trade is "indeed carried on—this treatment is wrong in law and that "disbursements genuinely made by the board for the purposes "of their trade or business are not rendered ineligible as deduc-"tions in arriving at the taxable profits on the ground, simply, "that they are made, have been made or could equally be made, "under a statutory scheme approved by the Secretary of State." Then in subparagraph (v) they say this: "In view of the very "definite advice received by them, the board, in these circum-"stances, have decided that it is their duty to contest the "taxation issues in the courts. The board have also, during the "past year, incurred expense of a kind analogous to that hereto-"fore made under statutory schemes." Then they set out the runner's allowance at £1 per starter. They had done that perfectly fairly and openly with the view of seeing whether that is a proper way of dealing with the matter in the accounts.

The question that I have to determine is whether that view which has been expressed by the board is correct or not, or whether the former procedure is indeed the proper procedure that should be followed from an income tax point of view.

On behalf of the board, Mr. Heyworth Talbot has put the case in this way: He submits that the board is not really a trader at all; it is a statutory administrator which has statutory obligations to fulfil; but he concedes that for the purposes of income tax the activities of the board are in the nature of trade and are taxable if a surplus be shown as such. But he argues that the expenses of making provisions for the improvements of stands and so forth which I have already enumerated are the expenses

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

Upjohn J.

of carrying on that trade and ought to be allowed before a balance for the purposes of income tax is ascertained. He submits one must look at the activities of the board as a whole for the purpose of income tax. Every penny that it disburses, he points out, should be a disbursement out of the totalisator fund, and he says that the board, if it is to be regarded as a trader at all, must be regarded as a trader throughout its activities. That does not necessarily mean, as he fairly concedes, that all expenses are necessarily deductible for the purposes of income tax. The only expenses that can be deducted are those which fall within section 137 (*a*) of the Income Tax Act, 1952. [His Lordship read section 137 (*a*) of the Income Tax Act, 1952.]

It is submitted that the matter must be looked at in this way: at the end of each accounting year the board has a surplus to deal with, and it can consider how that surplus should be dealt with, just like any ordinary trading concern. A trading concern which finds it has a surplus at the end of a year's trading may decide to apply it in a dividend, but it may not. It may, for instance, decide to apply it in paying a bonus wage or in undertaking some advertising activity. Then next year, when it is found that that profit has been applied in paying a bonus wage, that obviously is an expense allowable for income tax, and if some of it has been applied as an ordinary trade advertising expenditure, it, too, will be allowed for the purposes of tax. So, it is said, by Mr. Talbot, that here one finds that the board has a surplus. It decides then to apply it to matters which, it is submitted, are wholly and exclusively laid out for the purpose of the trade, that is to say, for the improvement of racecourses or the increase of prize money and all the other matters which I have discussed, because that is an expenditure which has to be incurred to earn more profits, and he relies on the well-known passage in *Inland Revenue Commissioners* v. *The Stonehaven Recreation Ground Trustees.*[1] That is the passage in the judgment of the Lord President, Lord Clyde, who says this[2]: "But it is trite law that, "as Lord President Kinross observed in *Harris* v. *Corporation of* "*Irvine,*[3] 'the term "profits" prima facie means all the net "'proceeds of a concern or adventure, after deducting the neces- "'sary outgoings without which these proceeds could not be "'earned, but when the proceeds have been so ascertained, "'income tax is leviable on the full balance of them, to whatever "'purpose,—whether to the payment of debt or any other pur- "'pose,—they are applied after they have been earned—*Mersey* "'*Docks* v. *Lucas.*[4]'" That is said to be the case here. One must ask for what purpose, for example in the year 1954, were these payments or appropriations made. The answer he submits, must be that if for the relevant purpose, that of collecting tax, the board

[1] (1929) 15 T.C. 419.
[2] Ibid. 426.
[3] [1900] 2 F. 1080, 1084; 4 T.C. 221.
[4] (1883) 8 App.Cas. 891; 2 T.C. 25.

is to be regarded as a trader, those sums were expended wholly for the purpose of the trade with the object and for the purpose of increasing the trade and increasing the profits in future years; and in paragraph 7 of the case the commissioners accept that view. "We were satisfied on the evidence that all the payments "set out in exhibits B, B1 and B2 were made by the board with "the object of increasing the receipts of its totalisators, although "such payments might and in all cases did (in the words of "section 3 (6) of the Act of 1928) improve the breed of horses "or the sport of horse-racing, and although the increase in such "receipts was not in all cases expected to be exactly proportionate "to the expenditure." They came then to the conclusion which they set out in paragraph 12 (2): [His Lordship read paragraph 12 (2), (3) and (4) set out above.]

The question is whether that is a right conclusion, and before going back to the Act there are one or two passages to which I can usefully refer in the speech of Lord Reid in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.*[5] where[6] he quotes the passage in the speech of Lord Davey in *Strong & Co. of Romsey Ltd.* v. *Woodifield*[7]: "He said of the words in the "rule, 'for the purpose of the trade,' that these words 'appear "'to me to mean for the purpose of enabling a person to carry "'on and earn profits in the trade, etc. I think the disburse-"'ments permitted are such as are made for that purpose. It "'is not enough that the disbursement is made in the course "'of, or arises out of, or is connected with, the trade, or is "'made out of the profits of the trade. It must be made for "'the purpose of earning the profits.'" Lord Reid then continued[8]: "This explanation has always been regarded as "authoritative and is difficult to reconcile with the respondents' "contention." Then, after referring to *Smith's Potato Estates Ltd.* v. *Bolland*,[9] he said[10]: "But I cannot reconcile the respon-"dents' contention with the opinions expressed by the majority "in *Smith's Potato Estates Ltd.* v. *Bolland.*[11] Lord Porter said, "with reference to the expense of an appeal for the purpose of "discovering the true measure of profits for tax purposes[12]: "'Such expenditure is incurred directly for tax purposes and "'for nothing else, though it may indirectly affect both the "'amount available for distribution to the proprietors of the "'business and that proper to be put to reserve.'" A little later on in Lord Porter's speech (quoted by Lord Reid) he refers to the observations of Lord Selborne in *Mersey Docks and Harbour Board* v. *Lucas*[13][14]: "'"it is reasonably plain that

[5] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259.
[6] [1952] A.C. 417.
[7] [1906] A.C. 448, 453; 22 T.L.R. 754; 5 T.C. 215.
[8] [1952] A.C. 417.
[9] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367; 30 T.C. 267.
[10] [1952] A.C. 418.
[11] [1948] A.C. 508.
[12] Ibid. 521.
[13] (1883) 8 App.Cas. 891, 905.
[14] [1952] A.C. 419.

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

Upjohn J.

" ' " the gains of a trade are that which is gained by the trading, " ' " for whatever purposes it is used," and therefore what your " ' Lordships have to determine is whether the expense is " ' incurred in order to earn gain or is the application or distribu- " ' tion of that gain when earned.' " The matter is summed up by Lord Reid [14]: " My Lords, I trust that I have not misrepre- " sented the speeches of noble Lords by giving these short " extracts from them. I have read and re-read those speeches " and they appear to me to establish conclusively (first) the " distinction between money spent to earn profits and money " spent out of profits which have been earned."

I approach the matter by returning to section 3 of the Racecourse Betting Act, 1928. It is quite plain that, although the word " trade " is not used, the activities which the board, exercising its statutory duties, are going to carry out are activities in the nature of a trade; that is, by running totalisators at racecourse meetings where the public can come and bet upon the results of races. The board is to make a deduction as a percentage, and the Act lays down how that percentage is to be dealt with; it is to be paid into a fund known as the totalisator fund, and then there is an express direction as to how it is to be applied in subsection (6). The whole question is whether it is right to consider that the Racecourse Betting Control Board, in making payments in accordance with section 3 (6), are making payments wholly and exclusively for the purpose of making gains.

This Act constituted and set up this statutory body and created a legal entity; its powers and duties must, therefore, be ascertained from the terms of the Act itself. Two main questions arise: first of all, is it proper to look upon the appropriation pursuant to a scheme prepared by the board and approved by the Secretary of State as money laid out for the purposes of section 137? Secondly, is it right to consider whether the same result could be achieved by a debit in the accounts of the board before making an appropriation for the approval of the Secretary of State, and is it proper to debit, by way of example, the sum of £42,000 for runners' allowances?

With regard to the first point, it seems to me that the scheme of the Act is this: the board engages in trade or something in the nature of trade; from that it makes a surplus, and from that surplus certain deductions are to be made. They are set out between brackets in subsection (6): " (. . . the payment out of " the totalisator fund of all taxes, rates, charges, and working " expenses, and the retention of such sums as they think fit to " meet contingencies, and the payment of sums to charitable " purposes . . .)." It seems to me that after that has been done, and possibly before the payment of sums to charitable purposes, the trading activities of the board have come to an end. Their trading activities have resulted in the creation of a fund. That fund is to be held in accordance with the trusts pointed out in subsection (6). It is a fund from which the working expenses of

carrying on the trade have been deducted, and from which tax has been deducted. If a claim to income tax cannot be resisted, that includes the deduction of income tax; rates, charges and other working expenses are all to come out of the fund before it is held upon the trust of subsection (6), and, accordingly, in my judgment, this fund at that stage is a fund which has finished with trading activities, and appropriations thereout have no longer any reference to trading activities of the board. The appropriations are made and are made only for the reason, that they have to be so made pursuant to section 3 (6) of the Act. They are made, not for the purposes of trade, but for public purposes conducive to the improvement of breeding of horses and the sport of horseracing and the advancement of veterinary science. The board is under a duty to prepare a scheme. The Secretary of State is the person to approve it. It is a statutory distribution of a fund in the hands of the board, and in my judgment it has nothing whatever to do with the trading activities of the board. True enough, the appropriations made coincide with the trading desires of the board. My comment upon that is how very fortunate it is for the board. But it cannot turn what is, in essence, a statutory distribution in accordance with an Act of Parliament of a surplus of a fund into a trading activity. Accordingly, it seems to me that when the Secretary of State approves an appropriation, that is something which has nothing to do with the trading activities of the board and cannot, in my judgment, form proper subject-matter of a deduction under section 137.

As to the second point, is it proper to regard the "runners' "allowances" as being proper deductions for the purpose of income tax: the first thing is, is it proper to deduct that sum from the fund which is going to be dealt with by section 3 (6)? It can only be deducted if it is permitted by the terms of the subsection as a charge, or a working expense, or a deduction to meet contingencies. Plainly it is not a charitable payment. If any of those, it can only be a working expense. Is it proper to regard a runner's allowance as a working expense? That seems to me entirely a question of construction of this Act of Parliament. This board is not a commercial concern. I have to construe the words "working expenses" as I find them in this Act. In my judgment, "working expenses" there means what one ordinarily thinks of as a working expense in connexion with the operation of the totalisators. It has nothing whatever to do with paying money to attract more horses, which, it is hoped, will attract more of the public, some of whom, it is hoped, will place more money with the totalisator. That is not a proper description of an outlay as a working expense. Accordingly, the deduction of this expense of £42,000 was, in my judgment, ultra vires the board. It could not make it except, of course, by way of a scheme approved by the Secretary of State. As, therefore, it could not deduct it in its accounts, it cannot deduct it for the purposes of income tax. But the matter does not rest there,

1957

RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).

Upjohn J.

because, even if it could be treated as a working expense, the question still arises whether it is a proper deduction for the purposes of section 137 of the Income Tax Act. I do not think that it is, because, with all respect to the special commissioners, I do not see how this sum of runners' allowances can be described as a sum wholly and exclusively laid out for the purposes of the trade. It is laid out to attract more horses and more public quite generally to racecourses. It is really an outlay which is as much, in the long run, for the benefit of the public, of racecourse executives and for the benefit of bookmakers, or generally for the sport of racing as it is for the benefit of the board, and, in my judgment, it would not in any event be a proper deduction for the purposes of income tax, even if it were a working expense, which in my judgment it is not.

In my judgment, the special commissioners have failed entirely to give proper weight to the construction and meaning of the Act. It is in the Act that one finds the powers and duties and obligations of the board set out, and I think that they have wholly failed to give due weight to that fact. Accordingly, the appeal must be allowed and the matter must be remitted to the commissioners to adjust the figures in accordance with my judgment.

That brings me to the second group of appeals. That proceeded upon this basis, that on the footing that these appropriations were proper deductions for income tax, a subsidiary point arose which is set out in paragraph 12 (5) of the case stated. [His Lordship read paragraph 12 (5) set out above.]

As I am reversing the commissioners on the main appeals, that question does not now arise, but, as the matter has been fully argued, I should consider the point quite shortly. The expenditure was not allowed on the principle that it was of enduring advantage to the company; that principle was stated by Lord Cave in *British Insulated and Helsby Cables Ltd.* v. *Atherton.*[15] The relevant passage is sufficiently set out in the later case of *Anglo-Persian Oil Co.* v. *Dale*,[16] and I can go straight to the judgment of Romer L.J., who said this[17]: "It was pointed "out by Lord Cave in *Atherton's* case[18] that an expenditure, "though made once and for all, may nevertheless be treated as "a revenue expenditure, and he then added this[19]: 'But when "'an expenditure is made, not only once and for all, but with "'a view to bringing into existence an asset or an advantage for "'the enduring benefit of a trade, I think that there is very "'good reason (in the absence of special circumstances leading "'to an opposite conclusion) for treating such an expenditure as "'properly attributable not to revenue but to capital.'" Then Romer L.J. continued[20]: "It should be remembered, in connexion

[15] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 188.
[16] [1932] 1 K.B. 124; 47 T.L.R. 487; 16 T.C. 253.
[17] [1932] 1 K.B. 145, 146.
[18] [1926] A.C. 205.
[19] Ibid. 213.
[20] [1932] 1 K.B. 146.

"with this passage, that the expenditure is to be attributed to "capital if it be made 'with a view' to bringing an asset or "advantage into existence. It is not necessary that it should "have that result. It is also to be observed that the asset or "advantage is to be for the 'enduring' benefit of the trade. I "agree with Rowlatt J. that by 'enduring' is meant 'enduring "'in the way that fixed capital endures.' An expenditure on "acquiring floating capital is not made with a view to acquiring "an enduring asset. It is made with a view to acquiring an "asset that may be turned over in the course of trade at a com-"paratively early date. Nor, of course, need the advantage be "of a positive character. The advantage may consist in the "getting rid of an item of fixed capital that is of an onerous "character, as was pointed out by this court in the case of *Mallett* "v. *Staveley Coal and Iron Co. Ltd.*[21]"

Each case depends on its own facts; and of *Coalville Urban District Council* v. *Boyce*,[22] referred to in the case, I desire only to say this. That was a very special case which turned on its own particular facts and, although it is interesting as an example of the application of the principle, it does not seem to me that it can in any way govern the case before me.

Bolam v. *Regent Oil Co. Ltd.*[23] was relied upon. That is another example of the principle; in that case it was not applied. But there, again, the facts of that case were so very different from this that it does not afford any guidance in this case. The real question that I have to consider is whether the putting out of this expenditure upon the property of other persons is something which really can be described to be of an enduring advantage to the board. In one sense, it is, of course, because the board hopes to attract more persons to its totalisator windows. But not every advertising expenditure is proper to come within the principle and, speaking for myself (though it is not necessary to come to a final conclusion for the reason I have already given), I find much difficulty in thinking that this expenditure can be treated as being an expenditure of the type envisaged by Lord Cave in *Atherton's* case.[24] However, in the event, of course, these two cross-appeals must be dismissed with costs.

Appeals allowed; cross-appeals dismissed.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons.*

I. G. R. M.

[21] [1928] 2 K.B. 405; 13 T.C. 772.
[22] 18 T.C. 655.
[23] (1956) 37 T.C. 56.
[24] [1926] A.C. 205.

[CENTRAL CRIMINAL COURT.]

C. C. C.

1957
Nov. 11.

Slade J.

* REGINA *v.* JOYCE.

Criminal Law — Evidence — Confession — Inducement — Must relate to charge or accusation to render admission inadmissible.

On Sunday, July 28, 1957, certain accusations were made to the police against the accused. At about 11.30 p.m. two police officers visited the accused at his home, and although he had retired to bed they nevertheless invited him to accompany them to the police station, one of them saying: "I need to take a statement from you." The accused, thinking he had little choice in the matter, accompanied the police to the police station; there he made a written statement which was alleged to contain an admission. At his trial the defence contended that such an admission was inadmissible, being obtained by reason of an inducement held out to the accused:—

Held, that although there had been an inducement, in the colloquial sense, held out to the accused in the invitation of the police both to accompany them to the police station and there to make a statement, it was an inducement insufficient in law to render an admission resulting from it inadmissible. To render an admission admissible, the prosecution must prove that no inducement relating to the charge or accusation was held out to the accused to make it; and this, in the present case, the prosecution had done.

PRELIMINARY POINT on a trial on indictment.

John Stanislaus Joyce was charged on indictment with incest and indecent assault. On the morning of Sunday, July 28, 1957, his daughter had made certain accusations to the police against him. She alleged that certain incidents, which culminated in an incident earlier that morning, had taken place. At about 11.30 p.m. that night two police officers visited the accused at his home; and although he had been working all day and had already retired to bed, they nevertheless invited him to accompany them to the police station, one of the officers saying: "I need to take a statement from you." The accused, although denying that he was guilty of any offence and being extremely reluctant to go to the police station, but thinking that he had very little choice in the matter, nevertheless agreed to accompany the officers to the police station. At the police station the accused made a statement, which was taken down in writing, but which he refused to sign.

At the trial the prosecution alleged that the statement contained an admission. The defence contended that such an admission, if made, was inadmissible, being obtained by reason of an inducement held out to the accused.

J. H. Buzzard and *John Worsley* for the Crown.

A. S. Wells for the defendant.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

The following cases were referred to in argument: *Reg.* v. *Doherty (1)* [1]; *Reg.* v. *Doherty (2)* [2]; *Rex* v. *James* [3]; *Reg.* v. *Reason* [4]; *Reg* v. *Rue* [5]; *Rex* v. *Thomas* [6]; *Reg.* v. *Thompson.* [7]

SLADE J. I do not intend to say more now than is necessary, because the case is to continue with the jury.

I have considered the submission of counsel at some length because it is disquieting for anyone who has to try a number of sexual cases to observe, on the one hand, the proportion in which an acquittal takes place through lack of corroboration, and because of the warning that the judge is bound to give to a jury; and to observe, on the other hand, the number of cases where corroboration is found in some oral statement alleged to have been made by the accused and to constitute an admission which, if put into the context for which the defence contends, may well have amounted to a denial of, or at least to no more than a colourless explanation of, the accused's alleged conduct. I am not going to say more because counsel know what I mean in this particular case.

The objection to the admissibility of evidence arises in this way. On Sunday, July 28, 1957, the complainant went to the police station and there made certain accusations against her father. She alleged that certain incidents, which culminated in an incident earlier that morning, had taken place. At 11.30 p.m. two police officers called at the accused's house and, after stating who they were, explaining the nature of their business, having had some conversation with him in which he denied certain accusations that his daughter had made against him at that stage and having made a search of the accused's clothing, invited him (to use a neutral word) to accompany them to the police station.

The accused, who had been in bed, had been awakened and had hastily put on a pair of trousers over his pyjamas. He had been working all that day, although it was a Sunday, and, being not unnaturally reluctant to turn out at that hour of the night, demurred at first to accompanying them to the police station, but then said, according to the police evidence: "All right, I will "come with you then. She has been stopping out, you know, "and she has been telling lies. I have had to chastise her." Then, again according to the police evidence (which on this point is rather more favourable to the accused than his own evidence in the witness-box in the absence of the jury during the trial) Detective Inspector Carter told the accused, and his statement was confirmed in substance by Detective Sergeant Coleman, that he would *need* to take a statement from him.

[1] (1874) 13 Cox C.C. 23.
[2] (1874) 13 Cox C.C. 24.
[3] (1909) 2 Cr.App.R. 319.
[4] (1872) 12 Cox C.C. 228.
[5] (1876) 13 Cox C.C. 209.
[6] (1834) 6 C. & P. 353.
[7] [1893] 2 Q.B. 12; 9 T.L.R. 435.

C. C. C.

1957

REGINA
v.
JOYCE.

Slade J.

I think it is right to say that the accused probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) "he "had very little choice in the matter"; and I will assume that that was the reason why he did so. I think it is further fair to say that the accused might very well have refused to answer any questions at all, even formal ones as to the members of his family and their ages and who occupied the bedrooms and such matters, if he had not been previously told: "I need to take a statement "from you."

The question I have to ask myself is whether that is a sufficient inducement in law to exclude any admission thereafter alleged to have been made by the accused. That it is an inducement of some kind is, of course, manifest. You would not normally leave your house to go to the police station about midnight if you had not been asked to do so in such terms that you thought you had no choice in the matter; and that must, of course, mean that there was an inducement operating on your mind to make you go. If you make a statement after being told: "I need to take "a statement from you," then obviously some inducement, in the colloquial sense, is held out to you to make it; but an inducement of that nature is not a sufficient inducement in law to render inadmissible a statement resulting from it. To render a confession or admission admissible the prosecution must prove affirmatively that no inducement *relating to the charge or accusation* was held out to the accused to make it. A confession or admission must be excluded if it is made (i) in consequence of (ii) any inducement (iii) of a temporal character (iv) connected with the accusation or relating to the charge (v) held out to the accused by a person having some authority over the subject-matter of the charge or accusation.

In my judgment the words "I need to take a statement from "you," or even words covering a suggestion that you will have to come to the station because we need to take a statement from you when we get there, is not an inducement in any way relating to the charge or accusation. The prosecution therefore have satisfied me that evidence is admissible of the admissions alleged to have been made by the accused.

Evidence admitted.

Solicitors: *Director of Public Prosecutions; A. A. Kassman.*

[LEEDS ASSIZES.]

* REGINA *v.* PRITAM SINGH.

1957
Dec. 12.

Mr. Commr. Wrangham.

Criminal Law—Perjury — Oath — Sikh—Oath impracticable—Affirmation — Whether lawfully sworn — Oaths Act, 1888 (51 *&* 52 *Vict. c.* 46), *s.* 1—*Perjury Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 6), *ss.* 1 (1), 15. *Evidence—Oath.*

The accused, a Sikh, had been a witness in proceedings in a magistrates' court and, according to his religion, an oath sworn on the "Granth" would have been binding on him. He had not objected to taking an oath but no copy of the "Granth" was available and he made an affirmation before giving his evidence. On a charge of having committed perjury in the magistrates' court:—

Held, the accused had not been lawfully sworn within section 1 (1) of the Perjury Act, 1911, because he did not fall into either of the two classes of witnesses who are permitted to affirm under section 1 of the Oaths Act, 1888,[1] and therefore there was no case to go to the jury.

TRIAL ON INDICTMENT.

The accused, Pritam Singh, was charged on indictment with perjury in proceedings at the magistrates' court at Huddersfield, contrary to section 1 (1) of the Perjury Act, 1911. The accused was a Sikh, and according to his religion an oath on the "Granth," the Holy Book of the Sikhs, would have been binding on him. At the proceedings in the magistrates' court he did not object to being sworn, but a copy of the "Granth" was not available and the accused made an affirmation before giving his evidence.

In the present trial, after certain evidence for the Crown had been heard, it was agreed by both counsel that it would be idle to go through the formality of hearing the whole of the evidence if the commissioner was of the opinion that the accused had not been properly sworn in the magistrates' court, and counsel for the accused was permitted to make a submission that there was no case to go to the jury on that particular point.

E. J. Parris for the accused. The accused was not "lawfully sworn" within section 1 (1) of the Perjury Act, 1911, which reads: "If any person lawfully sworn as a witness or as "an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false "or does not believe to be true, he shall be guilty of perjury . . ."

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

[1] Oaths Act, 1888, s. 1: "Every "person upon objecting to be sworn, "and stating, as the ground of such "objection, either that he has no "religious belief, or that the taking "of an oath is contrary to his "religious belief, shall be permitted "to make his solemn affirmation "instead of taking an oath in all "places and for all purposes where "an oath is or shall be required by "law, which affirmation shall be of "the same force and effect as if he "had taken the oath."

1957

REGINA
v.
PRITAM
SINGH.

The position at common law is set out in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 507: "The "general common law rule is that the testimony of a witness to "be examined viva voce in a criminal trial is not admissible "unless he has previously been sworn to speak the truth." As regards persons who can be affirmed, the original Act, the Quakers and Moravians Act, 1833, was enlarged by the Oaths Act, 1888.[1] By section 1 the witness must make the objection—that is a condition precedent before he can be lawfully affirmed—and then there are two grounds on which he may be lawfully affirmed, namely, if he is an agnostic or if the taking of an oath is contrary to his religious belief. Neither of these grounds applies in the present case, and if a witness who says that he is a Sikh is allowed to affirm, the affirmation is unlawful and there is no exception material to this case to the rule at common law.

The case of *Reg.* v. *Moore*[2] is exactly on this point, even the religion being the same as in the present case. In that case a witness who had no objection to being sworn, who had a religious belief and who had no religious objection to an oath, made an affirmation and gave evidence. No objection was taken till after the verdict was given and it was held that such evidence was inadmissible.

In Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 1288, some doubt is thrown on the binding authority of that decision which, being in 1892, was a direct commentary on the Act of 1888, but it is submitted that that doubt is quite wrong. Section 15 (1) of the Perjury Act, 1911, relates to oaths and reads: "For the purposes of this Act, the forms and cere-"monies used in administering an oath are immaterial, if the "court or person before whom the oath is taken has power to "administer an oath for the purpose of verifying the statement "in question, and if the oath has been administered in a form "and with ceremonies which the person taking the oath has "accepted without objection, or has declared to be binding on "him." Section 15 (2) of the Act, the interpretation subsection, deals with affirmation: "In this Act—The expression 'oath' in "the case of persons for the time being allowed by law to affirm ". . . instead of swearing, includes affirmation . . ." The note in Archbold following subsection (1) reads: "(Oath in this sub-"section includes affirmation and it appears to override *Reg.* v. "*Moore*[3])." It does not override that case, because "oath" does not include "affirmation" until you have first of all a person who is "allowed by law to affirm or declare," who is a person defined in section 1 of the Oaths Act, 1888, that is to say, a person who objects to taking an oath and states one of the two grounds in that section.

[MR. COMMISSIONER WRANGHAM. Supposing that in this country there was not any copy of the Holy Book of this particular religion and a member of the faith said: "I have a religious belief.

[2] (1892) 8 T.L.R. 287. [3] Ibid.

"I recognize the validity of the oath and the oath the validity "of which I recognize is an oath to be taken on a book of which "no copy is procurable in this country." Does that mean that a man in those circumstances cannot be sworn in this country at all?]

There is no possible way of swearing him in those circumstances. At common law evidence is inadmissible unless sworn before God. The Act of 1888 has made one exception, and another is the case of young children, but only those strict exceptions are permitted.

A. J. Cotton for the Crown. The court in this particular instance was entitled to have the witness affirmed. The practical difficulty in this case was that the "Granth" is a bible of which only three copies are known to exist in this country. Two are kept in the custody of temples and the copy produced here today is, it is understood, from the library in Leicester. No copy was available at the Huddersfield magistrates' court and in those circumstances the accused affirmed. Although the argument put forward on section 15 of the Act of 1911 is correct, it is submitted that a person objecting to be sworn—which he can do impliedly by merely saying "I affirm"—and whom it is impracticable to swear in the manner required by his religion should be permitted to affirm.

MR. COMMISSIONER WRANGHAM (to the jury). The charge against the accused is that he committed perjury in the magistrates' court in a case against a man called Mohammed Ali. It is clear that the first thing that the prosecution have to prove in order to establish their case is that the accused was lawfully sworn. They then have to prove that he said what they say he did. They then have to prove that what they say he said, was untrue, and untrue to his knowledge. But before we get to the question of what he said and whether it was true or not, we have first the question whether he was lawfully sworn. The evidence is that he was not sworn at all, he affirmed; and there is an Act of Parliament which says that any witness who wants to affirm on the ground that he has no religious belief (as, for example, in the case of an atheist), or that his religious belief forbids him to take the oath (as, for example, in the case of a Quaker), can affirm instead of taking the oath. If there was any indication that the accused fell into either of those two classes his affirmation would be as good as his oath and he would be equally liable to be prosecuted for perjury. But unfortunately—from the point of view of the prosecution—the evidence in the present case is precisely the other way. The evidence is that the accused has a religious belief, the Sikh faith; that there is a form of oath which he would regard as binding on him as a Sikh; and that, in any case, he never indicated that he wanted to affirm at all. The real reason why he affirmed instead of

1957

REGINA v. PRITAM SINGH.

Mr. Commr. Wrangham.

taking the oath was because it was impracticable in the magistrates' court to administer the Sikh oath. Apparently the Holy Book of the Sikh religion is very difficult to procure and it was not available in the magistrates' court. You may think that where it was found impossible or difficult that a man should be sworn according to the oath of his own religion, it would be reasonable enough if Parliament provided that he should be permitted with his own consent to affirm and that such affirmation should count as an oath, but Parliament has not yet so provided. In the circumstances I am bound to direct you that there never would be evidence fit for you to consider on this charge, and I therefore ask you to return on my direction a formal verdict of "Not Guilty" against this man on this indictment.

Verdict: "Not Guilty."

Solicitors: *Drabble & Stephenson, Huddersfield; Harry Bann, Town Clerk, Huddersfield.*

[PROBATE, ETC., DIVISION.]

1957 *Dec.* 20.

Mr. Commissioner Latey Q.C.

*LEACH *v.* LEACH AND HARROWER.

PRACTICE NOTE.

Husband and Wife — Judicial separation — Costs — Power of court to order woman named to pay wife's costs—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 3 (2), 14 (1).

UNDEFENDED PETITION.

A wife presented a petition for a judicial separation on the ground of her husband's adultery with a woman named, against whom an order for costs was prayed. She was named in the petition as a respondent, and entered an appearance to the suit. At the conclusion of the suit, which was undefended, the wife's claim for costs against the woman named was opposed on the ground that the court had no jurisdiction to make such an order.

H. S. Law for the wife.

Donaldson Loudoun for the husband and the woman named.

MR. COMMISSIONER LATEY Q.C. Mr. Loudoun, representing both the husband respondent and the woman named as an adulteress, who have not defended this suit for judicial separation on its merits, claims that this court has no jurisdiction to make the order for costs which is sought against the woman named. He says that there has been a section in the Matrimonial Causes Acts ever since section 28 of the Act of 1857, now contained

in section 3 (2) of the Act of 1950,[1] which permits a woman charged with adultery by a wife in a divorce suit to be made a respondent and to be made liable for the costs of the suit, but that that section applies only to divorce and not to suits for judicial separation, and, indeed, it does, taken by itself. He supports his proposition by reference to Rayden on Divorce, 6th ed., p. 484.

Mr. Law has said, in opposing this submission, that section 14 (1) of the Act of 1950 [2] picks up section 3, a preceding section in the statute. He also argues that nowhere in the Act is there any section which provides in the ordinary way for an order for costs, which must be implied as part of the ordinary duty of the court after a case has been decided, and referred me to *Butler* v. *Butler*,[3] and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, as to the unfettered discretion of the judge in regard to costs, which, of course, has to be exercised judicially.

[His Lordship referred to the Matrimonial Causes Rules, 1957, rule 5 (1),[4] and the fact that the woman named had entered an appearance and was named as second respondent in the title of the suit, and continued:] I cannot accept the submission that the court has no jurisdiction to make an order for costs against the woman named in this suit for one moment; it is negatived by the fact that section 14 of the Act of 1950 picks up section 3 (2) of that Act, and wherever there are parties to a suit the court is entitled to make an order for costs.

In the interpretation clause of the Supreme Court of Judicature (Consolidation) Act, 1925, section 225, it is clearly stated that "'Party' includes every person served with notice of or "attending any proceeding, although not named on the record." In this particular case the woman named is named on the record, and she stands in just the same position as a male co-respondent would in a husband's petition for divorce on the ground of his wife's adultery.

Order for costs against the respondent and the woman named.

Solicitors: *Vizard, Oldham, Crowder & Cash; Withers & Co.*

E. J.

[1] Matrimonial Causes Act, 1950, s. 3 (2): "On a petition for divorce "presented by the wife on the ground "of adultery the court may, if it "thinks fit, direct that the person "with whom the husband is alleged "to have committed adultery be made "a respondent."

[2] Matrimonial Causes Act, 1950, s. 14 (1): "A petition for judicial "separation may be presented to the "court either by the husband or the "wife . . . and the foregoing pro-"visions of this Act relating to the "duty of the court on the presenta-"tion of a petition for divorce, and "the circumstances in which such a "petition shall or may be granted "or dismissed, shall apply in like "manner to a petition for judicial "separation."

[3] (1890) 15 P.D. 126, C.A.

[4] Matrimonial Causes Rules, 1957, r. 5 (1): ". . . where a wife's "petition alleges adultery with a "woman named and contains a claim "for costs against her, she shall be "made a respondent in the cause."

[CHANCERY DIVISION.]

1957
Dec. 4.

Danckwerts J.

*DISTRICT BANK LTD. *v.* WEBB AND OTHERS.

[1957 D. 401.]

Estoppel—By conduct—Mortgage—Recital in conveyance that vendors "seised in unencumbered fee simple in possession"—Conveyance subject to lease—Vendors in possession as lessees—Legal charge—Claim for possession by mortgagee—Whether vendors estopped from setting up existence of lease.

Edward and Mrs. W., the owners in fee simple of a house, demised the house by a lease dated March 25, 1952, to Edward and his partner for a period of 21 years. In July, 1954, Edward and Mrs. W. charged the property in favour of the plaintiff bank to secure Mrs. W.'s bank account by memorandum of deposit and in October, 1954, her brother Edwin executed a further memorandum of deposit for the same purpose. On November 8, 1954, Edward and Mrs. W. conveyed the house to Edwin, and the conveyance recited that the vendors were "seised in unencumbered fee simple "in possession upon trust for sale" of the property in question. On July 7, 1955, by legal charge, Edwin charged the property in favour of the bank in order to secure his account. Edward and Mrs. W. were still at that date, and at all material times, either together or one of them, in possession of the house. The bank, upon failure by Edwin to pay moneys outstanding, claimed possession of the property under the legal charge executed by Edwin. On Edward and Mrs. W. resisting the claim for possession in reliance on the lease dated March 25, 1952, the bank contended that they were estopped from so relying by reason of the recital in the conveyance by them to the brother dated November 8, 1954:—

Held, that Edward and Mrs. W. were entitled to remain in possession in reliance on the lease since the recital that they were "seised in fee simple in possession upon trust for sale" did not constitute a sufficiently unambiguous representation to create an estoppel: a lease or tenancy was not normally to be regarded as an incumbrance and "fee simple in possession" distinguished such an estate from "fee simple in reversion" and did not indicate "vacant possession."

ADJOURNED SUMMONS.

By a conveyance dated February 22, 1952, land near Sevenoaks in Kent was conveyed to George Edward Webb and his wife, Constance Lilian Janet Webb, the second and third defendants to the summons. The property included a house called at that time "The Magnet House," although later renamed "Greensleeves."

By a lease dated March 25, 1952, the Webbs demised the house for a period of 21 years, at a rent of £70 a year, to George Edward Webb and Donald Martin, who afterwards became the partner of Webb. That partnership was later dissolved and Donald Martin claimed no beneficial interest in the lease.

[Reported by JENNIFER WEST, Barrister-at-Law.]

On July 28, 1954, the Webbs executed a memorandum of deposit to secure Mrs. Webb's bank account, and on October 14, 1954, a further memorandum of deposit was executed to secure her bank account by her brother, George Edwin Webb, the first defendant to the summons.

On November 8, 1954, George Edward and Mrs. Webb conveyed the house in consideration of the sum of £4,200 to George Edwin Webb, and the conveyance contained a recital that the vendors were "seised in unencumbered fee simple in possession "upon trust for sale" of the property in question. George Edward and Mrs. Webb, either both or one of them, continued in possession of the property.

On July 7, 1955, George Edwin Webb charged the property in favour of the District Bank Ltd., the plaintiffs to the summons. The mortgage was expressed to be a continuing security over the property for payments which George Edwin Webb might be called upon to make to the bank in respect of any advances made by the bank to him.

On September 1, 1955, the bank demanded in writing outstanding moneys, and George Edwin Webb failed to pay in accordance with the demand. The bank accordingly took out a summons for possession.

G. T. Hesketh for the bank.

The first defendant, George Edwin Webb, was not represented.

Mark Nesbitt for George Edward and Mrs. Webb.

DANCKWERTS J., after stating the facts, continued: If, therefore, the lease is effective, the bank cannot gain possession of the property because at the date when the legal charge was executed by George Edwin Webb, and at the date it was conveyed to him, it was subject to an existing lease for 21 years, which had at the date of conveyance to him about 19 years to run and is still, of course, operative. It is said, however, that by reason of their being parties to the conveyance, George Edward and Mrs. Webb are both estopped from setting up the existence of the lease because of the recital in that conveyance that they were "seised "in unencumbered fee simple in possession upon trust for sale."

As regards estoppel, it depends upon representation, and the cases show that in order to be effective a representation relied upon in conveyancing as creating an estoppel must be clear and unambiguous. The question arises, therefore, whether the recital contained in the conveyance is of such a kind. "Seised in "unencumbered fee simple in possession upon trust for sale": was that a representation that no such lease existed? In my view it was not.

In the first place, I am not satisfied that a lease was an incumbrance to these parties. It is true that in certain circumstances a lease may be regarded as an incumbrance, but it seems

1957

District Bank Ltd. v. Webb.

Danckwerts J.

to me that an incumbrance, normally, is something in the nature of a mortgage and not something in the nature of a lease or tenancy, and since, on the authorities, an unambiguous representation must be shown if an estoppel is to be created, it seems to me that in that respect the recital is not sufficient for the plaintiff bank's purpose. Secondly, the words "in possession" are relied upon, but I do not think that "in possession" means vacant possession. It seems to me that the meaning is "fee "simple in possession" as opposed to "fee simple in reversion" and there again it seems to me impossible for the bank to rely upon such representation in the recital to cause the vendors to be bound by any estoppel.

It is plain from what I have stated that there was in existence at the date of the legal charge an incumbrance created by the memorandum of deposit and deposit of title deeds by George Edward and Mrs. Webb on July 28, 1954, and also that mysterious incumbrance, if it was an incumbrance, constituted by George Edwin Webb by his memorandum of deposit of October 14, 1954. The bank must have known of these two incumbrances. It is plain from the evidence of Mr. Leech, the bank manager, that all the Webbs, all three of them, were on very close terms. They were always doing business together and it seems to me extremely likely that Mr. Leech must have been aware on the date when the legal charge was executed by George Edwin Webb that George Edwin Webb was not in possession of the property the subject of the charge, and that either or both George Edward and Mrs. Webb were living there and in possession, and if he knew that the person on the title, the owner of the property, was not in possession, but somebody else, there was an obligation to inquire as to the terms under which the person in possession held the property. The evidence is more by inference than positive, and it is not necessary to rely particularly on that ground in the present case. It seems to me that the bank is not entitled to an order for possession by reason of the existence of the lease.

Declaration accordingly.

Solicitors: *Claude Barker & Partners; Gregsons.*

[PRIVY COUNCIL.]

* CHIEF EKE OJA AND OTHERS . . . APPELLANTS;

AND

CHIEF KANU UKPAI AND ANOTHER . . RESPONDENTS.

J. C.†

1958
Jan. 20.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria)—Jurisdiction—Claim to ownership of land—Not a claim to fix boundaries—Jurisdiction of Supreme Court—Not ousted by Inter-Tribal Boundaries Settlement Ordinance (No. 49 *of* 1933) (*Laws of Nigeria*, 1948, *c.* 95), *ss.* 3, 4 *and* 5.

Where the respondents, as plaintiffs representing the people of Biakpan, claimed a declaration of title to a piece of land known as "Ekuot Ijoho" at Biakpan in the Calabar Province of Nigeria and defined by a plan, and the appellants as defendants representing the neighbouring people of Asaga contested the claim, it was simply a claim to ownership of the land and not a claim to have a boundary fixed between two tribes, and the decision of the claim was clearly within the jurisdiction of the Supreme Court of Nigeria, on transfer from the Native Court, by the joint effect of the Native Courts Ordinance and the Supreme Court Ordinance. Further, the Inter-Tribal Boundaries Settlement Ordinance, 1933, of Nigeria, did not deprive the Supreme Court of jurisdiction to hear and decide such a claim. That Ordinance contained no express exclusion of the Supreme Court's jurisdiction, did not in section 3 give any tribe a right to have a dispute decided, and by sections 4 and 5 made it clear that the decision under the Ordinance need not be based on any principle of law. A jurisdiction of the kind conferred by the Ordinance could not have been intended to take away the *right* of any tribe to have its claim to ownership of a defined piece of land decided by the Supreme Court on legal principles after hearing argument.

Judgment of the West African Court of Appeal affirmed in the result.

APPEAL (No. 28 of 1956) from a judgment and order of the West African Court of Appeal (May 28, 1954), affirming a judgment of the Supreme Court of Nigeria (July 14, 1953) in favour of the present respondents.

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of a suit commenced by plaint in the Native Court of Ubaghara and transferred to the Supreme Court by an order made under section 28 (1) (*c*) of the Native Courts Ordinance.

It is convenient to refer hereafter to the respondents (who were plaintiffs in the suit) as "the plaintiffs" and to the appellants (defendants in the suit) as "the defendants."

The plaintiffs claimed, for themselves and as representing the people of Biakpan, "(1) Declaration of title to all that piece or

† *Present*: LORD MORTON OF HENRYTON, LORD REID, THE RT. HON. L. M. D. DE SILVA.

J. C.
1958
EKE OJA
v.
KANU
UKPAI.

"parcel of land known as 'Ekuot Ijoho' situate and being at "Biakpan in the Calabar Province, property of the plaintiffs, "the said land to be particularly delineated on the plan to be "produced at the hearing.

"(2) £300 damages for trespass in that in or during the year "1947, the defendants and their people and/or agents broke and "entered into the plaintiffs' said land and therefrom collected "palm fruits and made farms therein, and thereby disturbed the "plaintiffs' quiet possession of the said land, without the leave "or licence of the plaintiffs.

"(3) An injunction to restrain the defendants, their people, "agents, servants and each and every one of them from any "further acts of interference with the plaintiffs' right, title, "interest in, and possession of the said land. Dispute started "since 1947."

By their statement of claim filed on September 15, 1952, the plaintiffs pleaded that the land in dispute was situate at Biakpan in the District of Arochuku, Calabar, was known as "Ekuot "Ijoho," and was and had been from time immemorial the property of the plaintiffs by virtue of first occupation and the exercise of maximum acts of ownership by the plaintiffs and their ancestors. They further alleged that while certain lands lying between the plaintiffs' village of Biakpan and the defendants' village of Asaga had been treated as the common property of both villages, the effective occupation and user and exclusive possession of the land in dispute by the plaintiffs and their ancestors were always recognized by the defendants and their ancestors, who were strangers to the land in dispute, until 1947 when the defendants and their people started to invade the land in dispute and to make farms and collect palm fruits thereon thereby trespassing on the plaintiffs' property and causing them damage.

By their defence dated November 5, 1953, the defendants, for themselves and as representing the people of Asaga, admitted the representative nature of the action and said that the true name of the land in dispute was "Ali Ukwu." They averred that the defendants were the real and true owners of the land in dispute by virtue of inheritance from their ancestors and the exercise of maximum acts of ownership thereover. They pleaded that the plaintiffs enjoyed the land whereon they now lived by virtue of a grant from the defendants and that until recently the plaintiffs had always acknowledged the defendants as their landlords. The defendants denied the trespass and damage alleged in the statement of claim, and pleaded (1) estoppel; (2) res judicata. The defendants did not plead any matters relied on in support of the pleas of estoppel or res judicata nor did they plead either common ownership or common user of the land in dispute.

At the hearing of the suit in the Supreme Court of Nigeria before Dove-Edwin J. it appeared that the parties were in

substantial agreement concerning the location and precise boundaries of the land in dispute, the said land being more particularly delineated on two plans (Exhibits A and B) put in evidence by the plaintiffs and defendants respectively. Those plans were substantially identical, save that Exhibit A referred to all physical features by Biakpan names and included more frequent reference to physical features associated with the Biakpan people than to those associated with the Asaga people. In the same way Exhibit B referred to all physical features by Asaga names and included more frequent reference to physical features alleged by the defendants to be associated with the Asaga people.

The plaintiffs and the defendants both called a number of witnesses to testify as to the prior occupation and continuous user of the land in dispute by the party by whom the said witnesses were called. The trial judge considered the plaintiffs and their witnesses to be reliable and accepted their evidence, and in terms said that he considered the defendants and their evidence as unreliable. He gave judgment for the plaintiffs for the declaration sought and for the injunction sought, but gave no damages for trespass.

The defendants appealed to the West African Court of Appeal, and de Comarmond Ag.C.J. (Nigeria) delivered a judgment dismissing the appeal, with which Foster Sutton P. and Henley Coussey J.A. concurred. The Acting Chief Justice said: "I do "not consider that the appellants can succeed in this appeal to "have the judgment set aside on the ground that it cannot be "supported having regard to the weight of evidence or that it is "unreasonable. The important question that falls to be decided "is whether the learned judge was right in rejecting the plea of "estoppel or res judicata raised in paragraph 8 of the Asagas' "statement of defence."

He then dealt with, and rejected, the defendants' plea of estoppel or res judicata and continued: "The last ground of "appeal, which is that the decision is unwarranted, unreason-"able and not supported by the weight of evidence, must also "fail because it cannot be said that there was not sufficient "evidence to support the trial judge's decision. I am satisfied "that the learned judge spared no effort in analysing and "weighing the evidence, and I see no reason for disagreeing "with him."

1957. December 2, 3, 4, 5. *Sir Andrew Clark Q.C.* and *D. M. Ogwo* for the appellants.

L. G. Scarman Q.C. and *A. S. Trapnell* for the first respondent.

The following cases, in addition to those referred to in the

J. C.
1958
EKE OJA
v.
KANU
UKPAI.

judgment, were cited in argument: *Assaf* v. *Fuwa*[1]; *Chief Kwame Asante* v. *Chief Kwame Tawra*[2]; *Rex* v. *The Steward, etc., of Havering Atte Bower*[3]; *Vanderpuye* v. *Botchway*[4]; *Healey* v. *Minister of Health*[5]; *Omanhene Kobina Foli* v. *Chief Oberg Akesse*[6]; *Amata* v. *Modekwe*[7]; *Chester* v. *Bateson*[8]; *Hedley* v. *Bates*[9]; *Trevivan* v. *Lawrance*[10]; *Magrath* v. *Hardy*[11]; *Reg.* v. *Hutchings*[12]; *Pasmore* v. *Oswaldtwistle Urban District Council.*[13]

1958. January 20. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above and continued: Faced with the concurrent findings of Dove-Edwin J. and the Court of Appeal, Sir Andrew Clark, for the defendants, naturally felt unable to contend that their Lordships should take a different view of the evidence which had been held to establish the title of the plaintiffs to the land in dispute. He contended, however, that neither the judge nor the Court of Appeal had jurisdiction to decide the plaintiffs' claim. In support of this contention he put forward three submissions:

(1) The present action is, in substance, a claim to have the boundary between two tribes fixed by the Supreme Court, and that court has never had any jurisdiction to fix such a boundary.

(2) If the Supreme Court ever had jurisdiction to decide such a claim as is now put forward by the plaintiffs, that jurisdiction was ousted by the Inter-Tribal Boundaries Settlement Ordinance (No. 49 of 1933) and has not existed since November 30, 1933, when that Ordinance came into force.

(3) Alternatively, the Ordinance just mentioned excludes the jurisdiction of the Supreme Court to give a judgment the effect of which is to alter an inter-tribal boundary, once such a boundary has been fixed by a decision under the Ordinance; and the boundary between the people of Biakpan and the people of Asaga has been fixed by a joint decision of two Assistant District Officers, Mr. T. G. Connell of the Afikpo Division of the Province of Ogoja, and Mr. C. T. C. Ennals of the Bende Division of the Province of Owerri, dated October 22, 1937.

It is to be observed that Sir Andrew did not rely upon any estoppel, and the alleged decision upon which he relies is not the same as the alleged decision upon which the defendants relied in the Supreme Court and the Court of Appeal. In these courts they relied upon an alleged decision of the Resident of the Province of Ogoja, Captain D. O'Conner, dated April 23 and 24,

[1] [1955] A.C. 215; [1954] 3 W.L.R. 552.
[2] [1949] W.N. 40; 65 T.L.R. 105.
[3] (1822) 5 B. & Ald. 691.
[4] [1956] A.C. 501, 508; [1956] 2 W.L.R. 1080.
[5] [1955] 1 Q.B. 221, 225; [1954] 3 W.L.R. 815; [1954] 3 All E.R. 449.
[6] [1934] A.C. 340.
[7] (1954) 14 W.A.C.A. 580.
[8] [1920] 1 K.B. 829; 36 T.L.R. 225.
[9] (1880) 13 Ch.D. 498.
[10] (1704) 1 Salk. 276.
[11] (1838) 4 Bing.N.C. 782.
[12] (1881) 6 Q.B.D. 300.
[13] [1898] A.C. 387; 14 T.L.R. 368.

1938, but the Court of Appeal held that this document was a nullity, and Sir Andrew did not seek to challenge that decision.

The result is that counsel for the defendants rely upon three submissions which were not put forward in either of the West African courts; but as these submissions challenge the jurisdiction of the Supreme Court and the Court of Appeal their Lordships feel bound to express their opinion on them.

In support of his first submission, already stated, Sir Andrew cited a number of decisions in England as to the fixing of boundaries by the court, including *Parish of St. Luke* v. *Parish of St. Leonard*,[1] *Wake* v. *Conyers*[2] and *A.G. to Prince of Wales* v. *St. Aubyn*,[3] and one case in Nigeria, *Ovat Ebenyam* v. *Ayigo*.[4]

Their Lordships would have thought it regrettable if they had to decide whether or not the Supreme Court has jurisdiction to fix a boundary between two tribes, without the assistance of any discussion of the matter by that court or by the Court of Appeal. In their opinion, however, the plaintiffs in the present suit did not claim to have a boundary fixed between two tribes. The claim and defence in the suit have already been set out with some particularity. They show that the plaintiffs simply claimed ownership of a piece of land, defined by the plan Exhibit A, and the defendants contested this claim. In their Lordships' view the decision of such a claim is clearly within the jurisdiction of the Supreme Court, on transfer from the Native Court, by the joint effect of the Native Courts Ordinance and the Supreme Court Ordinance. They would observe that the jurisdiction of the Supreme Court to decide upon such a claim does not appear to have been questioned in any case in the Supreme Court of Nigeria or in the West African Court of Appeal, and these courts have frequently decided cases of this nature. See, for instance, *Okon Owon* v. *Eto Ndon*[5] and *Mosalewa Thomas* v. *Preston Holder*.[6]

Sir Andrew Clark's second submission depends upon the true construction of the Inter-Tribal Boundaries Settlement Ordinance already mentioned. This Ordinance came into force on November 30, 1933, and was amended by No. 6 of 1935 and No. 38 of 1938. Section 2 of the Ordinance defines the expressions "District Officer" and "tribe," and section 3 provides "Any "district officer may, with the approval of the Resident in charge "of the province, inquire into and decide any dispute between "two or more tribes as to the boundaries between the lands of "such tribes." Section 4 provides that "In any inquiry under the "last preceding section the district officer may, if he thinks fit, "be assisted by . . . assessors," and section 5 provides that "No "legal practitioner shall appear for or act for or assist any party in "any inquiry held under this Ordinance unless he is a member

[1] (1779) 1 Bro.C.C. 40.
[2] (1759) 1 Eden 331.
[3] (1811) Wight. 167, 229–230, 231, 235.
[4] (1941) 16 Nig.L.R. 30.
[5] (1946) 12 W.A.C.A. 71.
[6] (1946) 12 W.A.C.A. 78.

J. C.
1958
EKE OJA
v.
KANU
UKPAI.

"of one of the tribes which are parties to the dispute, is personally interested in its settlement and receives no remuneration "for his services in the inquiry." Sections 6, 7 and 8 deal with the review of decisions of the District Officer by the Resident in charge of the Province or the Governor, and section 9 provides that "For the purposes of any inquiry under the Ordinance the "District Officer or Resident in charge of the Province, as the "case may be, shall have all the powers of a magistrate in "connexion with any civil cause in respect of enforcing the "attendance of witnesses and compelling the production of "documents." Section 10 provides that "Any decision or order "given upon an inquiry or a review under this Ordinance shall "be recorded in writing and shall be signed by the Officer giving "the same and shall be registered and preserved by the Resident "in charge of the province." Section 11, upon which Sir Andrew particularly relied, is as follows: "Any person who acts "in disregard or defiance of any decision which may be in force "under this Ordinance, or without due authority, removes, "damages or defaces any boundary or other mark erected during "the course and for the purposes of any inquiry under this "Ordinance or erected in connexion with any decision or order "given under this Ordinance, shall be guilty of an offence and "shall be liable to a fine of £50 or to imprisonment for six months "or to both such fine and imprisonment."

Their Lordships are quite unable to hold that this Ordinance deprived the Supreme Court of jurisdiction to hear and decide claims such as the claim of the plaintiffs in the present action. In the first place, they think that if the Ordinance had been intended to have any such striking effect, the intention would have been made plain by an express provision in the Ordinance to this effect. There is no such provision. Secondly, it is to be observed that section 3 of the Ordinance does not give any tribe a right to have a dispute decided. The section might have been construed as conferring such a right but for the words "with "the approval of the Resident in charge of the Province," but these words, in their Lordships' view, make it clear that the Resident has a discretion to give or withhold his approval to a suggestion by the district officer that he should inquire into and decide any particular dispute. Moreover, sections 4 and 5 of the Ordinance make it clear that the decision under the Ordinance need not be based on any principles of law.

Their Lordships cannot think that a jurisdiction of this kind was intended to take away the *right* of any tribe to have its claim to ownership of a defined piece of land decided by the Supreme Court on legal principles, after hearing legal argument by persons skilled in the law.

As to the third submission on behalf of the defendants, already stated, their Lordships are of opinion that the alleged joint decision of the two Assistant District Officers did not decide anything, and was not intended to be a decision under the

Ordinance. The document in question is headed "A Joint "Report by T. G. Connell, Esqr., and C. T. C. Ennals, Esqr., "Assistant District Officers, on the Inter-Tribal Boundary Settle- "ment between the Village of Biakpan, Afikpo Division, Ogojo "Province, and the Eziafor and Asaga Villages of the Bende "Division of Owerri Province." The events leading up to this Report are as follows: On November 3, 1936, Mr. Connell was appointed to hold an inquiry under the Boundaries Settlement Ordinance to determine the boundary between Eziafor and Biakpan. The Asagas and the Eziafors belong to the same clan. On the 16th of the same month Mr. Connell gave his decision. The Biakpans were satisfied but the Eziafors were not, and they brought in on their side the present defendants. Objections were raised against the boundary fixed by Mr. Connell, and, as a result, Mr. Ennals, was appointed to hold a further inquiry. He was instructed to fix the boundary between the Biakpans on the one side and the Asagas and Eziafors on the other. The boundary was so fixed, on April 24, 1937, and it differed in certain respects from the boundary fixed by Mr. Connell. This decision did not satisfy the Biakpans and they petitioned against it. It was as a result of these events that the joint Report of Messrs. Connell and Ennals came into existence. The Report begins "In accordance with instructions received from the "Resident, Owerri and Ogoja Provinces in their Memoranda"—then the numbers of the Memoranda are given—"the above- "mentioned Officers proceeded to the area in dispute on "October 22, 1937, accompanied by representatives selected by "each of the three villages."

The instructions there mentioned were not before their Lordships, but reading the Report as a whole they think it is clear that the two Assistant District Officers did not purport to make any decision under the Boundaries Settlement Ordinance. After describing their investigations they "recommend" an amendment of the Biakpan-Eziafor boundary. Then, after stating certain matters of history, and of the allegations of the respective disputants, they go on to say, in paragraph 5 of the Report, "The amendment in paragraph 2 above is put forward because" —and then they go on to give the reasons why the amendment "recommended" in paragraph 2 was "put forward." Paragraph 6 is as follows: "Ikama Pond: Fishing Rights Ubarar. "No amendment of Mr. Connell's decision is proposed." In paragraph 7 they deal with the Biakpan-Asaga boundary and, after stating certain matters, they end the paragraph "therefore "no amendments are proposed." Finally there is a portion of the Report headed "Description of Boundary. Proposed "Biakpan-Eziafor-Asaga Boundary," and they then go on to state the "proposed" boundary.

Their Lordships think it is impossible to construe a Report so worded as being a decision under the Boundaries Ordinance. The words "decision" or "decide" are not used in any part of

J. C.
1958
EKE OJA
v.
KANU
UKPAI.

the Report. On the contrary, as the quotations already set out show, the two gentlemen use the words "recommend," "put "forward" and, in three different places, "proposed." Moreover, there is a striking difference between the concluding part of this Report and the concluding part of the decision by Mr. Ennals already mentioned. The latter document is divided into two parts, each part being signed by Mr. Ennals on April 24, 1937. The first part is headed "Report" and takes the form of certain recommendations and proposals as to the Biakpan-Eziafor boundary and the Biakpan-Asaga boundary respectively. The second part is headed "Decision" and is in imperative terms. The earlier decision by Mr. Connell is not before their Lordships, but they cannot believe that if Mr. Connell and Mr. Ennals intended their joint Report to be a decision under the Boundaries Ordinance it would have taken the form already described. The document was merely a report intended to assist higher authority to review the two differing separate decisions of Mr. Connell and Mr. Ennals.

For these reasons their Lordships are of opinion that there has never been any decision under the Boundaries Ordinance as to the boundary between the lands of the plaintiffs and the lands of the defendants. Counsel on both sides agree that neither Mr. Connell alone nor Mr. Ennals alone could decide this boundary, since in so doing he would have decided also the boundary between the Province of Ogoja and the Province of Owerri, which he had no power to do; and, as has already been stated, the alleged decision of Captain O'Conner is no longer relied upon. Thus their Lordships are not called upon to decide as to the effect, if any, of a decision under the Boundaries Ordinance upon the jurisdiction of the Supreme Court to decide the present case, or to consider the decision of the West African Court of Appeal in the case of *Nnamene Anjoku* v. *Ivube Nwa Nnamani.*[7]

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.

Solicitors: *Robert K. George; Sydney Redfern & Co.*

C. C.

[7] (1953) 14 W.A.C.A. 357.

[COURT OF APPEAL.]

*CARGO LATELY LADEN ON BOARD THE FEHMARN (OWNERS) v. FEHMARN (OWNERS).

THE FEHMARN.

[1956 F. 1260.]

C. A.

1957
Dec. 16, 17.

Lord Denning, Hodson and Morris L.JJ.

Arbitration—Stay of judicial proceedings—Submission to foreign court—Assignment of contract—Both parties strangers to foreign court—Refusal of stay—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 4.

The plaintiffs, an English company and the holders of a bill of lading which acknowledged the shipment at a Russian port, in apparent good order and condition, of a cargo of turpentine by a Russian organization for carriage to London, began an action against the owners of the German vessel in which the turpentine was carried for damages arising out of a dispute under the bill of lading, it being alleged that, on delivery in London, the turpentine was discovered to be contaminated. It was a term of the bill of lading that all claims and disputes arising thereunder "shall be "judged in the U.S.S.R." After discharge the turpentine and the vessel were surveyed in the United Kingdom, and all the plaintiffs' witnesses as to their title to sue were in the United Kingdom. The German vessel traded regularly to the United Kingdom. Counsel for the defendants intimated in argument that the defendants might wish to call evidence at the trial as to the condition of the railway wagons from which the turpentine had been loaded. The defendants moved for an order that the writ of summons be set aside for want of jurisdiction, or, alternatively, that the action be stayed.

Willmer J. held that the court had jurisdiction and, exercising his discretion in favour of the English company, refused to stay the action. On appeal by the defendants, it was no longer contended that the court lacked jurisdiction:—

Held, that since the English courts clearly had jurisdiction, and it being shown that, in all the circumstances, the judge had sufficient reason for exercising his discretion in the way he did, the court should not interfere with the exercise of that discretion.

Decision of Willmer J. [1957] 1 W.L.R. 815; [1957] 2 All E.R. 707; [1957] 1 Ll.L.Rep. 511 affirmed.

Per Lord Denning. I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned.

APPEAL from Willmer J.

The plaintiffs commenced an action in rem against the defendants for damages arising out of a bill of lading relating to the carriage of turpentine from Ventspils to London. The defendants entered an appearance under protest and moved for an order that the writ of summons be set aside for want of jurisdiction, or, alternatively, that the action be stayed.

Willmer J. held, that by reason of the express provisions of section 1 (1) (*g*) of the Administration of Justice Act, 1956, the court had jurisdiction, and, accordingly, the writ of summons should not be set aside; and further, that prima facie, in view

C. A.
1957
The Fehmarn.

of the agreement between the parties to refer any dispute to a foreign tribunal, the defendants were entitled to have the action stayed, but that, in all the circumstances, and in particular, since both parties were strangers to Russia, and since the evidence of the plaintiffs was mainly in this country and that of the defendants from their vessel could be easily received in this country, the court ought to exercise its discretion in favour of the plaintiffs and allow the action to proceed. The defendants appealed, but before the Court of Appeal did not contend that there was any want of jurisdiction.

After the decision of Willmer J. the *Fehmarn* was arrested when she returned within the jurisdiction and security was furnished to obtain her release.

T. G. Roche Q.C. and *Derek Hene* for the appellants.

G. G. Honeyman Q.C. and *H. V. Brandon* for the respondents.

The following cases were cited in argument: *The Athenee* [1]; *Evans* v. *Bartlam* [2]; *Smith Hogg* v. *Black Sea & Baltic General Insurance* [3]; *Racecourse Betting Control Board* v. *Secretary for Air* [4]; *The Cap Blanco* [5]; *Kidston* v. *Deutsche Luft Hansa Aktiengesellschaft* [6]; *Osenton (Charles) & Co.* v. *Johnston* [7]; *Heyman* v. *Darwins Ltd.* [8]

Lord Denning. In September, 1955, a Russian company loaded about 500 tons of turpentine in bulk on a German ship then at a port in the Baltic. The Russian shippers presented to the master a bill of lading for signature. One half of the face of the bill of lading was in Russian and the corresponding half in English. All the conditions on the back were in the English language. The bill of lading said that these goods were shipped in apparent good order and condition on the vessel and that they were to be delivered subject to the conditions on the bill of lading. Amongst the conditions was one that the shipowners were bound to make the ship seaworthy before and at the beginning of the voyage. At the end of these conditions there were two clauses which I must read. Condition 26 says: "All "claims and disputes arising under and in connection with this "bill of lading shall be judged in the U.S.S.R." Condition 27 says: "All questions and disputes not mentioned in this bill of "lading shall be determined according to the Merchant Shipping "Code of the U.S.S.R."

The turpentine was duly shipped in bulk, I suppose by being

[1] (1922) 11 Ll.L.Rep. 6; (1923) 14 Ll.L.Rep. 275.

[2] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

[3] [1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405. Ll.L.Rep. 253.

[4] [1944] Ch. 114; 60 T.L.R. 147; [1944] 1 All E.R. 60.

[5] [1913] P. 130; 29 T.L.R. 557.

[6] (1930) 38 Ll.L.Rep. 1.

[7] [1942] A.C. 130; 57 T.L.R. 515.

[8] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

pumped on board the ship, at the port of Ventspils in the Baltic. The *Fehmarn* was owned by German owners in Hamburg. She made her journey to London, and the Russian shippers sold the goods to English buyers, who became holders of the bill of lading.

After the turpentine was unloaded in England, the English importers made complaint of short delivery and contamination. They say (as it now appears from the statement of claim) that there were some three tons short on delivery and that the turpentine was contaminated owing to the failure of the shipowners to make the ship seaworthy and fit for the reception of the turpentine. They say the tanks of the ship had previously carried linseed oil or other vegetable oils on previous voyages and they had not been properly cleaned out before the turpentine was loaded, with the result that there was a skin of linseed oil on the inside of the tanks, which dissolved and so contaminated the turpentine.

The solicitors to the English importers wrote a letter to the German owners making a claim for some £5,000 and intimating that, as the ship was a frequent visitor to this country, it might be necessary to take steps to arrest the vessel when she next came to this country in order that their claim should be settled. The German owners instructed English solicitors to deal with the claim. The solicitors to the English importers spoke on the telephone to the solicitors for the German owners and told them that, if they did not receive an undertaking for security to be given, they would arrest the ship when she next arrived in this country. Thereupon the solicitors for the German owners, after two months' interval, on November 15, 1956, wrote: "We "understand there will be no objection by our clients to a sub-"mission to a private arbitrator, but having regard to clauses 26 "and 27 of the bill of lading our clients are not prepared to give "security to meet your claim." Clauses 26 and 27 are those which I have already read.

So the parties were at issue. Eventually the English importers, the owners of the cargo, brought an action against the German owners of the ship in the Admiralty Division of the High Court claiming damages. Thereupon the German owners moved to set aside the writ on the ground that the English courts had no jurisdiction or alternatively that by the agreement the parties had agreed that all the disputes should be adjudged in the courts of Russia and not in this country.

As to the first point, it is not now suggested that the Court of Admiralty has not jurisdiction. By section 1 (1) (*g*) of the Administration of Justice Act, 1956 (following previous statutes), it is plain that the Court of Admiralty in England has jurisdiction to deal with such a claim as this.

Then the next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard

C. A.
1957
The Fehmarn.
Lord Denning

this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

I would ask myself therefore: Is this dispute a matter which properly belongs to the courts of this country? Here are English importers who, when they take delivery of the goods in England, find them contaminated. The goods are surveyed by surveyors on both sides, with the result that the English importers make a claim against the German shipowners. The vessel is a frequent visitor to this country. In order to be sure that their claim, if substantiated, is paid by the shipowners, the English importers are entitled by the procedure of our courts of Admiralty to arrest the ship whenever she comes here in order to have security for their claim. There sems to me to be no doubt that such a dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: Ought these courts in their discretion to stay this action?

It has been said by Mr. Roche that this contract is governed by Russian law and should be judged by the Russian courts, who know that law. And the dispute may involve evidence from witnesses in Russia about the condition of the goods on shipment. Then why, says Mr. Roche, should not it be judged in Russia as the condition says?

I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned. Here the Russian element in the dispute seems to me to be comparatively small. The dispute is between the German owners of the ship and the English importers. It depends on evidence here as to the condition of the goods when they arrived here in London and on evidence of the ship, which is a frequent visitor to London. The correspondence leaves in my mind, just as it did in the judge's mind, the impression that the German owners did not object to the dispute being decided in this country but wished to avoid the giving of security.

I think the dispute is more closely connected with England than Russia, and I agree with the judge that sufficient reason has been shown why the proceedings should continue in these courts and should not be stayed. I would therefore dismiss the appeal.

Hodson L.J. I agree. The judge stated in his judgment[1] that "where there is a provision in a contract providing that "disputes are to be referred to a foreign tribunal, then, prima

[1] [1957] 1 W.L.R. 815, 819.

"facie, this court will stay proceedings instituted in this country "in breach of such agreement."

That principle is well established and has been applied in a number of cases. MacKinnon L.J. in *Racecourse Betting Control Board* v. *Secretary for Air*[2] made it plain that that general principle was quite independent of section 4 of the Arbitration Act, 1889, now section 4 of the Arbitration Act, 1950, although in a number of cases where applications for a stay have been made argument has been addressed to the court and judgments have been delivered as if section 4 itself were being invoked. Mr. Roche, in arguing this case on behalf of the defendants, has sought to distinguish, or rather to escape from, the consequences of the decision of this court in *The Athenee*,[3] by saying that it was based, in part at any rate, upon a concession by Mr. Langton, who was moving to stay the action, in admitting that he was moving under section 4 of the Arbitration Act.

I notice that Atkin L.J. did not proceed on that basis, but founded himself upon the general principle which the judge stated and to which MacKinnon L.J. referred, that where parties have agreed that disputes should be referred to a foreign tribunal there is no indisposition on the part of the courts of this country to give effect to such a bargain. He went on to say that such a bargain is treated as equivalent to an arbitration clause, that is to say, the discretion is to be exercised on the same lines as where there is an arbitration clause.

Looking at the facts in *The Athenee*,[4] I am bound to say that it makes the argument for the defendants very difficult when an attempt is made to distinguish that case, because the application for a stay was made to the President and, in exercising his discretion in refusing to stay the action, he referred to matters which come under the heading, I think, of convenience, and the Court of Appeal (Bankes and Atkin L.JJ., Warrington L.J. agreeing with Bankes L.J.) referred to matters of the same kind as those which the judge had to consider in the present case, namely, the dispute being as to the condition of the cargo on arrival and the fitness of the ship to carry them and there having been a survey at which both parties were represented. It is true that in *The Athenee*[5] it was said that all the witnesses were in this country, whereas in this case it is clear that there will be witnesses or may be witnesses some of whom will not be in this country.

The judge, in my view, was quite correct in saying that on the authorities, particularly having regard to what was said in *The Athenee*,[6] he had a discretion in considering whether a stay should be granted, and he was entitled to take into consideration in exercising his discretion matters of convenience. I cannot see that he erred in any way in so doing and, if that is so, it is not

[2] [1944] 1 Ch. 114; 60 T.L.R. 147; [1944] 1 All E.R. 60.
[3] (1922) 11 Ll.L.Rep. 6.
[4] Ibid.
[5] Ibid.
[6] Ibid.

C. A.
1957
The Fehmarn.
Hodson L.J.

for this court, in my judgment, to substitute its discretion for his. I therefore would dismiss the appeal.

I have not forgotten one matter which was strongly relied upon by Mr. Roche for the defendants, namely that, in addition to the provision that disputes should be judged in the U.S.S.R., there was a subsequent provision in the succeeding paragraph in the conditions of the bill of lading to the effect that Russian law would apply in certain cases. The judge took that matter into consideration, as indeed he took all relevant matters into consideration. In my opinion, his judgment ought not to be disturbed.

Morris L.J. I am of the same opinion. In his judgment in *Racecourse Betting Control Board* v. *Secretary for Air*,[7] MacKinnon L.J. referred to contracts by which the parties had provided that the decision of a dispute should be in a foreign court. MacKinnon L.J.[8] said that the power and the duty in such cases to stay arose under what he called "a wider general "principle, namely, that the court makes people abide by their "contracts."

It seems to me that the approach of the judge in the present case was quite correct, for he referred to what he called the prima facie presumption, by which I think he had in mind the same considerations as those referred to by MacKinnon L.J., that the court will insist upon the parties honouring their bargain.

On the other hand, the judge referred to what he called the undoubted jurisdiction of the court, and again I think he was clearly correct in so referring to the jurisdiction of the court. He then considered whether sufficient grounds had been shown for displacing what he called the prima facie presumption so as to entitle the parties to take advantage of the jurisdiction of this court. My Lords have referred to the grounds that existed which, in the opinion of the judge, were good and sufficient reasons, and I am also of the opinion that the reasons to which they have referred are sufficient to displace the presumption that arises from the parties' contract.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Bentleys, Stokes & Lowless; Clyde & Co.*

A. S-R.

[7] [1944] 1 Ch. 114. [8] Ibid. 126.

[CHANCERY DIVISION.]

* *In re* MOXON'S WILL TRUSTS. DOWNEY *v.* MOXON.

1958
Jan. 28.

Danckwerts J.

[1957 M. 1459.]

Trust and Trustee — Power of advancement — Exercise of power — Statutory power—Application of capital—Payment to beneficiary direct—No particular purpose expressed—"Benefit"—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 32.

C. S. M. had a life interest in the residuary estate of his father, and his son, B. M., was contingently entitled to the capital thereof if he survived C. S. M. In the event of B. M. failing to survive his father, the fund went to the children of B. M. in equal shares. B. M. was 33 years of age at the present time, and had two infant children. The will contained no power of advancement, and the court was asked whether the trustees of the will could lawfully exercise the power of advancement conferred by section 32 of the Trustee Act, 1925,[1] by the payment, with the consent in writing of C. S. M., to B. M. for his own use of a sum out of the residuary estate not exceeding one-half thereof.

The estate was now worth about £55,000 and the trustees proposed to advance a sum of £20,000 to B. M. The evidence was that B. M. did not require the money for any particular purpose but that he was a responsible person and could be relied on to use the money in the best interest of himself and his family:—

Held, that the word "benefit" in section 32 of the Act was the widest possible word and included a payment of capital money direct to the beneficiary; but that did not absolve the trustees from making up their minds whether the payment in the particular manner which they contemplated was for the benefit of the beneficiary and they must satisfy themselves that it was a proper case for such a payment.

ADJOURNED SUMMONS.

Albert Edward Moxon made his will on January 25, 1927, and appointed the plaintiff Thomas Philip Downey, his wife, Maude Moxon, and his son, the first defendant, Charles Stone Moxon, as

[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance-"ment or benefit, in such manner as "they may, in their absolute dis-"discretion, think fit, of any person "entitled to the capital of the trust "property or of any share thereof, "whether absolutely or contingently "on his attaining any specified age "or on the occurrence of any other "event, or subject to a gift over on "his death under any specified age "or on the occurrence of any other "event, and whether in possession "or in remainder or reversion . . . "Provided that—(*a*) the money so "paid or applied for the advancement "or benefit of any person shall not "exceed altogether in amount one-"half of the presumptive or vested "share or interest of that person in "the trust property . . . (*c*) no "such payment or application shall "be made so as to prejudice any "person entitled to any prior life or "other interest, whether vested or "contingent, in the money paid or "applied unless such person is in "existence and of full age and con-"sents in writing to such payment "or application."

1958

Moxon's Will Trusts, *In re.*

executors and trustees thereof. The testator died on March 21, 1939.

The will contained no power of advancement, and by this summons the plaintiff asked the court: (1) Whether the trustees of the will could lawfully exercise the power of advancement conferred by section 32 of the Trustee Act, 1925, by the payment with the consent in writing of the defendant, Charles Stone Moxon (tenant for life of the testator's residuary estate) to the defendant Bryan Moxon (who was contingently entitled in remainder) for his own use of a sum out of the residuary estate of the testator not exceeding one-half of the said residuary estate. (2) Whether any lawful exercise of the said power in relation to the said residuary estate and with the consent in writing of the defendant, Charles Stone Moxon, would cause the life interest therein of the said Charles Stone Moxon to be forfeited by virtue of the provisions of clause 9 of the will.

The relevant provisions of the will were as follows: By clauses 7 and 8 the testator directed his trustees to stand possessed of his residuary estate (therein referred to as the "trust fund") upon trust to pay the income thereof to his wife, Maude Moxon, for her life.

Clause 9 of the will provided: "And after the death of my "said wife . . . my trustees shall if no act or thing shall have "been done or suffered by my said son Charles Stone Moxon and "if no event shall have happened whereby the income of the "trust fund or some part thereof would or might if belonging "absolutely to my said son become vested in or charged in "favour of some other persons or corporation or my said son "would or might be deprived of the right to receive the same or "any part thereof pay such income to my said son during his "life until some such act or thing as aforesaid shall be done or "suffered by my said son or some event as aforesaid shall happen "and after the failure or determination in the lifetime of my said "son of the trust in his favour hereinbefore contained then my "trustees shall during the residue of the life of my said son "stand possessed of the said income upon the trusts and subject "to the provisions upon and subject to which the said income "would for the time being be held if my said son were then "dead."

Clause 10 provided: "And after the death of my said son "Charles . . . my trustees shall stand possessed of the trust fund "and the income thereof in trust in equal shares if more than "one for all or any the children or child of my said son living at "the date of the death of the survivor of myself my said wife and "my said son who attain the age of 21 years and for all or any "of the issue living at the said date who attain the age of 21 "years of any child of my said son before the said date leaving "issue at the said date such issue to take through all degrees "according to their stocks in equal shares (if more than one) "the share which their parent would have taken if living at the

"said date and so that no issue shall take whose parent is living "at the said date and so capable of taking . . ."

The following facts were stated in an affidavit by the plaintiff: The testator's wife, Maude Moxon, died on November 22, 1952. The defendant, Charles Stone Moxon, was the testator's only child and was now aged upwards of 60 years. He had one child only (namely) the defendant, Bryan Moxon, who was upwards of 33 years and who was married and had two children, the infant defendants, Pamela Ann Moxon and Anthony David Moxon.

The plaintiff and the defendant, Charles Stone Moxon, as the trustees of the will intended, if they could do so lawfully and without causing a forfeiture of the life interest of the said Charles Stone Moxon in the trust fund, to exercise the power of advancement conferred by section 32 of the Trustee Act, 1925, by paying a sum of £20,000 to the defendant Bryan Moxon for his own use out of the capital of the trust fund. The trust fund now consisted of investments worth approximately £55,000.

An annuity bequeathed by the will amounting to £52 was paid out of the income of the trust; the other annuities had ceased to be payable.

The plaintiff continued: "to the best of my knowledge the "said Bryan Moxon does not at present require the said sum "for the purpose of any specific purchase or other expenditure. "But, in my opinion, and (as he informs me and I believe) in that "of my co-trustee, the said Bryan Moxon is a responsible and "trustworthy person who can be relied on to deal with the said "money in the best interests of himself and his family. We have "also taken into account the fact that if the said Charles Stone "Moxon lives for five years after the payment has been made a "substantial saving of estate duty on his death will result."

Kenneth Elphinstone for the plaintiff, one of the trustees of the will.

Michael Kelly for the tenant for life, Charles Stone Moxon, and the remainderman, Bryan Moxon.

E. J. Freeman for Pamela and Anthony, infant children of Bryan.

The following cases were cited in the argument: *Lowther* v. *Bentinck* [2]; *In re Vestey's Settlement* [3]; *In re Powles* [4]; *In re Ropner's Settlement Trusts* [5]; *In re Heyworth's Contingent Reversionary Interest.* [6]

DANCKWERTS J. The trustees desire to exercise the power, conferred not by the will but by section 32 of the Trustee Act,

[2] (1874) L.R. 19 Eq. 166.

[3] [1951] Ch. 209; [1950] 2 All E.R. 891.

[4] [1954] 1 W.L.R. 336; [1954] 1 All E.R. 516.

[5] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n.

[6] [1956] Ch. 364; [1956] 2 W.L.R. 1044; [1956] 2 All E.R. 21.

1958

MOXON'S WILL TRUSTS. *In re.*

Danckwerts J.

1925, by making an advance, with the consent, of course, of the life tenant, to the second defendant, Bryan Moxon, the son of the tenant for life, by a payment direct to him. He is 33, and they appear to think that he is a responsible person; but there is no evidence as to the purposes for which he would use the money, nor, indeed, does there appear to have been any inquiry by the trustees as to what he would do with it. There is merely evidence that they believe that he does not require it for any particular purpose or expenditure at the present moment.

The provisions of section 32 are in quite wide and general terms. It confers upon the trustees power in these words. [His Lordship read section 32 of the Trustee Act, 1925.] The second defendant, of course, is entitled contingently to the capital, and I am asked to say whether they may apply that power by a payment to the beneficiary in question directly.

One of the trustees said in evidence that one of the matters which has operated in their minds with regard to the proposed payment is that there will be substantial saving in estate duty on the death of the tenant for life; and that, of course, is undoubtedly a matter which will enure for his benefit. It seems to me that the word "benefit" is the widest possible word one could have and that it must include a payment direct to the beneficiary; but that does not absolve the trustees from making up their minds whether the payment in the particular manner which they contemplate is for the benefit of the beneficiary.

I propose, therefore, to answer the question which I am asked by saying that the power does include a payment of capital moneys directly to the beneficiary, but that the trustees must satisfy themselves that it is a proper case for a payment to be made in that manner.

The second question is covered by the decision of *In re Rees*,[1] and as that is conceded, I will make a declaration that any lawful exercise of the said power in relation to the said residuary estate, and with the consent in writing of the defendant, Charles Stone Moxon, will not cause his life interest to be forfeited.

Declarations accordingly.

Solicitors: *Crossman, Block & Co. for Eaton Smith & Downey, Huddersfield.*

I. G. R. M.

[1] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.

[QUEEN'S BENCH DIVISION.]

* HAZELL v. BRITISH TRANSPORT COMMISSION AND ANOTHER.

1957
Nov. 27, 28, 29.

Pearson J.

Railway — Level crossing — Accommodation road — Collision between motor-vehicle and train on foggy day—Whether special precautions to be taken by railway authorities and employees.

Negligence—Standard of care—Question of fact—Relevance of judicial precedent.

Judicial Precedent — Question of fact — Special class of situation—Application of legal principle.

Fact or Law—Negligence—Standard of care—Special class of situation.

The plaintiff's son, who was driving a tractor across an accommodation crossing on a foggy morning, was killed when a train ran into the tractor. In a claim under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, negligence was alleged against the railway authorities and their engine driver. The judge found that, despite the circumstances of fog and damp, the train could have been heard by anyone at the crossing if there was no other noise:—

Held, that although the railway authorities and their employees were bound to follow the basic rule of taking reasonable steps to promote safety, the principle which applied to an ordinary accommodation crossing was that, even in foggy weather, they were not bound to take any special precaution such as reducing speed, whistling on approach, or having whistle boards erected, and, accordingly, the defendants were not negligent.

Although it was a question of fact whether the defendants behaved negligently, it was permissible to look at decisions in other cases, especially Court of Appeal decisions, to see how the basic rule could properly be applied to situations of a particular class.

Kemshead v. *British Transport Commission* (post, p. 173) followed.

ACTION.

On October 11, 1955, at about 8.15 a.m., Arthur Frederick Hazell, aged 22, the son of the plaintiff, Alfred Frederick Hazell, was killed in an accident occurring at an accommodation crossing. The plaintiff, as administrator of his son's estate, claimed damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the British Transport Commission and the engine driver, Thomas Albert Jarrad, alleging negligence causing his son's death.

The deceased, when he left school, worked for a year or two for a farmer at Creeksea Place Farm. At the time of the accident he was home on leave from the Royal Air Force, and was helping on the farm in his usual way. He was used to driving the farmer's tractors and was an experienced and skilled driver. On the morning of the accident the deceased saw the farmer at about 7.30 and was instructed to do some work with a Fordson Major tractor on the northern side of the railway line. The deceased took the tractor down to the accommodation crossing.

1957

Hazell
v.
British
Transport
Commission.

called Creeksea Level Crossing, and was actually driving it over the line when the train ran into the tractor, throwing the deceased off and causing his fatal injuries.

The railway line where the accident occurred was a single branch line. In a distance of 16 miles, there were 33 level crossings, most of which, including the Creeksea Level Crossing, were accommodation crossings. Creeksea Level Crossing was created primarily for the accommodation of persons farming Creeksea Place Farm who might have other land on the other side of the railway.

The train in question was travelling from west to east, running on the single line round a left-hand bend with a slow down gradient of about 1 in 500. In ordinary weather the approaching train could have been seen by a person approaching the level crossing from the south (as the deceased did) several hundred yards away. On each side of the crossing there was an ordinary farm gate and the crossing was wide enough for the tractor to stand on either side of the line inside the gates. Beside each gate, there was a small wicket gate to enable pedestrians to walk across without opening the main gate. The footpath crossing the line was little used. Probably two or three vehicles a day on average belonging to the farm used the crossing. The gates were kept padlocked except when they were opened for the passage of a vehicle.

The day of the accident was foggy but visibility varied from place to place and the line was wet. The train would have been comparatively silent because (1) the steam had been shut off because the train would have to stop at a station about a mile or a mile-and-a-half away; (2) the train wheels running on wet lines would not make as much noise as usual; (3) the fog would smother the sound to some extent; (4) the train engine was an ex-express engine and therefore relatively silent; (5) it was not a long train, having only one engine, seven trucks and a brake van.

Pearson J. found that the train was comparatively silent, but it could have been heard by a man on the crossing if there was no other noise, and that the obvious explanation of the accident was that the deceased still had the engine of his tractor running and could not have heard the train coming. He could have switched off the engine a short time before he had to cross the line and then he would have heard the train.

N. C. Lloyd-Davies for the plaintiff.
H. Tudor Evans for the defendants.

The cases cited in argument are referred to in the judgment.

Pearson J. stated the facts and continued: The question is whether there was any negligence on the part of the engine driver or of his employers, the British Transport Commission, the owners of the railway. There have been some decided cases on rather

similar matters, but, as a matter of general application, in my view, when there is an accusation of negligence against the defendants, it is a question of fact whether in a particular situation the defendants behaved negligently or not. The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation, and I approach with scepticism any suggestion that there is any other rule of law, properly so called, in any of these cases. But, of course, one can look at decisions in other cases, especially Court of Appeal decisions, to see how that basic rule can properly be applied to situations of a particular class. The situation in the present case belongs to a well-defined class. When the driver of a railway train is coming towards an accommodation crossing, what can reasonably be expected of the engine driver and what previous precautions can reasonably be expected of the railway company? From the cases which have been decided on similar situations there emerges a principle that, in the absence of special features, the engine driver is not expected either to reduce his speed or to whistle at an ordinary accommodation crossing, and that the railway company is not expected to erect a whistle board at the approach to an ordinary accommodation crossing. I do not think I need go into the reasons for that at great length. They are based on the special conditions of railway traffic. The assumption is that railway traffic has to proceed reasonably. It would not be reasonable to expect an engine driver to proceed at the speed of five miles an hour or so because of fog, and it would not be reasonable to expect an engine driver to whistle at every ordinary accommodation crossing, because that might mean that he would be sounding his whistle almost continuously, which would be a great nuisance to everybody, and would probably be bad for the animals on farms. The method by which an engine driver has to drive his train is completely different from the method by which a ship has to be steered or a road vehicle has to be taken along the roads. The engine driver is going along a fixed track, his direction is predetermined and his main preoccupation is with his own railway signals. He cannot reasonably be expected, to any great extent, to look at the people coming up to the line from side roads, and in a fog (this is very clear from one of the cases) it is not reasonable to expect the engine driver to go slowly and he is expected to go at his ordinary speed. If the engine driver becomes aware that there is something on the line, or that something is likely to come onto it when the train is approaching, he must take the proper steps to avoid an accident. There is no suggestion in any of the cases that the British Transport Commission or an engine driver is absolved from the ordinary rule of taking reasonable steps to promote safety. What I am concerned with is how one applies the basic rule to the situation of a train approaching a level crossing which is an accommodation crossing.

1957

Hazell v. British Transport Commission.

Pearson J.

There have been several cases on the point, all of which I have read for this purpose. One is *Smith* v. *London, Midland & Scottish Railway Co.*,[1] a Scottish case; another is *Lloyds Bank Ltd.* v. *Railway Executive*[2]; next there is *Lloyds Bank Ltd.* v. *British Transport Commission*[3]; and, finally, *Kemshead* v. *British Transport Commission*,[4] of which I only have a transcript of the Court of Appeal's judgment. From all those cases one can deduce a general principle that special precautions of the kind suggested cannot reasonably be expected of the British Transport Commission or of its engine drivers where an ordinary accommodation crossing is concerned. By "special precautions," I mean precautions such as having a whistle board erected or making a practice of whistling on approach to a level crossing, of reducing speed to some slow speed. Those special precautions cannot be required in the ordinary case.

[His Lordship read extracts from the judgments of Lord Goddard C.J. and Denning L.J. in *Kemshead* v. *British Transport Commission*,[4] and continued:] That being the way in which the Court of Appeal approached a somewhat similar case, can one differentiate this case? There was a fog in that case and there is a fog here. That was an ordinary farm crossing and this is almost an ordinary farm crossing, the degree of user as a footpath being very slight, and there being a slight down gradient to this level crossing. But there must be a great many other accommodation crossings in the country to which there are slight down gradients or more extensive down gradients. The only point about a down gradient is that it causes, or may cause, the train to come coasting down it. Equally, there may be other accommodation crossings which are near some station in which the train will have to stop. Therefore one cannot rely on the fact that it was usual to shut off steam on approaching this level crossing as being an important differentiating feature and, in my view, it was not a differentiating feature. The question of fog was fully dealt with in *Kemshead's* case. I am unable to say that there is any sufficient differentiating feature here. This is a most tragic and unfortunate case but, in my view, there is no liability either on the British Transport Commission or on the engine driver and, therefore, this action fails.

Judgment for the defendants.

Solicitors: *Alan, Edmunds & Phillips; M. H. B. Gilmour.*

C. J. E.

[1] 1948 S.C. 125.

[2] [1952] 1 T.L.R. 1207; [1952] 1 All E.R. 1248.

[3] [1956] 1 W.L.R. 1279; [1956] 3 All E.R. 291.

[4] Post, p. 173.

NOTE.

[COURT OF APPEAL.]

* KEMSHEAD *v.* BRITISH TRANSPORT COMMISSION.

C. A.

1956
July 20.

Lord Goddard C.J., Denning and Birkett L.JJ.

Railway — Level crossing — Accommodation road — Collision between motor-vehicle and train on foggy day—Whether special precautions to be taken by railway authorities and employees.

APPEAL from Stable J.

The defendants, the British Transport Commission, appealed against a decision of Stable J., at Northampton Assizes, in favour of the plaintiff, William Kemshead, in an action in which the plaintiff claimed damages in respect of personal injuries which he suffered in an accident at a level crossing on December 6, 1952, which he alleged was due to the defendants' negligence.

The plaintiff, a master builder, was travelling with a plumber in the plumber's motor-car and a third person, to a small hamlet, consisting of a farmhouse, an old mill and two or three cottages, on the far side of an accommodation crossing, where the plaintiff and the plumber had to do some work. The plaintiff had been down the road in question at least 20 times, and knew that there was a notice on the gate requiring the people who used the crossing to shut and fasten the gates. When the car in which the plaintiff was travelling came to the crossing the gates were found to be open. It was a foggy morning and as the motor-car crossed the railway line a train came into collision with it. The plaintiff and the driver were seriously injured and the third person in the car was killed.

Marven Everett Q.C., Graham Swanwick Q.C. and *H. Tudor Evans* for the defendants.

Phineas Quass Q.C. and *Montague Solomon* for the plaintiff.

LORD GODDARD C.J. stated the facts and continued: This case was complicated to some extent by the fact that at a previous assize, which was held, I think, more than a year before, a case had been brought by the widow of the passenger in the car who had been killed. That case was tried before the same judge, and we are told that in that case the judge gave judgment for the plaintiff and awarded her damages, on what ground we do not know, but I imagine that there was more evidence for the plaintiff in that case than there was in the present one. That judgment was never appealed against. Some reference was made by Mr. Swanwick, who was then appearing for the British Transport Commission, in the course of this case, saying that he was not going to call any evidence in this case such apparently as he had called in the previous case when it had not been believed by the judge, who had rejected it. But there was no agreement made by the parties here that the evidence which had been used in the previous case should be used in the present case, nor was any evidence called as to what the evidence for the defendants in the previous case had been. I suppose somebody might have been called to say, "I was present in court and "I heard the defendants' witness on oath say so and so."

That matter becomes very material because Mr. Quass has put his case very much on the ground that no whistle or indication was given of the approach of this train. There is no evidence whether the driver of the train whistled or did not, because both the witnesses who were called by the plaintiff had no recollection whatever of the circumstances just before the accident; all they remembered was that they were

C. A.
1956
KEMSHEAD v. BRITISH TRANSPORT COMMISSION.
Lord Goddard C.J.

driving down the road and the next thing they knew was that they had been injured. They only remembered what had hit them.

Mr. Quass says that he was entitled, in those circumstances, to have it assumed that there was no whistle. I do not think he was. Evidence could have been given that there was, or if they could give evidence that there was no whistle be it so, but if they did not I do not know that anybody is entitled to draw an inference about it. Supposing this case had been tried before another judge, what then? But in this case the judge expressly disclaimed any recollection of having tried the case at all; at any rate he did not remember any of the details of the case. We did, however, allow Mr. Quass to address us on the footing that the inference was that the train did not whistle. I do not think that is an inference that can strictly be drawn, but in the view the court take it really does not matter whether there was whistling or whether there was not. This was what is known in the statutes as an accommodation crossing. There is no obligation upon a railway company to put watchmen or have signals or bells at such crossings, nor so far as I know to whistle, unless the circumstances are such that an ordinary prudent man would know by reason of the special nature of the crossing that people may reasonably be expected to be upon it at any time.

I refer to a judgment of Scrutton L.J. which Tucker J. read from a shorthand note in *Knight* v. *Great Western Railway Co.*[1] I always like, if I can, to find authority from Scrutton L.J., who was one of the greatest judges of my time. His judgment was given in *Burrows* v. *Southern Railway Co.*,[2] and the quotation which Tucker J.[3] read was as follows: "The first question, therefore, in our view, and the only "question we are going to decide, is this: Was there evidence upon "which the jury could find that the railway company had not taken "reasonable precautions to prevent danger at this crossing? Now I "should be very reluctant to lay down a rule that at any private "crossing the railway company is bound to use special precautions of "some kind. I can quite conceive of cases where owing to a sharp "turn in the railway, or the presence of large numbers of trees in a "cutting obstructing the view, a jury may find, 'We think some "'reasonable precautions should be taken even at a private crossing.' "But I ask myself, and I have considered the evidence very carefully, "whether at this crossing as we see it, and on the facts we know, there "was anything to distinguish it from any other private crossing where "the railway company has for some reasons granted rights to particular "people in the locality, but not to the whole public, because obviously "there are great differences between cases where any member of the "public, not having seen the crossing before, may come to a crossing "and cases where the crossing is only used by people who are always "using it, because they are in the locality and using it for the purposes "of their business."

The cases which have been cited to us—and several have been called to the attention of the court—were all cases which, upon examining the facts, were shown to be ones in which the court proceeded on the ground that there were special facts or circumstances relating to the particular crossing which might as a matter of common sense and common or reasonable precaution require that special precautions should be taken. In the present case I cannot see any reason for holding that this accommodation crossing was any different from the hundreds of other farm accommodation crossings that exist up and down the country. No evidence was given by the plaintiff here with regard to the nature of this road. We cannot assume that it was a highway, because if it was a highway the probabilities are that precautions would have to be taken.

[1] [1943] 1 K.B. 105; 58 T.L.R. 352; [1942] 2 All E.R. 286.

[2] November 8, 1933, unreported.

[3] [1943] 1 K.B. 105, 108.

because there are special provisions in the Railway Clauses Consolidation Act, 1845, with regard to the precautions which should be taken on railways where they are crossed by highways.

In this case it looks as if this is a mere lane leading down to the farm. At any rate there is no evidence to the contrary. It is a farm accommodation crossing and not a public crossing, and there are these gates which have to be opened and closed by persons using the crossing. I can see no ground, therefore, for holding that this was any different from the many other farm accommodation crossings which one finds up and down the country.

But it is said—and Mr. Quass has really confined his whole argument to this—that if there is a fog then some special precaution must be taken. I agree there ought to be special precautions taken in the case of fog. But by whom? I should say by the person crossing the line who should stop, look and listen. One sees such notices put up, very often. I should have thought that if these people had stopped and listened they must have heard the train coming. Otherwise the obligation which it is sought to put on the engine driver would be intolerable. There are many crossings where the railway company, recognizing that precautions ought to be taken, put up "whistle" boards. There is no whistle board at this crossing, and so far as I know it was not put forward as a ground of negligence that the railway company had not erected a board directing their drivers to whistle. How can a driver on the railway line remember all the farm gates he may pass on his run, and how can he know exactly how far away he is from any particular crossing when there is a fog which obstructs visibility?

The fact is, as we all know, that trains run in fog, not like ships, but at their ordinary pace very often. Fog signals are used near the ordinary signals and if the distant signal is at danger there is a fog signal detonator set to go off in time for the driver to pull up his train by the time it gets to the home signal where detonators also go off. But in between signals trains, naturally enough, do not go at a crawl at every place, nor can they be expected to go along with the whistle going the whole time, especially in country districts such as this, which appears to be a rural part of Northamptonshire.

Stable J. said: "In the absence of some evidence of some special "precaution under fog conditions such as prevailed on this day it "seems to me quite plain that there was some duty on the railway "company to warn whoever might be using this crossing." With all respect to the judge I do not think there was any duty on the railway company. The special conditions have to be special conditions attaching to the crossing. There were no special conditions attaching to this crossing. I cannot see, therefore, that there was any duty on the railway company or on the train driver to whistle at this place, even if he did not, and there was no evidence that he did not, but I am assuming he did not. Therefore, in my opinion, the appeal succeeds, and judgment must be entered for the defendants.

DENNING L.J. I agree. This accident took place on December 6, 1952. On a foggy morning a car was crossing a level crossing and a train ran into it. One passenger was killed. The driver of the car and another passenger were so severely injured that they remember nothing about it. The representatives of the dead passenger brought an action which came for hearing before Stable J. in February, 1954, in which it was held that the British Transport Commission were liable. Our decision today means that in the self-same accident the commission are not liable. It is very unfortunate that in regard to two different plaintiffs there should be different results in the courts of law, but I would emphasize that the parties ought to have taken a different course. They ought all to have been plaintiffs in one action;

C. A.

1956

KEMSHEAD v. BRITISH TRANSPORT COMMISSION.

Denning L.J.

or they could have agreed upon one action being a test action. They did not do that. The plaintiff brings his action on his own, separately from the other, and it must be dealt with solely on the evidence in this action.

The case concerns an ordinary accommodation crossing, a farm crossing, with gates which the people using the crossing have to open and close themselves. It is a single line, deep in the country, which is crossed by this farm road. It is not suggested that there has been any increase of traffic since the railway was built. There is a long straight length of line on each side, and a straight farm road crosses it at right angles on each side. What is the duty of the company in regard to such a crossing? It is a duty to take reasonable care, certainly. But this is not a case where there are any special circumstances of danger. In the cases which have been before the courts in recent years, such as *Smith* v. *London, Midland and Scottish Railway Co.*,[4] and a case in this country, *Lloyds Bank Ltd.* v. *Railway Executive*,[5] there were very special circumstances creating exceptional danger. For instance, in the latter case there was a great increase of traffic on rail and road, many accidents had taken place, and several people killed at the crossing. It was held there by the judge and confirmed by this court that in such a situation the company ought certainly to have put up a "whistle" board so that all their drivers should whistle at that crossing. But in a more recent action, also brought by Lloyds Bank Ltd. [*Lloyds Bank Ltd.* v. *British Transport Commission*[6]], a stronger case than the one now before the court, it was held that the circumstances were not such as to compel the railway to put up a "whistle" board. Of course, if there are circumstances in which the company ought to put up a "whistle" board and they do not put it up they will be held liable. That has been held by this court. But nothing of the kind is suggested here. If this accident had happened in ordinary daylight and there had been no "whistle" board and no whistle, no one suggests that the commission would have done anything wrong.

The whole point made by Mr. Quass is that it was a foggy morning and on that account the driver of the train ought to have whistled. But how was the driver of the train to know where all the farm gates were along the line? It was, indeed, as the plaintiff said in his evidence, particularly the responsibility of people crossing the line in a car on a foggy morning, when they found the gate was open (someone unfortunately having left it open), to take special care themselves and to get out and look and listen to see that all was safe before they crossed.

I agree with my Lord that there are no special circumstances in this case which put upon the commission the duty to put up a "whistle" board or upon the driver of this particular train the duty to whistle. No negligence has been proved against the commission, and I agree that the appeal should be allowed accordingly.

BIRKETT L.J. I am entirely of the same opinion and do not desire to add anything.

Appeal allowed.

Solicitors: *M. H. B. Gilmour; Iliffe, Sweet & Co. for Burnham, Son & Lewin, Wellingborough.*

C. J. E.

[4] 1948 S.C. 125.

[5] [1952] 1 T.L.R. 1207; [1952] 1 All E.R. 1248.

[6] [1956] 1 W.L.R. 1279; [1956] 3 All E.R. 291.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (FOREIGN MARRIAGES).

1958
Jan. 28.

Husband and Wife—Marriage—Foreign marriages—Proof—Proof of foreign marriage in Divorce Division.

Where it is necessary to adduce expert evidence to establish the validity of a foreign marriage which is the subject of proceedings in the Divorce Division, the validity of the marriage not being in issue, such evidence, unless otherwise directed, may be given by affidavit, without prior leave.

This Practice Direction does not apply to marriages celebrated in France or Belgium, which are covered by the Practice Direction of May 16, 1955.[1]

B. LONG,
Senior Registrar.

Principal Probate Registry.
January 28, 1958.

[1] [1955] 1 W.L.R. 668; [1955] 2 All E.R. 465.

[PROBATE, ETC., DIVISION.]

* ALDERMAN *v.* ALDERMAN AND DUNN.

1958
Jan. 23.

Sachs J.

Husband and Wife — Divorce — Evidence — Admissions by infants—Admissibility.
Evidence—Admission—Infant, by—Admissions by infants before proceedings—Admissibility.

At the hearing of a petition for divorce the petitioner sought to adduce evidence of admissions of adultery made voluntarily to an inquiry agent by the infant co-respondent in the presence of the respondent, and contained in a statement signed by him. It was submitted by the Official Solicitor, as guardian ad litem, that such admissions by an infant were not admissible in evidence, or, if admissible, that they could not be taken into account against the infant:—

Held, that there is no reason why evidence of admissions made by an infant before proceedings are commenced should be excluded in matrimonial causes, or why they should not be given whatever weight the court may consider it proper to attribute to them, and that the evidence should be admitted accordingly.

PETITION for divorce on the ground of adultery.

The marriage took place in 1947 when the husband was 23 and the wife 17. At the end of 1955 the husband discovered that his wife was associating with another man, Dunn, and warned him that his wife was a married woman with five children; but the association continued, and the wife eventually went to live with

1958

ALDERMAN v. ALDERMAN AND DUNN.

Dunn in adultery. The husband decided to petition for divorce, and the couple were interviewed together by an inquiry agent, Buttery. After proper warning that any statement made might be used in divorce proceedings, voluntary statements were made, taken down in writing and signed, by which both the wife and Dunn admitted that they were living together and that the wife was pregnant by Dunn.

Dunn was born in September, 1937, and was therefore a minor throughout these proceedings. An appearance was entered on his behalf as co-respondent by the Official Solicitor, who had been assigned as his guardian in accordance with rule 64 (4) of the Matrimonial Causes Rules, 1950 (as amended in 1954) (now rule 66 (4) of the Matrimonial Causes Rules, 1957 [1]). By his answer the co-respondent "made no admissions" in regard to the allegations in the petition.

The point was taken on behalf of the co-respondent that because he was an infant at the time his admissions to the inquiry agent were not admissible in evidence, or, if admissible, that they could not be taken into account against him, since an infant was incapable of making an admission binding against him in these proceedings.

Stuart Horner for the Official Solicitor as guardian ad litem for the co-respondent, Dunn, whose contentions are summarized in the judgment, referred, in addition to the rules and textbooks cited therein, to *Stanga* v. *Stanga*,[2] and submitted that any decisions prior to the Matrimonial Causes Rules, 1937, would, in any event, be no longer binding in view of the new provisions then made in the Matrimonial Causes Rules in relation to the appointment of guardians ad litem. (He called no evidence.)

John Mortimer, for the husband, submitted that the Rules of the Supreme Court relied upon on behalf of the co-respondent related only to admissions made in pleadings, but that if he were wrong, and they related equally to admissions made before proceedings had begun, it would be necessary to consider the practice of the ecclesiastical courts before deciding whether, in matrimonial causes, all admissions by an infant were to be excluded. He referred to *Matalon* v. *Matalon* [3] and the reference therein to section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, and to *Redfern* v. *Redfern*.[4]

The respondent wife did not appear and was not represented.

[1] Matrimonial Causes Rules, S.I. 1957, No. 619, r. 66 (4): "Where a "petition, answer or originating sum- "mons has been served in accordance "with the last foregoing paragraph "and no appearance has been entered "on behalf of the infant, the party at "whose instance the petition, answer "or originating summons was served "shall, before proceeding further with "the cause, apply for an order that "some proper person be assigned "guardian of the infant by whom he "may appear and defend or intervene "in the proceedings."

[2] [1954] P. 10; [1953] 3 W.L.R. 609; [1954] 2 All E.R. 16.

[3] [1952] P. 233, 235; [1952] 1 T.L.R. 1467; [1952] 1 All E.R. 1025.

[4] [1891] P. 139, 146, 148; 7 T.L.R. 157.

SACHS J. stated the facts, saying that the propriety with which the inquiry agent had made his inquiries had been unquestioned, and continued: On those facts the husband petitioner has with complete clarity made out his case against the wife for a decree in accordance with the prayer in the petition, and that decree I accordingly grant.

There remains, however, a point taken on behalf of the co-respondent, who, having been born on September 21, 1937, is still under 21 years of age, and who, having regard to rule 66 of the Matrimonial Causes Rules, 1957, is now represented by Mr. Stuart Horner instructed by the Official Solicitor. The point taken is this—as the co-respondent remains under 21 years of age. it is submitted on his behalf, first, that any admissions which he made to the inquiry agent, as given in evidence (de bene esse in the first place) by Buttery, are not admissible. Secondly, that, if admissible, they cannot be taken into account against an infant on the ground that an infant is incapable of making an admission which is binding upon him in these proceedings.

Mr. Horner informs me that this is the first occasion since 1937, when first the Official Solicitor commenced to act in the court for infants whose representation by a guardian had become mandatory [1] under the Matrimonial Causes Rules, that this point has been raised in relation to a co-respondent who was still a minor at the date of trial; and that the point is raised on the instructions of the Official Solicitor lest it might later be taken against him, when the infant co-respondent comes of age, that he has let the matter so to speak go by default.

In support of his careful and, if I may respectfully say so, well-argued submission, Mr. Horner referred to statements in certain books which relate to the practice of the High Court. He referred me first to that passage at p. 2012 of the Annual Practice, 1958, which states generally: "An infant cannot make "admissions, but can now be interrogated, or ordered to make "an affidavit of documents"; to R.S.C., Ord. 19, r. 13,[2] and to the fact that R.S.C., Ord. 31, r. 29,[3] as to discovery, was only introduced in 1893. Next he referred to Daniell's Chancery Practice, 8th ed., vol. 1, p. 114, where it is stated: "Formerly an "infant was not bound by admissions at any stage of the pro-"ceedings, unless, indeed, such admissions were for his benefit." (In so far as the word "formerly" is concerned, that referred, of course, to the state of the Rules of the Supreme Court before

[1] Matrimonial Causes Rules, 1937 (S.R. & O., 1937, No. 1113/L.14), r. 64. For the historical origin of the rule, see *Stanga* v. *Stanga* [1954] P. 10.

[2] R.S.C., Ord. 19, r. 13: "Every "allegation of fact in any pleading, "not being a petition or summons, if "not denied specifically or by neces-"sary implication, or stated to be not "admitted in the pleading of the "opposite party, shall be taken to be "admitted, except as against an "infant, lunatic, or person of unsound "mind not so found by inquisition."

[3] R.S.C., Ord. 31, r. 29: "This "Order [which relates to discovery "and inspection] shall apply to infant "plaintiffs and defendants, and to "their next friends and guardians *ad* "*litem*." (The rule was added by R.S.C., November, 1893, r. 16.)

1958

ALDERMAN v. ALDERMAN AND DUNN.

Sachs J.

they were amended to enable such admissions to be made.) Mr. Horner also referred to Phipson on Evidence, 9th ed., at p. 240, where it is stated: "An infant, however, cannot bind himself by "any admissions made in an action."

It was the submission made on behalf of the co-respondent that the word "admissions," when used in the phrases to which I have referred, and in other passages of relevant works relating to the practice of these courts, included two categories of admissions: first, those made formally in the course of proceedings; and, secondly, those made before the proceedings commenced.

So far as the first category is concerned, that is a matter which does not arise in the present cause: no admissions were made by the infant in the course of these proceedings. Accordingly, it is not necessary for me to discuss the point raised by Mr. Mortimer that the practice and procedure of this court on such a matter might well prove to be regulated by the old ecclesiastical practice and procedure.

As regards the second category of admissions, those made before proceedings are commenced, Mr. Horner, despite the extensive searches which he had made, was unable to quote to me any authority relating either to the suggested inadmissibility of such evidence or to the court's alleged duty to attribute no weight at all to it. It was conceded in the course of argument that if there was a rule of the nature for which he contended, then on principle it would equally apply to matters of contract and tort. For instance, it would apply where an infant who had contracted to acquire necessaries made any admission that he had been supplied and that he still owed the money. It would apply likewise to an admission by an infant driver of a motor-car who said after an accident: "It is all my fault." Suffice it to say that not only do none of the textbooks of which I am aware refer to such statements on the part of an infant being inadmissible, and that I have so far never heard of the point being raised, but that I have been concerned in a number of cases in which such admissions by an infant were accepted by the court in the normal course of events.

I would also mention, though Mr. Horner rightly points out that there may be a distinction between civil and criminal matters, that it would seem unlikely that in a matrimonial cause evidence would be excluded by a rule which did not even exclude them in a criminal case. I ventured to call Mr. Horner's attention to the daily occurrence in so many courts where the young man who has been arrested after the relevant event says something of the nature of "It is a fair cop."

It is, accordingly, enough for me to say that no authority of any sort has been quoted to me in aid of the submission that admissions in the second category should be excluded from evidence in matrimonial causes or that they should not be given whatever weight the court may consider it proper to attribute to them. Equally, upon general principle, I can find no reason why

there should be a rule of that nature; indeed, I have only dealt with the matter in a rather more than cursory way out of respect for the care with which Mr. Horner has put the matter before me.

In those circumstances I admit into evidence that statement of the co-respondent, without which the case against him cannot be established; find he has committed adultery with the wife; and hold that he is capable of being condemned in costs in the normal way.

Decree nisi.
Costs against co-respondent.

Solicitors: *Tillson, Phillips & Co.; The Official Solicitor.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

* BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD AND ANOTHER.

[1955 B. 49.]

1957
Dec. 2, 3, 4, 5, 6, 9, 10, 11, 12, 13.
Barry J.

National Health Service — Hospital — Transferred officer — Transfer to service of regional hospital board on setting up of national health service—Terms and conditions of service—Consultant's refusal to accept permanent contract owing to dissatisfaction with terms offered — Termination of services by board — Validity — Duty of Minister to hear appeal—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (2), 14 (1), 68 (1)—*National Health Service (Transfer of Officers and Compensation) Regulations,* 1948 (*S.I.* 1948, *No.* 1475), *reg.* 4.

Tribunal—Statutory—Control by courts—Declaration—Hospital board —Wrongful dismissal—Consultant on staff of hospital—Transfer to regional hospital board on appointed day—New contract incorporating terms and conditions of service issued by Minister—Termination by board—Whether board acted mala fide—Remedy for breach.

The plaintiff, a consultant on the staff of a local authority hospital, continued to serve the hospital after it was transferred to the National Health Service pursuant to the National Health Service Act, 1946,[1] and came under the control of a regional hospital

[1] National Health Service Act, 1946, s. 6 (2): "Subject to the "provisions of this Act, there shall "also, on the appointed day, be trans-"ferred to and vest in the Minister "by virtue of this Act all hospitals "vested in a local authority im-"mediately before the appointed day, "and all property and liabilities held "by a local authority, or to which a "local authority were subject, im-"mediately before the appointed day, "being property and liabilities held "or incurred solely for the purposes of "these hospitals or any of them or for "the purposes of securing accommo-"dation for persons in the area at any "hospital not vested in the authority."

S. 14 (1): "All officers employed "for the purposes of any hospital "providing hospital and specialist "services, other than a teaching hos-"pital, shall be officers of the Regional "Hospital Board for the area in which "the hospital is situated . . . and the "remuneration and conditions of ser-

1957

BARBER
v.
MANCHESTER
REGIONAL
HOSPITAL
BOARD.

board. In accordance with regulations[2] made under the Act he continued his existing duties for the preliminary period laid down therein without entering into a new contract with the board. By a circular letter of July 1, 1949, the board informed the plaintiff that permanent contracts on the basis of terms and conditions of service for hospital staff issued by the Minister of Health in June, 1949, would shortly be offered to all whole-time officers, but that pending settlement of such contracts the duties of his present post would be continued "subject to the terms and conditions of service "above referred to." The terms and conditions concerned covered whole-time and part-time consultants and, by clause 16, gave to a consultant who considered his appointment was being unfairly terminated a right to submit his case to the Minister, whose duty it was to place the case before a professional committee, and, in the light of their advice, confirm the termination, or direct reinstatement or arrange some third solution. That procedure was to be completed before the board's decision to terminate was carried into effect. On and after July 1, 1949, the plaintiff continued to serve the hospital. As he refused to sign a permanent contract on the terms offered by the board he was dismissed, and the Minister refused to entertain an appeal under clause 16 of the terms and conditions of service above referred to on the ground that the plaintiff was not, at the time of his dismissal, employed under a contract which incorporated those terms and conditions.

The plaintiff sued the board and the Minister of Health, claiming against the board declarations (1) that he was employed under a contract which did in fact incorporate those terms and conditions; (2) that his employment with the board had never been validly determined and that he was entitled to salary to the date of the writ; alternatively, damages for breach of contract. He claimed a declaration that the Minister had acted in breach of his duty under the National Health Service Act, 1946, in failing to entertain his appeal. He alleged that the board, in dismissing him, had acted mala fide and therefore in breach of its statutory power, and that accordingly his employment had never been validly terminated:—

Held, (1) that by continuing to serve the board after the receipt of the letter of July 1, 1949, the plaintiff must be deemed impliedly to have accepted the offer contained therein and had accordingly entered into a new contract with the board which clearly, having regard to the terms of the letter, incorporated the terms and conditions of service issued by the Minister in June, 1949, in so far as they were applicable to his particular contract.

"vice of all such officers shall, subject "to regulations, be determined by the "Regional Hospital Board. . . . (2) "Regulations may make provision "with respect to the appointment of "such classes of the medical or dental "officers employed on the staff of any "such hospitals as aforesaid as may "be specified in the regulations. . . ."

S. 68 (1): "Regulations shall provide—(a) for the transfer of officers "employed immediately before the "appointed day solely or mainly at "or for the purposes of any hospital "transferred to the Minister by virtue "of this Act, to the regional hospital "board for the area in which the "hospital is situated . . . subject, in "the case of honorary officers, to "such exceptions and conditions as "may be prescribed."

[2] The National Health Service (Transfer of Officers and Compensation) Regulations, 1948, Part II, reg. 4: "All officers who immediately "before the appointed day were employed solely or mainly at or for the "purposes of any hospital which is "transferred to the Minister by virtue "of the Act . . . shall on that day "be transferred to and become officers "of the regional hospital Board for "the area in which the hospital or "premises is situated. . . ."

(2) That clause 16 of the terms and conditions of service was clearly appropriate for inclusion in the contract, and that the clause had contractual force between a consultant and a board notwithstanding that it could only be implemented if the Minister consented to hear an appeal; and therefore, by carrying into effect the termination of his employment before the terms of clause 16 had been complied with and a decision reached by the Minister, the board had committed a breach of its contractual obligations towards him.

(3) That the plaintiff had failed to establish mala fides on the part of the board as, although he had been unfairly treated, the board's decision had been honestly reached in the belief that it was made in the best interests of the national health service, and as this was a matter governed by the discretion of the board it was not for the court to substitute its view for the view of the board.

Short v. *Poole Corporation* [1926] 1 Ch. 66; 42 T.L.R. 107 and *Price* v. *Rhondda Urban District Council* [1923] 2 Ch. 372 applied.

(4) That the contract between the plaintiff and the board was in essence an ordinary contract between master and servant, and accordingly the plaintiff's only remedy for the breach was damages. A declaration that the contract had not been validly determined was not appropriate as the circumstances could not be equated with a case where a plaintiff was working under a statutory scheme of employment.

Vine v. *National Dock Labour Board* [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939 distinguished.

(5) That the Minister, in denying the plaintiff a right of appeal under clause 16, had acted in breach of his statutory duty under the National Health Service Act, 1946, and the plaintiff was entitled to a declaration accordingly.

ACTION.

The following are the facts relevant to this report. The plaintiff, Alexander Howard Barber, a gynaecological and obstetric surgeon, joined the staff of the Boundary Park Hospital, Oldham, Lancashire, in 1937 as consultant in charge of the gynaecological and obstetric unit. In 1940 he became acting medical superintendent and was carrying out those duties immediately before the National Health Service Act, 1946, came into force on July 5, 1948. Although devoting practically the whole of his time and skill to his hospital duties, the plaintiff carried on a small private practice with the consent of the local authority which, up to July 4, 1948, owned and administered the hospital. On July 5, 1948 (the appointed day under the Act of 1946), pursuant to section 6 (2), the hospital was transferred to and vested in the Minister of Health and thereafter the Manchester Regional Hospital Board, the first defendants (hereinafter referred to as "the board"), became responsible for its administration. Pursuant to section 14 (1) all officers employed at the hospital became officers of the board, and in accordance with the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, made under section 68 (1) of the Act, all those who immediately before the appointed day were employed solely or mainly at or for the purposes of the hospital were to continue

1957

BARBER v. MANCHESTER REGIONAL HOSPITAL BOARD.

their existing duties for a preliminary period without the necessity of entering into new contracts with the board.

The plaintiff continued to serve the hospital after the appointed day and, although the senior administrative medical officer of the board was at all times aware of the conditions of his appointment with the local authority hitherto, he was for many months regarded by the board as a whole-time officer and treated as such. On July 1, 1949, a copy of a letter addressed to all whole-time officers was sent to the plaintiff. It was in the following terms: "Hospital Medical and Dental Staff New Contracts. "The board now has in preparation the permanent contracts "which it will shortly offer to all whole-time practitioners now "engaged in the hospital service. These permanent contracts "will be on the basis of the terms and conditions of service agreed "between the Minister of Health and the medical and dental "professions and detailed in the supplement to the British "Medical Journal of June 11, 1949." The letter went on to say that each contract would have to be considered separately with regard to the duties and remuneration of individual officers and continued: "In the meantime, this letter is to inform you that "pending settlement of the permanent contracts the duties of "your present post will be continued with effect from July 5, "1949, in the grade of specialist of full staff and consultant status "and subject to the terms and conditions of service above "referred to. The foregoing applies to all whole-time officers, "subject to the right of a transferred officer . . . to opt to "continue on a personal basis on his or her present salary "scale . . ."

The terms and conditions of service referred to were those contained in a memorandum entitled "Terms and Conditions "of Service for Hospital Medical and Dental Staffs (England "and Wales)" issued by the Minister of Health on June 7, 1949, after consultation with representatives of the medical profession. They were to replace the interim arrangements in operation at the time and to form the basis of new contracts of service. They were to apply retrospectively with effect from July 5, 1948. They applied to whole-time staff and also to part-time consultants. In regard to the latter, clause 5 provided for the duties of the posts to be assessed in terms of hours per week and to be expressed as a number of "notional half-days." The maximum number of hours a week for a part-time appointment was to be 28 and the number of notional half-days nine. By clause 16 it was provided: "Where a consultant considers that his appointment is being "unfairly terminated by a board, he shall be entitled to send a "full statement of the facts to the Minister, who will obtain the "written views of the board concerned and place the case before "a professional committee . . . for their advice. . . . In the "light of their advice the Minister may confirm the termination "of services, or direct reinstatement, or arrange some third

"solution agreeable to the parties concerned, such as re-employ-
"ment in a different post. This procedure shall be completed
"before the board's decision to terminate the consultant's
"appointment is carried into effect."

After the receipt of the letter of July 1, 1949, the plaintiff continued to carry out his duties, but in accordance with the request of the board, stated that he would prefer a permanent contract on a sessional rather than a whole-time basis; that he would give eight half-day sessions at the hospital and also continue his work at an ante-natal clinic, making in all nine half-days. Further circular letters of December 20, 1950, informed him that the existing contracts of practitioners with whom permanent arrangements had not yet been agreed would be extended until April 5, 1950. By a letter of March 20, 1950, he was informed that the board was prepared to offer him an appointment as a consultant under a permanent contract on the basis of 24 hours' and seven notional half-days' work per week. That contract was "to replace the existing interim contract" and would be subject to the terms and conditions of service agreed between the Minister and the profession. The plaintiff intimated his unwillingness to accept a contract on the terms offered, claiming that his work, which had hitherto been regarded as full time, entitled him to a contract based on the maximum number of half-day sessions, namely, nine. He was informed that it was impossible for the board's offer to be increased and urged to give the proposals urgent consideration as the interim contracts for specialist staff would expire on April 4, 1950. The plaintiff refused to accept the offer of seven notional half-days and although this offer was (for certain reasons) subsequently increased to eight notional half-days he maintained his contention that he was entitled to a contract based on the maximum number of half-day sessions, on the ground that his work justified it. He submitted a complaint to the Minister of Health, but the Minister, after receiving a report from the board, decided that it would not be proper for him to intervene and informed the plaintiff accordingly.

Meanwhile, certain events had taken place at the hospital which led to police inquiries, and as a result certain documents containing statements reflecting on the plaintiff's professional conduct were sent to the board by the Ministry of Health. As a result, an inquiry was held and a report made to the disciplinary sub-committee of the board which in fact stated that the plaintiff's conduct in relation to the matters complained of was not deserving of censure. In spite of that report the board, on July 4, 1951, addressed a letter to the plaintiff censuring him severely, and informing him that the board intended to designate a consultant to be in charge of the obstetrical and gynaecological unit at the hospital, and that, although the plaintiff's clinical duties would continue as heretofore, his responsibilities in relation to the medical administration of the unit would cease. The

1957

BARBER
v.
MANCHESTER
REGIONAL
HOSPITAL
BOARD.

plaintiff, through his solicitors, asked the board to reconsider its decision and stated that, if necessary, he would appeal to the Minister under clause 16 of the Terms and Conditions of Service. The board insisted on its right to effect such changes in the hospital services for which it was responsible as appeared to it to be proper and necessary in the interests of those services and stated that clause 16 of the Terms and Conditions of Service applied to consultants whose appointments had been unfairly terminated. They referred to the terms of the letter of July 4, 1951, and clearly indicated that they regarded the existence of a contract between themselves and the plaintiff as beyond question.

The new consultant was appointed on October 1, 1951. On October 4, 1951, the terms of a new contract were proposed to the plaintiff which provided for the equal sharing of the beds and the responsibility for the administration between him and the other consultant. The plaintiff sent a statement of the material facts to the Ministry of Health and informed the board that his position could not be considered irrespective of the outcome of that submission. In December, 1951, the plaintiff attended a meeting of the disciplinary sub-committee of the board at which he expressed the view that a contract in the terms offered was unacceptable to him as long as it appeared to stem from the letter of censure of July 4, 1951, which he considered to be wholly undeserved. He was told that if he did not sign the contract offered to him his services would be terminated, but that he would have a right of appeal to the Minister under clause 16 of the Terms and Conditions of Service. The terms previously offered by the board were embodied in a formal contract which the plaintiff was asked to sign by January 14, 1952. On that date officials of the Ministry of Health for the first time informed the plaintiff's solicitors that the Minister queried the plaintiff's right of appeal if he did not sign the contract. He still refused to accept the board's offer and on January 22, 1952, the board passed a resolution authorizing his dismissal on April 30, 1952. That decision was communicated to the plaintiff the following day. In February, 1952, representations were made to the Minister by the Member of Parliament for Oldham West asking him to concede the plaintiff's right of appeal, but the Minister refused to do so, stating that the plaintiff held no contract which entitled him to claim the appeal as a right, i.e., a contract specifically embodying the Terms and Conditions of Service for Hospital, etc., Staffs. The terms of the Minister's letter were communicated to the board, but the board never informed the Minister that the disciplinary sub-committee had given the plaintiff a categorical assurance that he had a right of appeal if he failed to sign the permanent contract, nor did the board tell the Minister of the terms of the letter of July 1, 1949, which had been sent to the plaintiff. The plaintiff was not aware until March 6, 1952, that the right of appeal had been finally refused.

He subsequently asked to be allowed to accept the board's offer but the board refused. His services were accordingly terminated on April 30, 1952, and a few days afterwards he was prohibited from entering the hospital under threat of police action.

In this action the plaintiff claimed (1) a declaration that his employment with the board was subject to the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) issued by the Minister on June 7, 1949; (2) a declaration that his employment with the board had never been validly determined together with salary at the rate of £2,375 per annum from May 1, 1952, to the date of the writ; alternatively, (3) damages for breach of contract and for wrongful dismissal. Against the Minister, he claimed (4) a declaration that in failing to comply with the terms of clause 16 of the Terms and Conditions of Service above referred to and the procedure therein laid down, the Minister was acting wrongfully and in breach of his statutory duty under the National Health Service Act, 1946.

By his statement of claim the plaintiff alleged, inter alia, that on July 5, 1948, being an officer employed mainly at or for the purposes of the hospital he was transferred to and became an officer of the board by virtue of regulation 4 of the National Health Service (Transfer of Officers and Compensation) Regulations, 1948; that as from June 7, 1949, his employment by the board became subject to the Terms and Conditions of Service of Hospital, etc., Staffs (England and Wales) issued by the Minister of Health on that date and that that variation was confirmed by letter from the board dated July 1, 1949; that the terms and conditions of service were issued by the Minister in pursuance of powers and duties imposed upon him under the provisions of the Act of 1946 and that the Minister had directed regional hospital boards, including the first defendants, to comply with them. He contended that the terms and conditions of service having been issued by the Minister, it was his statutory duty to carry out any obligations assumed by him thereunder. He relied on clause 16 thereof as a term of his employment, and alleged that it was the duty of the Minister to comply with the procedure laid down therein before any decision of the board to terminate his employment was carried into effect; in breach whereof by letter dated January 23, 1952, the board had purported to determine his employment as from April 30, 1952. He alleged, further, that the Minister, in breach of his statutory duty, contending that the terms and conditions did not apply to him or his employment, refused to take the steps laid down in clause 16. By an amendment to the statement of claim the plaintiff alleged that in purporting to terminate his employment the board acted at the instigation or with the connivance of the Minister and that both the board and the Minister, in purporting to exercise their statutory powers towards him, failed to act in a bona fide manner in breach of their duty. In the premises he contended that his

1957

BARBER v. MANCHESTER REGIONAL HOSPITAL BOARD.

employment with the board had never been validly determined and that he was still a consultant on the staff of the hospital. By reason of the matters complained of he alleged that he had been deprived of his employment wrongfully and had lost the major part of his livelihood and had suffered damage.

The defendants denied that the plaintiff's employment by the board became subject to the terms and conditions of service relied on by him, or that any contract of employment arose out of the board's letter of July 1, 1949. They contended that the plaintiff had never accepted the offer to employ or appoint him as a consultant made to him by letter of March 20, 1950; although it was admitted that he performed duties at the hospital and received payment therefor, they denied that the plaintiff had after receipt of the offer of March 20, 1950, any appointment or contract either within the meaning of or governed by the terms and conditions of service or at all; or that clause 16 of the Terms and Conditions of Service constituted a term of his alleged employment. They contended moreover that the plaintiff had failed to invoke the clause. They denied the alleged breach of contract and specifically denied that either defendant had acted otherwise than bona fide towards the plaintiff. They claimed that the plaintiff was not entitled to any of the relief claimed.

J. Scott Henderson Q.C. and *A. Munro Kerr* for the plaintiff.

John Foster Q.C., *J. T. Molony Q.C.* and *Alan Garfitt* for the defendants.

The following case (other than those referred to in the judgment) was cited in argument: *Taylor* v. *National Assistance Board.*[3]

BARRY J. stated the facts, read the relevant sections of the National Health Service Act, 1946, and the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, made thereunder, referred to the Terms and Conditions of Service for Hospital Medical and Dental Staff (England and Wales) issued by the Minister on June 7, 1949 (clause 16 of which is set out above), and continued: It being admitted that the actual, or the purported, termination of the plaintiff's appointment was carried into effect before completion of the procedure laid down in clause 16 of the Terms and Conditions of Service for Hospital Medical and Dental Staffs, issued by the Minister in June, 1949, the first question for my consideration is whether or not that clause was incorporated in the contract under which the plaintiff was serving the board as a consultant on the date when his services were terminated. From a consideration of the correspondence I should have thought that the answer to

[3] [1957] P. 101; [1957] 2 W.L.R. 189; [1957] 1 All E.R. 183.

this question was obvious despite Mr. Foster's subtle and ingenious arguments. After the appointed day, July 5, 1948, there can, I think, be no doubt that the plaintiff entered into the board's employment under terms similar to those which were applicable to his contract with the Oldham Borough Council before the appointed day. If nothing further had been done, and no further contractual arrangements had been made, I think that there is a great deal to be said in favour of the view of the Ministry that the terms and conditions of service would have had no application until the plaintiff had entered into a new contract with the board in which those terms and conditions were incorporated. In the present case I am entirely satisfied that the plaintiff did enter into a new contract with the board on the terms indicated in the board's letter of July, 1949. If anything in that letter is clear it is that from that date, or, from July 5, 1949, four days later, the plaintiff was being offered a continued service with the board "subject to the terms and "conditions of service above referred to," which were the terms and conditions issued by the Minister on June 7, 1949, and reprinted for the whole medical profession in the issue of the British Medical Journal of June 11.

The plaintiff continued to serve the board after the receipt of this letter, and by so doing I am satisfied that he must be deemed impliedly to have accepted the offer which it contained. I wholly reject the argument that the letter of July 1, 1949, had no effect because it purported to refer to whole-time officers. The plaintiff was plainly a "transferred officer" within the meaning of the National Health Service (Transfer of Officers and Compensation) Regulations, 1948. There was not, at any time, any possible doubt on that point. As a transferred officer his position was identical with that of a whole-time transferred officer, except that, when the terms and conditions came into force with regard to remuneration, he would, as a part-time officer, be remunerated on a different basis. Whether by mistake or otherwise, the defendants did in fact address this letter to the plaintiff, and they never suggested that it was not to be regarded as governing his terms of employment. Indeed, as the long history of this case shows, they more than once relied upon the terms and conditions in order to adjust the plaintiff's salary in various directions. In this connexion one cannot forget the Ministry's direction which is printed in full in the British Medical Journal of June 11, 1949: "Remuneration and condi-"tions of service are interdependent and the application retro-"spectively of the former should ideally be accompanied by "the application retrospectively of the latter."

Mr. Foster's second submission, as I understand it, was to this effect: if, contrary to his submission, any of the terms and conditions were incorporated in this contract, it does not mean that they became part of the contract in the sense that

1957

BARBER
v.
MANCHESTER
REGIONAL
HOSPITAL
BOARD.

Barry J.

the applicable terms and conditions became terms of the contract between the plaintiff and the defendants. As I understand his argument, the phrase "subject to the terms and conditions "of service" should only be regarded as meaning that the terms and conditions will regulate the future relationship between the plaintiff and the board as regards leave and other such matters, and that the regulations will ultimately be incorporated into a permanent contract. I am bound to say that in my judgment the second paragraph of the board's letter of July 1, 1949, cannot possibly be held to bear that suggested interpretation. I say no more about that branch of Mr. Foster's argument.

Thirdly, he submitted that even if the letter and the words "subject to the terms and conditions of service above referred "to" can be said to incorporate some of the terms and conditions, they cannot be said to incorporate all of them. In a sense, of course, as Mr. Scott Henderson conceded, this argument is obviously correct. The terms and conditions are a code and obviously there cannot be incorporated into the contract with a part-time officer the terms and remuneration applicable to whole-time officers. Similarly, certain other paragraphs in the terms and conditions are more applicable to the board itself, and really contain directions to the board rather than directions which may be incorporated in any contract between either a whole-time or a part-time officer and the board.

However, in my judgment, clause 16 is a clause which can quite clearly be incorporated in a contract made with either a whole-time or a part-time consultant, and if a whole-time or a part-time consultant is employed by the board subject to these terms and conditions, clause 16 is one of the terms and conditions incorporated into his contract. That clause gives him a measure of security of tenure in his employment, and prevents its termination, if he considers such termination to be unfair, until the procedure laid down in clause 16 has been carried out. I can see no foundation for saying that the words "subject "to the terms and conditions of service" can on any reasonable interpretation be said to exclude clause 16. If any terms and conditions are to be incorporated in the contract, why should clause 16 be excluded? I have been unable to find any satisfactory answer to that question. It is a clause clearly appropriate to inclusion in the contract of a consultant, just as appropriate as the clauses relating to his terms of remuneration, leave and other matters of a similar kind. The long-term contract offered to the plaintiff did include words exactly similar to the words used in the board's letter of July 1, 1949. It is common ground that it was the intention of the Ministry and of the board that the terms and conditions should in fact be incorporated in the long-term contracts, and they were in fact incorporated by the use of words exactly similar to the words used in the letter of July 1, 1949.

In my judgment those words clearly mean that those of the terms and conditions which are applicable to any particular contract are to be incorporated in it, and I am quite satisfied that under the letter of July 1, 1949, which was never altered or amended in any way, except as regards remuneration, the plaintiff's employment with the board was, throughout his service, from that date regulated by those terms and conditions.

Mr. Foster, however, went further than the suggestion that clause 16 was not incorporated in this particular contract. He submitted that in every contract, be it what might be described as an interim contract of this kind or a permanent contract, that clause could not form the basis of any contractual and binding agreement between the board and a consultant. He adduced as one reason for that submission, that the operation of this clause involved the co-operation of the Minister and that the board could never be sued on the ground that the Minister had refused that co-operation and denied the right of appeal to any particular consultant. Even if it does form the basis of some contractual obligation, Mr. Foster submits, it must be subject to an implied term that its operation can only be effective if and when the Minister consents to entertain an appeal; if he does not do so prior to the termination of the consultant's employment, then the clause can have no operation. In view of the relationship between the Minister and the board, which is made quite clear in sections 3, 11, 12, 13 and 14 of the National Health Service Act, 1946, I have no hesitation in rejecting that argument. I see no reason to suppose that in the negotiations which took place between the Ministry and the representatives of the medical profession it was ever doubted that this clause would have contractual force. I am quite satisfied that it has contractual force.

I am unimpressed by the question raised by Mr. Foster as to what would happen if the Minister failed to entertain an appeal. I do not think that the board would have to continue to employ a consultant until that consultant's death or until he reached the retiring age. It is, of course, a very unreal consideration, having regard to the relationship between the Minister and the board. The board are administering the hospital and specialist services on behalf of the Minister, and subject to such regulations and directions as the Minister may give. If that were a real dilemma I see no reason why its solution should be thrust upon the consultant rather than upon the board. If, indeed, in the inconceivable event of the Minister refusing to entertain an appeal, although a right of appeal had under his authority and directions been conferred upon the consultant, the board were then placed in a difficulty, it would be for the board to apply for an order of mandamus to compel the Minister to exercise his functions, and not for the consultant.

I am, therefore, satisfied that at least from July 5, 1949, this term formed part of the plaintiff's contract with the board.

1957

BARBER
v.
MANCHESTER
REGIONAL
HOSPITAL
BOARD.

Barry J.

The plaintiff was, of course, not bound to invoke the clause, and unless he did invoke it, or unless in law he was excused from doing so before his employment was terminated, he cannot, of course, rely on its provisions.

Both the defendants, as I understand it, raise the singularly unmeritorious point, that the plaintiff failed to send a full statement of the facts to the Minister, and that in consequence of that failure the machinery of the clause was never invoked by him, and never came into operation. In addition to its complete lack of merits this point, I think, fails on two grounds. In the first place, it is clear from the correspondence that the plaintiff did in fact supply a full statement of facts to the Minister. But that point seems to me to be of less significance than the second point which I regard as quite fatal to the defendants' submissions on this point. If ever there was a case of waiver, in my judgment, this is one.

On January 14, 1950, the Ministry were saying that no appeal lay. The board, when they received information to that effect, as they did through the secretary on January 14, elected to support the Minister's view of the situation which was, I think, based on wholly inadequate information as to the facts of this particular case. Having done so with some alacrity, they adopted the same position as that which the Minister had adopted in relation to this appeal. In any event, I think the Minister can be regarded in relation to this matter as the principal of the board. If he denied the right of appeal and the board acquiesced in that view after they, at a very early stage, became apprised of it, clearly, in my judgment, it does not now lie in the mouth of the board to say: "We, having "said no appeal will lie, now contend that you cannot invoke "the provisions of clause 16 because you did not put into "operation the appeal which we said we would refuse to enter-"tain." I think that there is no substance whatsoever in that submission.

In those circumstances I am quite satisfied that the plaintiff's contract was governed by clause 16, and that no omission to send a full statement of facts to the Minister, even if such omission was established, invalidates his contractual right, which was that his employment should not be terminated until the machinery envisaged in clause 16 had been put into effect and a decision reached by the Minister. Clearly, therefore, the termination of the plaintiff's services on April 30, 1952, was a breach of the board's contractual obligations to him. That having been established, it necessarily follows that the plaintiff is entitled to some remedy.

Before I turn to the question of the remedies or remedy available to the plaintiff, I must say a few words concerning the other ground upon which he bases his claim, namely, that the board's decision to dismiss him was made mala fide. The law, I think, is clear: in ordinary circumstances, by giving the

appropriate notice, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so. The position differs somewhat in relation to statutory bodies which can only act for the purposes for which they are created. A statutory body has equally an untrammelled right to terminate the services of one of its own employees by giving appropriate notice, provided that decision is arrived at bona fide and, as I understand the meaning of the word, it is that the decision must be reached, and honestly reached, in the belief that it is a decision made in the best interests of the objects of the statutory body—in this case, the administration of the health services in the region under the board's control—and not made for some wholly extraneous reason. An obvious one would be shown if it could be proved that a decision to terminate the employment of a servant was made, not because it was genuinely or perhaps mistakenly thought by the statutory authority that the termination of his services was in the best interests of the service which they were administering, but, while knowing that they were not furthering the interests of that service by dismissing him, they dismissed him owing to personal spite against him. In that case I think that their decision could be impugned in the courts.

One thing is quite clear: the discretion of the authority must be the governing factor in cases of this kind, and the court cannot substitute its views on whether or not a servant should, in certain circumstances, have been dismissed for the views of the board, provided that the views of the board were bona fide held.

I need not cite a great deal of authority on this point. The law is most fully explained in the judgment of Warrington L.J. in *Short* v. *Poole Corporation*,[1] where there are passages which explain the position very clearly, and I need refer only to a passage from the judgment of Eve J. in *Price* v. *Rhondda Urban District Council*,[2] which reads thus: "Argument has been "addressed to me on the question whether the authority in "engaging and dismissing its employees is to be regarded as "acting in a fiduciary capacity, but I do not think it necessary "to deal fully with these arguments, because in my opinion it "is sufficient to point out that this body, being a statutory body "entrusted with statutory powers, can only exercise those powers "for the purpose and with the object of giving effect to the "statutory duties imposed upon it, and as one must assume that "in dismissing employees or in doing any other administrative "act or adopting any particular policy consistent with the powers "conferred upon it it acts in good faith, it lies upon those who "assert the contrary to establish the truth of that assertion if "they can."

Mr. Scott Henderson, on behalf of the plaintiff, asks me to say that in the present case the board, through their members

[1] [1926] Ch. 66, 90; 42 T.L.R. 107.
[2] [1923] 2 Ch. 372, 389.

1957

BARBER v. MANCHESTER REGIONAL HOSPITAL BOARD.

Barry J.

and officials, were not acting bona fide or in the proper performance of their statutory powers when they reached their decision to terminate the plaintiff's employment.

[His Lordship referred to the events following the report of the panel of investigators, and said that, in his judgment, the plaintiff was in the result unfairly treated, but that no one individual who took part in the consideration of those matters had any intention to act unfairly. He was satisfied that both the senior medical administrative officer and the secretary of the board had, for a long time prior to the plaintiff's ultimate dismissal, formed the conclusion that he was a nuisance and that it would be in everybody's interests if his services were terminated. His Lordship continued:] I am not, however, satisfied that, however wrong they may have been in reaching that conclusion, they were in any way lacking in bona fides, or that they reached that conclusion on any ground other than the belief (albeit a mistaken belief) that it would be in the best interests of the health service if the plaintiff were excluded from it. Similarly with regard to those who sat on the various committees, I am far from saying that I agree with a great deal of their conduct, or with a number of decisions which they made. None the less, I am satisfied that none of those people intended to act unfairly.

The fact that certain officials of the board were prejudiced against the plaintiff; the fact that he might have been given a much greater opportunity of presenting his own case to the board if they decided to reject the panel's report; the fact that they might well, having misled him about his right of appeal, have been somewhat more generous in renewing their offer of a contract when they found the Minister was refusing to recognize that right, are all matters which might affect the judgment of the court, if it was for the court to decide whether or not the plaintiff's services were to be determined, but that is not the legal position. The court has to be satisfied that these people were acting mala fide, and I am not so satisfied; indeed I am satisfied that throughout, however mistakenly, they were all acting in what they honestly believed to be the best interests of the service.

I come now to the question of the plaintiff's remedies, which I regard as perhaps the most difficult problem in the present case. In the statement of claim the plaintiff asked for a declaration that his employment was subject to the "Terms "and Conditions of Service for Hospital Medical and Dental "Staff." I have already found that it was so subject and whether or not that declaration is made, is a matter which is only of academic importance. The second claim is for a declaration that his employment with the board has never been validly determined. The significant word is the word "validly." If the declaration asked for was one which merely declared that the plaintiff's employment had never been lawfully or rightly

determined, that is a declaration which, if necessary at all, would follow from the findings which I have already made.

However, Mr. Scott Henderson's case is that the termination of the plaintiff's employment on April 30, 1952, was not only a breach of the plaintiff's contractual rights, but was in fact a nullity. In law, Mr. Scott Henderson submits, the plaintiff's services were not terminated on April 30, 1952, and have never been terminated up to today. In consequence he relies on the third prayer, namely, for an order for payment of salary at the full rate of £2,375 per annum from May 1, 1952, to the date of the writ. Mr. Scott Henderson puts the case in a way which, at first sight, appears attractive. The terms and conditions, as he points out, provide in the clearest possible terms that the procedure laid down in clause 16 shall be completed before the board's decision to terminate a consultant's appointment is carried into effect. That procedure was never completed and, therefore, he argues, the board's decision to terminate the plaintiff's appointment can never have become effective; he is still in their service, and is still entitled to his agreed rate of remuneration.

Mr. Scott Henderson relied on certain authorities and in particular on *Vine* v. *National Dock Labour Board*,[3] and on the judgment of Jenkins L.J. when the case came before the Court of Appeal,[4] a judgment which was approved on appeal to the House of Lords.[5]

In reply to this argument, Mr. Foster submits that this is an ordinary relationship of master and servant. In his submission, the law in relation to master and servant is clear: a contract for personal services cannot be enforced by an order for specific performance, nor is it open to a servant to refuse to accept the repudiation of the contract of service by his master and to sit back saying that the contract had never been validly terminated and insist on the payment of his wages for the remainder of his working days. Mr. Foster rightly said that it could not be suggested that a servant who, by the terms of his contract, was entitled to three months' notice on dismissal, could say, if he was instantly dismissed without notice, that that dismissal was ineffective, because no lawful dismissal could take place without the giving of the requisite period of notice. Similarly he says here that the plaintiff cannot say that the de facto determination of his services, which undoubtedly took place on April 30, 1952, or just after—as he was threatened with criminal proceedings if he entered Boundary Park Hospital—can be said to be a nullity because it was in breach of a contractual obligation not to put that decision to terminate into effect until after clause 16 had been allowed to operate.

[3] [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939.

[4] Reversing [1956] 1 Q.B. 658, 673; [1956] 1 All E.R. 1.

[5] [1957] 2 W.L.R. 106.

1957

BARBER
v.
MANCHESTER
REGIONAL
HOSPITAL
BOARD.

Barry J.

Lord Keith, in considering this question in *Vine's* case,[6] used these words: "This is not a straightforward relationship of "master and servant. Normally, and apart from the interven-"tion of statute, there would never be a nullity in terminating "an ordinary contract of master and servant. Dismissal might "be in breach of contract and so unlawful but could only sound "in damages."

Giving this matter the best consideration I can, I am unable to equate this case to the circumstances which were being considered by the Court of Appeal and the House of Lords in *Vine* v. *National Dock Labour Board.*[7] There the plaintiff was working under a statutory scheme of employment, and clearly in those circumstances all the Lords of Appeal who dealt with the case in the House of Lords[8] took the view that it could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract. Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more. In those circumstances I feel bound to apply the general rule stated by Lord Keith,[9] and to reach the conclusion here that the plaintiff's only remedy against the board is the recovery of damages.

[On the question of damages, his Lordship said that although, on the evidence, three months' notice seemed to be the appropriate period, as he had held that the plaintiff's contract was subject to clause 16 of the Terms and Conditions of Service for Hospital Staffs, it was subject to three months' notice only if, on appeal to the Minister, the Minister took the view that his services had not been unfairly terminated. He was reasonably satisfied that if the appeal procedure under clause 16 had been put into effect the Minister would have been advised that a substantial element of unfairness had entered into the termination of the contract and that the Minister would have accepted that advice. It was almost certain that as a result the plaintiff would have continued to be a consultant at the hospital on the basis of eight notional half-days a week, for which the basic salary was £2,375; but it did not necessarily follow that he would have held that position for the rest of his working life and a fair period to take in relation to loss of remuneration was five years. In addition, he assessed the loss to the plaintiff's private practice arising from the termination of his employment at £1,500, and taking into account tax deductible awarded total damages of £7,437 10s. He gave judgment for the plaintiff against the board for that sum. He declined to make the declarations asked for by the plaintiff against the board but against the Minister, against whom judgment was also given, he made the declaration asked

[6] [1957] 2 W.L.R. 106, 118.
[7] [1956] 1 Q.B. 658.
[8] [1957] 2 W.L.R. 106.
[9] Ibid. 118.

for by the plaintiff, namely, that in failing to comply with the terms of clause 16 he had acted wrongfully and in breach of his statutory duty under the National Health Service Act, 1946.]

1957

BARBER v. MANCHESTER REGIONAL HOSPITAL BOARD.

Judgment for the plaintiff, against both defendants.

Solicitors: *Gregory Rowcliffe & Co. for Ponsonbys, Oldham; Solicitor, Ministry of Health, for Solicitor, Manchester Regional Hospital Board.*

E. M. W.

[COURT OF APPEAL.]

* *In re* D., AN INFANT.

[Plaint No. W. 326.]

C. A.

1958 *Jan.* 27.

Lord Evershed M.R., Parker and Sellers L.JJ.

Adoption—Consent of person liable to maintain—"Unreasonably withheld"—Test in case of putative father—Welfare of infant—"Parent"—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4) (*a*), 3.

The putative father of an illegitimate infant was convicted of having murdered the mother. Whilst he was serving a life sentence for that offence, he opposed an application to the court for an adoption order in respect of the infant, then about three years old. It was assumed in his favour that he was a "person . . . liable by ". . . order . . . to contribute to the maintenance of the infant" within section 2 (4) (*a*) of the Adoption Act, 1950,[1] because before the murder an affiliation order had been made against him ordering him to contribute towards the infant's maintenance:—

Held, that although it had been assumed that he came within section 2 (4) (*a*) of the Act of 1950, the putative father was not on the same footing as a legal parent and had no parental rights which would be taken away by the adoption. Consequently, the primary test in considering whether to make the order was the welfare of the infant, and on the facts that pointed overwhelmingly in favour of an immediate order.

In re M. [1955] 2 Q.B. 479; [1955] 3 W.L.R. 320; [1955] 2 All E.R. 911 applied.

Hitchcock v. *W. B. and F. E. B.* [1952] 2 Q.B. 561; [1952] 1 T.L.R. 1550; [1952] 2 All E.R. 119 distinguished.

APPEAL from Judge Harcourt Barrington, sitting at Woolwich County Court.

In 1955 a male child was born to a single woman, and complaint having been made by her to the West London Magistrates'

[1] Adoption Act, 1950, s. 2 (4): "Subject to the provisions of section 3 "of this Act, an adoption order shall "not be made—(*a*) in any case, except "with the consent of every person ". . . who is liable by virtue of any "order or agreement to contribute to "the maintenance of the infant."

S. 3 (1): "The court may dispense "with any consent required by para-"graph (*a*) of subsection (4) of section "2 of this Act if it is satisfied—"(*c*) . . . that his consent is un-"reasonably withheld."

C. A.
1958
D., AN INFANT, *In re.*

Court an affiliation order was made against the father ordering him to pay to the clerk of the court 30 shillings per week for the maintenance and education of the boy until he should attain 16 years. In 1956 the father murdered the mother of the boy. The boy was put into the care of two persons, hereinafter called the applicants, and in 1957 they applied under the Adoption Act, 1950, for an adoption order to be made in their favour in respect of the boy. At that time the father, who had been convicted of the murder, was serving a life sentence in Her Majesty's prison at Wormwood Scrubs. He opposed the application, stating in his evidence that one of his four sisters, who was then about 30 and unmarried, would come from India (the father's home country), that she would get work and get someone to look after the boy whilst she was at work, and that she would be in effect the boy's foster-mother. He further stated that having paid for the boy's maintenance in pursuance of the order made against him, he had only stopped doing so because the mother had said that she was going to Scotland on a visit, leaving the boy in England, and that when she returned they would be married. She did not return and marry him but apparently married someone else. The father concluded his evidence by saying that the sole reason why he opposed the adoption was that he wanted his sister to have the boy because he was his son and he loved him.

The county court judge refused to make the order, and the applicants appealed.

A. Lloyd Stott for the applicants.
Jonathan Sofer for the father.

In addition to the cases referred to in the judgments, the following were cited in argument: *In re K.*[2]; *In re Aster*[3]; *Barnado* v. *McHugh.*[4]

LORD EVERSHED M.R. We need not trouble you, Mr. Stott.

In the very strange circumstances of the present case I have come to a clear conclusion that the county court judge, with all respect to him, fell into error and misdirected himself upon a vital matter. The case is one which arises under the Adoption Act, 1950, two paragraphs of which require some consideration.

[His Lordship stated the facts, commenting that, as the county court judge had said, there was nothing which could be said against the applicants, and much, as it seemed to him, in their favour. His Lordship continued:] It is, no doubt, true that in the case of a man serving a life sentence it does not at all follow that he will remain in prison for the rest of his days.

[2] [1953] 1 Q.B. 117; sub nom. *K. (an Infant), Re Rogers* v. *Kuzmicz* [1952] 2 All E.R. 877.

[3] [1955] 1 W.L.R. 465; sub nom. *In re A. (an Infant)* [1955] 2 All E.R. 202.

[4] [1891] A.C. 388; 7 T.L.R. 726.

He said somewhat blandly, in the course of his evidence: "I "have not been told when I can expect release from prison." Indeed, I have been forced to wonder if he regards murder as a really serious matter—as serious, say, as dipsomania, which might in certain cases deprive the father of a legitimate child of the right to look after it. But it is quite certain that, having murdered the child's mother, he is (and in the foreseeable future is likely to remain) in a position in which he would be quite unable to perform any parental obligations towards the child, or in which any ties of affection could conceivably flourish at all. Still, he opposed the application, and I have referred to the reason for his opposition. On his behalf it may perhaps fairly be said that the mother did not do well by him; but, of course, that cannot possibly excuse his conduct.

Two points arise on the Act of 1950.

[His Lordship read sections 2 (4) and 3 (1) and continued:] The first question which was before the judge, and which Mr. Stott intimated that he would desire to put before us, is whether on the facts of this case the father is a person "who is liable "by virtue of any order . . . to contribute to the maintenance "of the infant" within section 2 (4) (*a*). He puts forward the point that at the relevant date the father, having murdered the mother, had ceased to be under an obligation to pay the maintenance. It was, therefore, questioned what was the effect of the murder of the mother on the obligations under the order on the father: did they survive, or did they not? If the true view is that at the relevant date the father could not be said to be a person "liable by virtue of any order . . . to contribute "to the maintenance of the infant," then his consent was no longer required under the section. We have not heard argument on that point, which the judge decided or assumed in the father's favour, and, therefore, I say nothing further about it, because in my judgment it is sufficient to say that if the father is a "person" within paragraph (*a*) of section 2 (4), on the facts of this case his consent was unreasonably withheld within the terms of paragraph (*c*) of section 3 (1); and it is upon that point—whether consent was or was not unreasonably withheld —that the present argument has been put before us.

The judge in concluding, as he did, that the refusal on the father's part was not unreasonable, directed himself as follows. He said that since the father is within section 2 (4) (*a*)—that is to say, that he was a "person" comprehended by that paragraph—"he must qua parent be treated on the same footing "as a legal parent for the purpose of deciding whether his "consent is being unreasonably withheld; that is, the principle "of *Hitchcock* v. *W. B. and F. E. B.*[1] applies, and the test is "whether his attitude, as a father, in refusing consent, is un-"reasonable," and the judge referred to a passage in the judgment of Devlin J. in that case.

[1] [1952] 2 Q.B. 561; [1952] 1 T.L.R. 1550; [1952] 2 All E.R. 119.

C. A.
1958
D., An Infant, *In re.*
Lord Evershed M.R.

With the greatest respect to the county court judge, I think it is at that point that he fell into error, for I do not agree that the principle of *Hitchcock's* case [1] applied, and I do not agree that because the father was (as we assume) a "person" within paragraph (*a*) of section 2 (4), for the reasons that I have stated, he must therefore qua parent be treated on the same footing as a legal parent. *Hitchcock's* case [1] was that of a legitimate child. It was a case in which an order for custody had been made by justices in favour of the child's mother, and thereafter application was made for the child's adoption. Having become separated from the mother, the father objected. The magistrates had taken the view that by reason of the order for custody, the father's objection should be disregarded, and held unreasonable. But the Divisional Court did not take that view; they came to the conclusion on the evidence that this was a case in which, though the father had had in the past a somewhat shady career, he had pulled himself together, was working well and satisfactorily, and was in a position to make proper provision for the child, and look after it. But, more important than that, the court observed that the father was the child's father, having the rights of parenthood which belong to the father of a legitimate child; and, there being no disqualification —for it was at this point that reference by way of example was made to dipsomania being a disqualification which might prevent the father prima facie from exercising those natural and legal rights—it was not right that his consent should be disregarded.

In my judgment, that case, and the principle of it, has no application to the present. It depended first and last upon the circumstances that the father in *Hitchcock's* case [2] was the father of a legitimate child, claiming as such to exercise his parental rights. In the present case, the father is not here as the father of a legitimate child, but as the putative father of an illegitimate child; and this court has decided in the case of *In re M.*[3] that the putative father of an illegitimate child, for the purpose of the Adoption Act, has not the rights of a parent. More precisely, the word "parent" in section 2 does not comprehend the father of an illegitimate child, and so he cannot come to court and claim (as could the father of a legitimate child) to exercise the parental rights which would then belong to him. As my brother Parker pointed out in the course of the argument, that position under the Act is emphasized if one looks, for example, at section 5 of the Act where parental rights are spoken of in circumstances which quite clearly exclude the consideration of someone in the situation of the respondent in this case. Indeed, Mr. Sofer has not argued to the contrary so far; he concedes that the judge at this point fell into error in saying that the

[2] [1952] 2 Q.B. 561.

[3] [1955] 2 Q.B. 479; [1955] 3 W.L.R. 320; [1955] 2 All E.R. 911.

principle of *Hitchcock's* case [4] applied. But Mr. Sofer has, none the less, contended that one cannot sensibly treat the father here as though he was a total stranger. He observes that had the father taken steps to make the child a ward of court, the views that he put forward for the child's welfare would be entitled to receive consideration from the court. That, no doubt, is so. The father has not in fact taken any such step. But at most I venture to think that argument cannot get Mr. Sofer beyond this point, that since we are not here concerned with any parental rights which would be taken away by the adoption, the primary test at any rate (without putting it any higher) of the right order to make is that of the welfare of the infant; and again in that I think I am saying no more than Mr. Sofer has said for the father.

Looking at the matter from that point of view, therefore, what is the answer? It will be recalled that in putting his case before the county court judge, the father had informed the court of the pending arrival in England of his sister. For some reason or other—it does not matter why—that did not take place; the sister appears still to be in India, and all we know is that she has suggested that the child might be sent to India. Mr. Sofer says that he has some further information, and his suggestion was that, in the interests of the child, it was desirable that this matter should be re-heard. I am not persuaded that that is so. I think that in the circumstances of this case an end should be made of this matter, and that an order should be made in favour of the applicant adopters. One reason for that view (and it will suffice) is that so far as I can see in the very peculiar circumstances of this case, where nothing whatever can be said from the child's point of view, against the adopters, the welfare of the child seems to me almost overwhelmingly to point in favour of an order being made, and made now. After all, if such an order is not made, what is going to be this child's future? He is going to be brought up by some relative of the father. He will clearly not at any relevant age, so far as I can see, be able to enjoy anything comparable to a father's affection and protection. On the contrary, he will inevitably find out sooner or later (and probably sooner) that he is the illegitimate child of a union, that his mother was murdered by his father, who is serving a life sentence for that offence. I cannot think that bringing the child up in that state of affairs would be to his advantage. Indeed, it may well be that here, even if the father could assert the rights of what I will call a legitimate father, that the fact of his having murdered the boy's mother (for which offence he was imprisoned for life) would itself—the other circumstances in this case being the same—disqualify the father from successfully refusing his consent. But it is unnecessary to go so far because, as I have more than once said, the father can assert no parental rights; and, once

[4] [1952] 2 Q.B. 561.

C. A.
1958
D., AN INFANT, *In re.*
Lord Evershed M.R.

that is out of the way, it appears to me tolerably plain in the very singular and distressing circumstances of this case that there is an overwhelming advantage from the infant's point of view in taking advantage of the generous offer of the adopters, and making an order in their favour.

I would, therefore, allow this appeal, and make an adoption order accordingly.

PARKER L.J. I entirely agree. It seems to me clear that the county court judge, in considering whether consent had been unreasonably withheld, fell into error in treating the test as the same in this case as in the case of a parent. He approached the matter on the principles laid down in *Hitchcock's* case,[5] which was the case of a parent as opposed to a putative father, and, applying that test, held that consent was not unreasonably withheld. I think it is clear that in a case, such as this, of a putative father, the primary consideration, if not the only one, must be the welfare of the infant; and as to that, it appears to me that the case is overwhelmingly made out in favour of adoption.

I would merely add that if one applied the tests laid down by Devlin J. in *Hitchcock's* case,[6] it seems to me that, even if this father had been the parent, he would certainly still have unreasonably withheld consent. Accordingly, I would allow the appeal.

SELLERS L.J. I entirely agree.

Appeal allowed.

Solicitors: *Braund & Fedrick; Pratt & Sidney Smith.*

E. D.

[5] [1952] 2 Q.B. 561. [6] Ibid. 572.

[COURT OF APPEAL.]

C. A.
1958
Jan. 23.
Lord Evershed M.R., Parker and Sellers L.JJ.

* CRADDOCK *v.* HAMPSHIRE COUNTY COUNCIL AND ANOTHER.

[Plaint No. 5078A.]

Landlord and Tenant—Business premises (Security of tenure)—Application for a new tenancy—Landlord's intention to demolish—Whether intention merely ancillary to intention to relet—Right of landlord to possession—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Agriculture—Agricultural holding—Smallholding—County council as smallholdings authority—Delegation of powers to "Smallholdings "committee"—Committee's intention to demolish buildings on

demised premises — Premises not a "smallholding" — Whether intention of local authority established — Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 47, 66—*Landlord and Tenant Act,* 1954, *s.* 30 (1) (*f*).

Judicial Precedent—Court of Appeal decision—Decision on effect of Court of Appeal decision—Ratio decidendi—Whether early or later decision binding on Court of Appeal—Two members of court parties to both decisions.

The Hampshire County Council in 1953 let ·229 acre to a tenant for one year. The premises had formed part of the adjoining agricultural land of the council, and, being less than one acre in extent, did not constitute a "smallholding" within the definition of that term in section 66 of the Agriculture Act, 1947. On the premises were a cowshed and Nissen hut in which the tenant carried on the business of repairing motor-vehicles. The council having served notice to quit on the tenant, he applied under Part II of the Landlord and Tenant Act, 1954, for the grant of a new lease. The council served a notice, opposing the application on ground (*f*) in section 30 (1) of the Act of 1954,[1] that they intended to demolish the premises.

It appeared from the evidence that in 1950 the council had passed a resolution delegating their powers and duties as a "small-"holdings authority" under Part IV of the Agriculture Act, 1947, in relation to smallholdings to their smallholdings committee. That committee had passed a resolution that the buildings on the tenant's premises should be demolished with a view to the premises being relet for agricultural purposes. The county court judge ordered the grant of a new tenancy on the ground that the council's intention to demolish, though genuine, firm and settled, was merely ancillary to their intention to relet the premises for agricultural purposes:—

Held, (1) that intention to demolish was not made ineffective because it might be called ancillary, or subsidiary, to some other purpose, namely, to incorporate the premises in a tenant's agricultural holding.

Fisher v. *Taylor's Furnishing Stores Ltd.* [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78 followed.

Atkinson v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340 distinguished.

(2) That the powers and authority of the council as a smallholdings authority under Part IV of the Agriculture Act, 1947, were not limited to dealing with units which were themselves smallholdings and that a determination of intention of the council's smallholdings committee might be a determination of intention on the part of the council themselves, but that the evidence showed that the intention to demolish was, in fact, not only the intention of the committee, but of the council themselves, and that a new tenancy should not be granted as the council had established the ground of its objection.

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy under the Act] ". . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to "say:— . . . (*f*) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding; . . ."

C. A.

1958

Craddock v. Hampshire County Council.

Appeal from Judge Tyler, sitting at Portsmouth County Court.

By a tenancy agreement of April 30, 1953, the Hampshire County Council let to Reginald William Craddock ·229 acre at Cosham Purbrook for a year from October, 1952, and thereafter on a yearly tenancy. There was on the land a cowshed and a Nissen hut which the tenant undertook to remove, if required to do so by the council. The land in question was carved out of a larger area which had been let by the owner of the freehold, Mrs. Eva Sardinia Borthwick-Norton, to the council.

The tenant, who had been in occupation for some 15 years in all, had carried on the business of motor-car and agricultural machinery repairer on the premises.

In 1950 the council had passed a resolution delegating their duties as a "smallholdings authority" under Part IV of the Agriculture Act, 1947, to the Hampshire Smallholdings Committee. The terms of the resolution are contained in the judgment of Lord Evershed M.R.

By notice to quit dated March 21, 1957, the council determined the tenancy as from September, 1957. By an application dated May 27, 1957, the tenant applied under the Landlord and Tenant Act, 1954, for the grant of a new tenancy of the premises pursuant to Part II of the Act for a term of 14 years. The council served a counter-notice dated June 6, 1957, in which it was stated that the council would oppose the application for the grant of a new tenancy on the ground that, on the termination of the current tenancy, they intended to demolish and reconstruct the premises, and, further, that they intended to occupy the holding for the purpose of a business to be carried on by them. The counter-notice further stated that the council were tenants under a lease having less than 14 years unexpired, and that their immediate landlord was Mrs. Borthwick-Norton. The counter-notice was signed by the solicitor and clerk of the council. On appeal, it was admitted that the council did not intend to reconstruct the premises, nor did they intend themselves to carry on a business on the premises.

On June 27, 1957, the smallholdings committee passed a resolution that the buildings on the premises should be demolished and the cleared site let for agricultural use to one Meares.

The county court judge, while stating that he was satisfied that the council had a bona fide intention of demolishing the buildings on the premises, made an order for the grant of a new tenancy. He held that the demolition of the buildings was merely ancillary to the main purpose of the council, which was to let the land to another tenant for agricultural purposes. The council accordingly had not, having regard to the decision in *Atkinson* v. *Bettison*,[2] established their ground of opposition under section 30 (1) (*f*) of the Act of 1954.

The council and Mrs. Borthwick-Norton appealed.

[2] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 840.

David Stinson for the county council and the freeholder.
A. J. Balcombe for the tenant.

The following case was cited in argument in addition to those referred to in the judgments: *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[3]

LORD EVERSHED M.R. In this case the respondent to the appeal had for some years carried on, on the premises which are the subject of the proceedings and described as London Road, Purbrook, Hampshire, an engineering business, doing repair work to motor-cars, and, more particularly, to agricultural vehicles. The freehold of the premises of the holding is vested, and at all material times was vested, in the second appellant, Mrs. Borthwick-Norton. It is for that reason that she is joined in the proceedings, since the tenant's claim for a new tenancy under the Act of 1954 is for a tenancy extending beyond the interest of the Hampshire County Council, the first of the appellants, themselves tenants of Mrs. Borthwick-Norton. There is, however, no issue between the county council and Mrs. Borthwick-Norton; and for the purposes of the rest of this judgment I will assume that the only party, other than the tenant, with whom the case is concerned is the Hampshire County Council.

On April 30, 1953, the county council made a written agreement of tenancy of these premises with the tenant. The term granted to him was a single year from October 1, 1952, to September 29, 1953; and thereafter from year to year at an annual rent of £52. The subject-matter was stated to measure ·229 acre, and it was delineated on an attached plan. The covenants on the part of the tenant were (in addition to the normal covenants for paying rent, rates and taxes, etc.) "To "keep the garage and workshop and other works and buildings "erected on the land . . . in good repair and condition"; and later, (ix) "If required by the county council and" (the estate now represented by Mrs. Borthwick-Norton) "to remove the "buildings," and certain other things.

The tenant continued in occupation on the terms of that document until, in due course, a notice of determination was given, and thereupon he applied under the Act of 1954 for a grant of a new tenancy. The notice of objection on behalf of the county council is signed by the solicitor to and clerk of the county council, and two grounds are put forward: namely, (a) that on the termination of the current tenancy they intend to demolish and reconstruct the premises comprised in the holding or a substantial part thereof; and (b) that on the termination of the current tenancy they intend to occupy the holding for the purposes of a business to be carried on by them.

[3] [1957] 1 Ch. 67; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1, C.A.; reversing [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

C. A.
1958
CRADDOCK v. HAMPSHIRE COUNTY COUNCIL.
Lord Evershed M.R.

Those two objections reflect the provisions of paragraphs (*f*) and (*g*) of section 30 (1) of the Act. So far as paragraph (*g*) is concerned, I need not make any further reference to it. Whatever else may be said about the county council and their powers and intentions in this case, it is reasonably manifest that they did not and do not intend to occupy the holding themselves for the purpose of any business of their own; that objection, therefore, goes out of further consideration. As regards the first objection, it will be noticed that in terms the objection—the draftsman having perhaps allowed his eye to be too much attracted by the language of the paragraph and too little by the actual subject-matter with which he was dealing—is said to be the intention to "demolish and reconstruct." Nobody has the smallest doubt that it never was the intention of the county council to "reconstruct" anything. The alleged intention from the start had been—and nobody, including the tenant, had been in any doubt about it—to demolish all buildings, the so-called garage and workshop, so that the land might revert to agricultural uses unencumbered by any building.

During the course of the case it was eventually conceded that the use of the words "and reconstruct" was a mistake, and that therefore this objection should be read as though those words had never found a place in it. Thus, the matter is reduced to this: have the county council established, as a ground of objection, an intention to demolish the premises? The premises themselves are small in extent—when I say "the premises," I mean the whole subject-matter of the holding—and they are carved out of an area which is in general used for agricultural purposes by the council. More precisely, the area as a whole has been used by them in exercise of their powers and duties to provide smallholdings, which will be found in Part IV of the Agriculture Act, 1947.

It is tolerably clear (subject to the point taken by Mr. Balcombe, to which I will come in due course) that the notice served indicated that what the county council were proposing to do was to take down all these buildings (which are not either particularly elegant or firmly built, being of the nature of a Nissen hut, cowsheds, and so forth) and then to use the land as part of a larger unit in exercising the powers of providing smallholdings. That raised the point which appealed to the county court judge, namely, that the avowed intention to demolish—assuming it was established—was merely subsidiary to the intention to let the premises to an agricultural tenant; and the judge thought (following *Atkinson* v. *Bettison* [1]) that he must therefore hold that intention not one comprehended by paragraph (*f*) of section 30 (1) of the Act. Mr. Balcombe, supporting that view, also said that, after all, one of these buildings certainly was originally erected as a cowshed, and there was no reason

[1] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

why it should not remain as a cowshed and be quite convenient as such for an agricultural tenant. In truth (said Mr. Balcombe) this alleged intention to demolish is merely something asserted by the council for the purpose of getting the benefit of the Act: they are not really concerned to demolish: all they want to do is to get it back, so as to be able to let it as an agricultural tenancy; and *Atkinson* v. *Bettison* [1] (Mr. Balcombe says, and so the judge said) disqualifies the council from seeking to rely on such an intention.

Atkinson v. *Bettison* [1] was a case (like all these cases) in which it is first necessary to observe carefully what the facts were. It was a case in which the tenant, carrying on a provision business, applied for a new lease from his landlord. The landlord wanted himself to occupy the premises for his business as a jeweller, and he therefore said, first of all: "I am going to "reconstruct"; and he then said he was going to occupy them himself. The second point was, as such, no good to him, because he had not acquired the premises in due time having regard to the provisions of section 30 (2). What this court (undoubtedly) held was that in that case the reconstruction was in truth something put forward to make good the defects with which the landlord was faced in relying on paragraph (*g*). As the court observed, the reconstruction was in truth nothing more than making what was a provision shop more suitable for a jeweller's business; and in any case, therefore, the reconstruction was not of the premises or of "a substantial part" thereof. But it is true to say that in the course of their judgments the members of this court—Denning, Hodson and Morris L.JJ.—used language which seemed to indicate that, if it appeared that the reconstruction was purely ancillary to the main purpose—which was to repossess—that main purpose not being open to the landlord because of the second subsection, then the court ought not to allow the landlord to evade the difficulties he would be in under paragraph (*g*) by putting forward a specious case under paragraph (*f*).

That reasoning came again before this court in a later case of *Fisher* v. *Taylors Furnishing Stores Ltd.*,[2] and it is to be noted that in that case two members of the court—Denning and Morris L.JJ.—had been members of this court when deciding *Atkinson* v. *Bettison*.[3] I will not in this instance read the facts of *Fisher's* case [4]: it will be sufficient first to refer to this passage in the headnote: "It was proved to the satisfaction of "the judge that the landlords intended to demolish the whole "of the premises; that they could not reasonably do so without "obtaining possession, and that their object was not to occupy "the old building but to rebuild on the site and to occupy the

[1] [1955] 1 W.L.R. 1127.
[2] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.
[3] [1955] 1 W.L.R. 1127.
[4] [1956] 2 Q.B. 78.

C. A.
1958
Craddock v. Hampshire County Council.
Lord Evershed M.R.

"new building for the purposes of their business of furniture "retailers." It then appeared that the county court judge had felt, none the less, that *Atkinson* v. *Bettison*[5] (and in particular the expressions to which I have alluded) bound him to hold that the reconstruction was ancillary to the landlord's wish to repossess and that, since the landlord had not acquired the premises in due time, therefore he must fail.

The headnote in *Fisher's* case[6] proceeds: "*Held*, allowing "the appeal, that the grant of a new lease should be refused. "As the landlords had established to the satisfaction of the "court that they genuinely intended to demolish and rebuild "the premises on the expiration of the tenancy, and reasonably "required possession for that purpose, the fact that they "intended to occupy the rebuilt premises themselves did not "deprive them of their right to possession."

The leading judgment was delivered by Denning L.J., who adverted to what he had said in *Atkinson* v. *Bettison*.[7] At the beginning of his judgment he said[8]: "The correct ground of the "decision"—that is, in *Atkinson* v. *Bettison*[9]—"was that the "proposed work was not 'substantial' within section 30 (1) (*f*); "but the court considered also section 30 (1) (*g*) and (2), which "says that if the landlord wants to get possession for his own "purposes, he must have been owner for the last five years. "In this connexion the court gave an emphatic warning against "allowing a landlord too easily to escape from the five years' "rule. That is the full extent of *Atkinson* v. *Bettison*,[9] and it "should not be taken to decide anything more." The Lord Justice makes certain citations from his previous judgment, and says[10]: "Whilst I adhere to the view that the landlord should "not be allowed to circumvent the five-year rule by putting "forward a colourable case of reconstruction, nevertheless I "think it is going too far to say that the work of reconstruction "must be the primary purpose." After saying whence the word "primary" had come, and that the Act of 1954 contained provisions different from those of the Act of 1951, which had given rise to the use of the word, he concludes[11]: "In many "cases the landlord will have two purposes, both of which are "genuine and important; the one is to get possession for his own "business, and the other is to reconstruct the premises. He "does not lose the benefit of section 30 (1) (*f*) simply because he "bought the premises less than five years before. . . . Applying "these principles, I think that the case of *Atkinson* v. *Bettison*,[12] "properly understood, did not prevent the judge giving effect to "the view which he had formed."

Morris L.J. gave judgment to the same effect. I will finally cite one short passage from my brother Parker's judgment. He

[5] [1955] 1 W.L.R. 1127.
[6] [1956] 2 Q.B. 78.
[7] [1955] 1 W.L.R. 1127.
[8] [1956] 2 Q.B. 78, 84.
[9] [1955] 1 W.L.R. 1127.
[10] [1956] 2 Q.B. 78, 85.
[11] Ibid. 85.
[12] [1955] 1 W.L.R. 1127.

cites the language of the paragraphs and continues[13]: "From "the scheme of the Act as there laid down I should have "thought that it was clear, apart from authority, that if any of "those grounds of objection is established, the tenant's applica- "tion for a new lease must fail. Each ground is entirely "separate and independent, and each, if proved, entitles the "landlord to succeed. Thus, if ground (*f*) is proved to the satis- "faction of the court, it matters not to what use the landlord "ultimately intends to put the holding. He may intend to let "it when the work is done to a third party. He may intend "ultimately to occupy it himself for his own business; or he may "not have made up his mind at all. To suggest that, if his "intention is ultimately to occupy it himself and he cannot by "reason of subsection (2) of section 30 rely on ground (*g*), "he is thereby debarred from relying on ground (*f*), is to apply "a proviso to the operation of ground (*f*) which is not there and "for which there is no warrant." I need not refer further to my Lord's judgment because he proceeds to deal with *Atkinson* v. *Bettison*[14] in exactly the same way as had Denning L.J.

Mr. Balcombe invited us to say that that interpretation of *Atkinson* v. *Bettison*[14] is not really justified by the language, or some of the language, of the judgments in *Atkinson* v. *Bettison*[14] themselves: and that we now should improve on the performance of Denning, Morris and Parker L.JJ. by giving another interpretation to the earlier case; and he warned us that by the rules applicable to it this court is bound by its previous decisions, right or wrong—unless, of course, they are per incuriam—that we ought to say that this court's attempt to whittle down *Atkinson* v. *Bettison*[14] in *Fisher's* case[15] really went too far; and that in the present case *Atkinson* v. *Bettison*[16] should govern.

I am unable to take that view. It seems to me quite plain that we must now regard *Atkinson* v. *Bettison*[16] as deciding what this court said in *Fisher's* case[17] it did decide and no more. In saying that, I am not to be taken to be indicating any doubt as to the correctness of the views in *Fisher's* case[17] that I have quoted. It follows, therefore, that if the county council establsh a genuine bona fide intention to demolish, it is not made ineffective because it is what might be called ancillary to or subsidiary to some other purpose, namely, to incorporate it in someone's agricultural holding. The judge thought himself bound by *Atkinson* v. *Bettison*[18]; but, unfortunately, he did not appear to have in his mind (I am not sure whether his attention had been drawn to it or not when he wrote his judgment) *Fisher's* case,[19] which is not referred to. I think that had he had *Fisher's case*[19] in mind, he would not, and could not, have

[13] [1956] 2 Q.B. 78, 91.
[14] [1955] 1 W.L.R. 1127.
[15] [1956] 2 Q.B. 78.
[16] [1955] 1 W.L.R. 1127.
[17] [1956] 2 Q.B. 78.
[18] [1955] 1 W.L.R. 1127.
[19] [1956] 2 Q.B. 78.

C. A.
1958
Craddock v. Hampshire County Council.
Lord Evershed M.R.

regarded *Atkinson* v. *Bettison* [20] as laying down a principle which compelled him to decide in the tenant's favour. I therefore think, with all respect to him, that the judge wrongly regarded *Atkinson* v. *Bettison* [20] as governing the matter or, indeed, as having anything to do with it.

Of course it would still be open to the tenant to say that the intention to demolish was not really a genuine intention at all—that the council were not concerned to demolish: they were only pretending to say so because they wanted to throw this property into an agricultural holding and knew that, unless they said they were going to demolish, they would not succeed in establishing the objection under the section. But the short answer to any suggestion of that kind (and Mr. Balcombe did not contend to the contrary) is that the judge held that there was here proved a genuine intention, a firm and settled intention, on the county council's part to demolish.

But that last statement of mine remains subject to the final point which Mr. Balcombe took, and it is this: That the county council failed to prove any such intention on their part because all that they established was an intention on the part of one of their committees, which was called the smallholdings committee. Among the papers, we have got a copy of a resolution of the council passed in the year 1950 whereby the following delegation was resolved upon: "that the powers and duties of the county "council (i) as a Smallholdings Authority in relation to Small-"holdings"—I am leaving out (ii) and (iii)—"(iv) in relation "to . . . all other matters in connection with agriculture "except"—certain matters with which we are not concerned—"be delegated to and exercised by the Hampshire Smallholdings "Committee for and on behalf of and in the name of the county "council." We have also a resolution of June 27, 1957, of the Hampshire Smallholdings Committee, which is directly related to this matter of Mr. Craddock's tenancy. Without reading it in full, it is a resolution that the council resist Mr. Craddock's application, and that the council determine to demolish the buildings on the premises, and so forth; and so, Mr. Balcombe says, all we have got is a resolution of the smallholdings committee of the council purporting to be in exercise of their delegated powers, but in truth outside their powers.

Mr. Balcombe sought to make good that proposition by reference to section 66 of the Agriculture Act, 1947, which contains a definition of "smallholding"; and that definition includes the characteristic that a smallholding must exceed in extent one acre. I have said that the subject-matter of the appellant's smallholding was ·229 acre. Therefore (Mr. Balcombe says) the tenant's holding is not and never was a "smallholding" within the meaning of the Agriculture Act, 1947, and, therefore, within the meaning of the word "smallholding" as it was used in these resolutions.

[20] [1955] 1 W.L.R. 1127.

But it seems to me that there is more than one answer to this objection. In the first place, I very much doubt whether it could be said that the powers delegated were limited to dealings with units which were all themselves smallholdings. The powers and duties of the county council delegated were their powers "as a Smallholdings Authority in relation to Small-"holdings." That is no doubt a reference to Part IV of the Agriculture Act, 1947, to which I have earlier referred; but it would, I think, be going much too far to say that the powers and duties of the council as a smallholdings authority were limited to dealings with units which were all themselves smallholdings. If further support were wanted, I think it can be found in paragraph (iv) of the delegated powers, which (it will be recalled) included powers "in connection with agriculture "except" certain matters which are not relevant. I am therefore far from satisfied that, if all that there was established was a resolution of the smallholdings committee, it could be said that a determination, an intention on the part of the smallholdings committee, was not an intention on the part of the county council. But I think further (and this is a second answer to the argument) that if it was a question whether the county council had themselves proved an intention, then the evidence which they adduced was sufficient at any rate to establish a prima facie case to that effect. After all, if the smallholdings committee purported to act as they did in exercise of this power, but exceeded it, the county council could ratify what the committee had done.

I have referred already to the circumstances that the notice of objection to Mr. Craddock's application alleged an intention by the county council, and that notice was signed by the solicitor and clerk to the county council; from which it might (I would have thought) have been reasonably inferred that the county council, through their properly authorized officers, were at least adopting what the smallholdings committee had done. What is more, the county council called as a witness John Henry Brown (who, incidentally, appears to have been the individual who made the written tenancy agreement with the tenant), who had been, when he gave evidence, the county land agent of the county council for 15 years and more; and he spoke in his evidence of what the county council intended to do. In 1955 (he said) the county council decided to terminate the tenancy; and in cross-examination he said: "The intention is to use it" (that is, the holding) "for agricultural purposes. The county "council intend to let it to Meares"—all of which means that the county council were themselves intending to do this, that and the other with the holding, to demolish the buildings on it, to let it to Meares, and so forth.

Mr. Brown's right to speak for the council as such was not challenged; and I think that Mr. Brown's evidence is sufficient prima facie to establish the fact that the alleged intention was

C. A.
1958
CRADDOCK v. HAMPSHIRE COUNTY COUNCIL.
Lord Evershed M.R.

the intention not merely of some committee but of the county council themselves, on whose behalf the evidence was tendered by the advocate conducting the case, instructed by the county council. I am therefore not satisfied that there is any substance in this point; and I think it is tolerably plain, in the circumstances, that there could be no merit in it. The point was not decided by the judge, because it was in the circumstances, of course, unnecessary for him to reach any conclusion upon it; though it is to be noted that he intimated that he thought on this matter that the county council had made good what they alleged. He said, for example, in an appendix to his judgment: "I was satisfied that the county council had the "bona fide intention to demolish the buildings," etc. It is true to say that he did not in terms decide this point of delegation. He said as regards that: "I am inclined to think that "the objection is cured by the delegation of power by the county "council to the committee"; which I understand to mean that he thought the terms of the delegation covered what the smallholdings committee had in fact done. However that may be, having considered it now and heard Mr. Balcombe's point and Mr. Stinson's answer to it, I am satisfied that, one way or another, the bona fide intention which clearly was established was the bona fide intention of the council as a whole and not merely that of a committee acting outside the strict limits of their powers.

For the reasons which I have tried to state, I think that the judge should not have granted a new tenancy, but should have held that the council had established the first of their two objections.

I ought to have said, and I add by way of conclusion, that the terms of the paragraph (it will be recalled) speak of an intention to demolish "the premises comprised in the holding." The holding was a piece of land ·229 acre in extent, and the buildings—the Nissen hut and the ex-cowshed—do not cover the whole of that space. You might (as was pointed out in argument) get a case in which the holding was substantially open but upon which there was one relatively small building like a pavilion on a cricket ground, and it might be said: It would be a strange thing if all you had to do was to show an intention to destroy one relatively small building in order to justify recovering possession of a very large area. But that is not the case here, and I need not pursue it. The ex-cowshed and the so-called garage cover an appreciable part of the building, to say no more; and those premises—all of them—it is shown to be the intention of the council to demolish. No point, therefore, of the kind intimated arises here; and I have already said that following what the judge held—that the intention has been established within paragraph (*f*)—I think the judge should have refused the tenant's application.

I would therefore allow the appeal and order accordingly.

PARKER L.J. I entirely agree, and have nothing further to add.

SELLERS L.J. I also agree.

Appeal allowed.

Solicitors: *Walker, Martineau & Co.; Arthur S. Joseph & Cates for MacDonald, Jacobs & Oates, Southsea.*

B. A. B.

C. A.
1958
CRADDOCK v. HAMPSHIRE COUNTY COUNCIL.

[HOUSE OF LORDS.]

* WIGRAM FAMILY SETTLED ESTATES LTD. . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)†
1957
Nov. 25, 26.
1958
Jan. 23.

Revenue—Surtax—Company—Apportionment of undistributed income pursuant to surtax direction—"In accordance with . . . interests "of members"—Meaning—Part of income to be carried to fund for redemption of preference shares — Whether preference shareholders' "interests" included such sums—Investment company—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *Sch. I, paras.* 8, 10.

By section 21 of the Finance Act, 1922: "With a view to "preventing the avoidance of the payment of super-tax [now sur-"tax] through the withholding from distribution of income of a "company which would otherwise be distributed, it is hereby "enacted as follows: (1) Where it appears to the Special Com-"missioners that any company to which this section applies has "not, within a reasonable time after the end of any year or other "period . . . for which accounts have been made up, distributed "to its members in such manner as to render the amount distributed "liable to be included in the statements to be made by the members "of the company of their total income for the purposes of super-"tax, a reasonable part of its actual income from all sources for "the said year or other period, the Commissioners may, by notice "in writing to the company, direct that for purposes of assess-"ment to super-tax, the said income of the company shall for the "year or other period specified in the notice, be deemed to be the "income of the members, and the amount thereof shall be appor-"tioned among the members . . ."

Schedule I, para. 8: "The apportionment of the actual income "from all sources of the company shall be made by the Special "Commissioners in accordance with the respective interests of the "members . . ."

An investment company issued to an assurance society 6 per cent. first preference shares, non-voting and redeemable on the terms that the company would maintain a redemption fund out of funds otherwise available for dividend. The assets of the company were amply sufficient at all material times to enable the society's preference shares to be redeemed in full in any foreseeable event.

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

H. L. (E.)

1958

WIGRAM FAMILY SETTLED ESTATES LTD. v. INLAND REVENUE COMMISSIONERS.

A surtax direction was made on the company under section 21 of the Finance Act, 1922, and the commissioners apportioned the income of the company among the members in accordance with their dividend rights. The company contended that in addition to those rights the assurance society (which was not liable to surtax) ought to be treated as entitled to sums which had been carried to the redemption fund as well as to the dividend rights:—

Held, that, even assuming that the society had an "interest" within the meaning of Schedule I, para. 8, in respect of the redemption fund, on the facts of the present case the commissioners were well justified in treating it as negligible, and apportioning sums carried to that fund among the other members of the company.

F. P. H. Finance Trust Ltd. v. *Inland Revenue Commissioners (No. 2)* [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492 applied.

Decision of the Court of Appeal [1957] 1 W.L.R. 233; [1957] 1 All E.R. 311 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 14, 1956, dismissing an appeal by the appellant company, Wigram Family Settled Estates Ltd. (in liquidation), from an order of the High Court (Vaisey J.) dated July 17, 1956, whereby an appeal by the appellant company on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of those commissioners was affirmed.

The relevant facts are set out in the report of the case when before the Court of Appeal, [1957] 1 W.L.R. 233.

Cyril King Q.C. and *Philip Sykes* for the appellant company.
John Pennycuick Q.C. and *Alan Orr* for the respondents.

The following cases were referred to in argument: *F. P. H. Finance Trust Ltd.* v. *Inland Revenue Commissioners* [1]; *Inland Revenue Commissioners* v. *Fred's Securities Co.* [2]; and *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association.* [3]

Their Lordships took time for consideration.

January 23, 1958. VISCOUNT SIMONDS. My Lords, this appeal is from an order of the Court of Appeal affirming an order of Vaisey J., who upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts had affirmed their determination. I have not been persuaded that a wrong conclusion has been reached.

The facts are set out in great detail in the case stated, which can be referred to if necessary. I shall content myself with a brief summary.

[1] [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492.

[2] [1939] 2 K.B. 734; [1939] 3 All E.R. 241.

[3] [1915] 1 Ch. 881.

The appellant company, which has been in liquidation since May 19, 1952, had at the relevant dates the following capital structure: (A) 100,000 6 per cent. redeemable preference shares of £1 each; (B) 2,500 6 per cent. participating cumulative preference shares of £1 each; (C) 3,500 6 per cent. cumulative non-participating preference shares of £1 each; (D) 1,500 ordinary shares of £1 each. All these shares were issued and fully paid up except 500 of the (B) shares. The special feature in this structure, upon which, in effect, this appeal turns, lies in the provisions relating to the redeemable preference shares. These were (a) that such shares should be redeemed on the expiration of ten years from March 31, 1935, out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue made for the purposes of such redemption; (b) that for the purposes of such redemption the company should create, and, so long as any such shares should remain outstanding, should in each year beginning with the year ended March 31, 1936, carry to the credit of, a separate fund out of the profits of the company which would otherwise be available for dividend (i) for the year ended March 31, 1936, the sum of £9,050, (ii) for each subsequent year ended March 31 the sum of £7,797 or such larger sum as the directors might think fit, with a proviso that when and so long as the fund should amount in value to £100,000 no further sum should be carried to its credit; (c) that all sums carried to the fund should be invested in investments thereby authorized with power to vary such investments. The whole of these shares were taken up by the Equity and Law Life Assurance Society (whom I will call "the society"). It may be assumed that they insisted on the redemption terms as a condition of taking up the shares.

The appellant company did not comply precisely with these provisions, no doubt with the assent of the society, but by March 31, 1949, the commencement of the first of the three relevant accounting periods of the company (namely, the years of assessment 1949–50, 1950–51 and 1951–52), a sum of £77,000 out of the profits had been transferred to and stood to the credit of the fund. During the relevant years ending March 31, 1950, 1951, 1952, the following further transfers were made to the fund, namely, £4,000, £10,000 and £4,000. On August 30, 1950, 80,000 of the shares were redeemed by applying to that purpose £80,000 standing to the credit of the fund. The remaining 20,000 shares continued to be held by the society.

I need state only three further facts. First, it is plain from the facts as stated in the case and the documents annexed to it that at all times the net assets of the company were ample to meet its obligations in respect of its redeemable preference shares. Secondly, the company was an "investment company" to which section 20 (1) of the Finance Act, 1936, section 14 (2) of the Finance Act, 1937, and section 14 (1) of the Finance Act, 1939, applied. Thirdly, the actual income from all sources of the

H. L. (E.)
1958
WIGRAM FAMILY SETTLED ESTATES LTD. v. INLAND REVENUE COMMISSIONERS.
Viscount Simonds.

company for the same three years ending March 31 was £13,154, £21,885 and £13,527.

It follows from what I have said that the Special Commissioners had no discretion in the matter but were bound to give a direction that these sums should, however much or little thereof had been distributed to the members of the company, be deemed for the purposes of surtax to be their income. This was at one time, but is no longer, disputed.

The direction having been duly given, it then fell to the commissioners to apportion the same income among the several members of the company, that is to say, among the several classes of preference shareholders and the ordinary shareholders. In doing so they have no other statutory guidance than is to be found in paragraph 8 of Schedule I to the Finance Act, 1922, the relevant words of which are: "The apportionment of the actual "income from all sources of the company shall be made by the "Special Commissioners in accordance with the respective "interests of the members."

What, then, were the respective interests of the members in the actual income of the company? The commissioners apportioned to the redeemable preference shareholders, i.e., to the society, £6,000 (being 6 per cent. on the 100,000 shares) for the first year and £3,204 and £1,200 for the second and third years respectively (being 6 per cent. on the unredeemed shares during those years) and no more. They apportioned 6 per cent. per annum to the holders of the other preference shares and the remainder they apportioned to the ordinary shareholders.

The appellant company appealed against the apportionment, contending that the society in addition to their interest in the income of the company to the extent of 6 per cent. on their shares also had a relevant interest in the income in respect of the amounts carried in each of the three years to the redemption fund out of the profits available for dividend, that is to say, the several sums of £4,000, £10,000 and £4,000.

The commissioners rejected this contention. They held that the society's interest as a member was adequately measured by taking 6 per cent. on the amount of its preference shareholding in the material years, and, further, that the guarantee on which the society had insisted as a condition of subscribing for its shares was no more than a security for the eventual repayment of its capital. They further stated that they had also considered whether any fairer method of apportionment could be devised but in the facts of the case were unable to find one after taking into account the voting rights and the rights of ordinary shareholders on a winding up.

My Lords, as I have said, the determination of the commissioners was sustained by Vaisey J. and by the Court of Appeal, and I have no doubt that they were right.

I have already pointed out how little guidance is given to the commissioners in their task of apportionment, but it should, I

think, be remembered that section 21 of the Finance Act, 1922, from which this branch of taxation stems, opens with the words: "With a view to preventing the avoidance of the payment of "super-tax through the withholding from distribution of income "of a company which would otherwise be distributed . . ." I should therefore expect any apportionment of the actual income of a company to proceed upon the footing that what any member received upon an apportionment would be a share which, if it had been distributed instead of being withheld, would have the character of income in his hands and, as such, be liable to super-tax or surtax, if he was an individual. But I find myself at once in this difficulty. It would be a fantastic result of this legislation if it increased, even notionally, the income of a 6 per cent. preference shareholder. But, if it does not have that effect and the apportionment beyond his 6 per cent. is to be regarded as a capital payment, then the purpose of the section is defeated. Surtax is neither payable nor avoided.

The strength of the appellant company's case lies in this: that the obligation imposed on it by its articles did preclude it from distributing the whole of its income. It was contractually bound to carry yearly sums to the redemption fund. It may therefore be said that it would be a hardship on the ordinary shareholders that an apportionment should be made to them in any year of income upon which they could not lay their hands. But the question is not whether such an apportionment would be a hardship on them but what are the respective interests of the different classes of shareholders in the actual income of the company. I do not intend to lay down any general rule. It would be hazardous to do so in face of the very general words by which the duty of apportionment is cast upon the commissioners. But on the facts of the present case I cannot fail to be impressed by the consideration that neither at the end of any year nor at the commencement of the liquidation was there any doubt as to the capital of the redeemable preference shares being well secured apart from the redemption fund. The commissioners in their determination regarded the fund as a security for eventual repayment of capital. I think they were right in doing so, and, further, that, if in the event the security proved unnecessary because the capital was secure without it, they were well justified in treating the society's interest in it as negligible. They might ask the simple question whether the society in fact got any benefit from the fund. The answer could only be that it may have got some peace of mind from the knowledge that the fund was there, but that it was the ordinary shareholders who would eventually get the income which was temporarily withheld. And that is what in fact happened.

I was further impressed by the admission which, as I understood him, counsel for the company felt constrained to make—that, if the appellant company had built up the same fund out of profits, not under the compulsion of its articles but as a matter

H. L. (E.)
1958
WIGRAM FAMILY SETTLED ESTATES LTD. v. INLAND REVENUE COMMISSIONERS.
Viscount Simonds.

of prudent finance, the society could not be said for the purpose of apportionment to have any relevant interest in it. Yet upon the facts of the case the material interest of the society was precisely the same, whether the fund was established voluntarily or under a contractual obligation. It may be observed, too, that, though in one sense the company were obliged to carry some part of their profits to the fund, yet this was an obligation into which they had voluntarily entered.

Reference was made both in the courts below and in argument before this House to the case of *F. P. H. Finance Trust Ltd.* v. *Inland Revenue Commissioners (No. 2)*.[1] I agree with Vaisey J. and the learned Master of the Rolls in thinking that it gives no support to the company's contention. In that case Lord Russell of Killowen said[2] that it was the duty of the commissioners in apportioning the income among the members to determine who are the members "of whom it can be said . . . that they are "the persons who, in view of all their interests in the company, "are the persons really interested in the income in question and "in what proportions." This seems to me to be just what the commissioners in the present case set out to do and fairly did.

The appeal must, in my opinion, be dismissed with costs.

LORD REID. My Lords, in consequence of directions given by the Special Commissioners under section 21 of the Finance Act, 1922, in respect of the years 1949–50, 1950–51, and 1951–52, the actual income of the appellant company for these years was deemed to be the income of its members; and the Special Commissioners had to apportion that income to them "in accordance "with the respective interests of the members," income so apportioned to each being "deemed to represent his income from "his interest in the company." (Finance Act, 1922, Sch. I, para. 8.)

As a result the appellant company became liable to pay surtax on sums apportioned to individual members at rates appropriate to them. But as surtax is a tax on individuals there is no liability to pay it in respect of any sum apportioned to a non-individual member. It is therefore in the appellant's interest to have as large sums as possible apportioned to its non-individual member, the Equity and Law Life Assurance Society, which held all the 6 per cent. redeemable preference shares in the appellant company.

The Special Commissioners have apportioned to that society the sums required to pay the 6 per cent. on their shares, holding that the society's interest as a member was adequately so measured. By virtue of an agreement made when these preference shares were issued the appellant company was bound to carry certain sums out of its profits to the credit of a redemption fund for these shares, and in the years in question it paid into

[1] [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492.
[2] [1946] A.C. 38, 51.

that fund, under the agreement, sums of £4,000, £10,000 and £4,000. The appellant's contention is that these sums ought to have been apportioned to the society, in addition to the 6 per cent. on its shares, because the society had an interest in these sums.

The society was concerned, not merely to receive annually the 6 per cent. on its shares, but also to have its shares redeemed in accordance with the agreement between it and the appellant, and, in order that funds might be available for the redemption at the stipulated date, it was concerned to see that the redemption fund was built up by the appellant carrying part of its profits to that fund. I shall assume, without deciding the point, that this could properly be regarded as an "interest" within the meaning of the Finance Act, 1922. But it would, in my opinion, be erroneous to hold that such an interest necessarily required the apportionment to the society of the whole of the sums carried to the redemption fund. The other shareholders also had an interest in these sums and it appears to me that in the present case the society's interest was negligible in comparison with the interest of the other shareholders. The real interest of the society, beyond payment of their 6 per cent. annually, was to receive payment in due course of its capital. In the present case the assets of the appellant were amply sufficient to enable the society's preference shares to be redeemed in full in any foreseeable event, and the only importance of building up the redemption fund was to facilitate the redemption. Carrying these sums to the redemption fund did not in any way increase the amount of money which the society would receive. It meant in effect that the sums available for distribution to the other shareholders were diminished for the time being, but that the other shareholders' shares became more valuable. They were entitled in the end to the whole of the appellant's assets beyond what was required to redeem the society's shares, and the amount of the appellant's assets was increased by carrying these sums to the redemption fund instead of distributing them. In other words, retaining these sums in this fund postponed the enjoyment of them by the other shareholders, but did not in any substantial way add to the financial return which the society would receive or the probability that they would be paid in full. That appears to me to justify the apportionment made by the Special Commissioners.

It has been said in the Court of Appeal that this is a hard case for the appellant and the other shareholders. No doubt all high taxation is a hardship for the taxpayer but I do not see any special hardship in this case. If an individual, in order to raise more capital, chooses to undertake to set aside part of his income to provide for repayment, he cannot thereby diminish his liability for surtax. I see no reason why a company should be entitled to expect to be better off.

I would dismiss this appeal.

H. L. (E.)
1958
WIGRAM FAMILY SETTLED ESTATES LTD. v. INLAND REVENUE COMMISSIONERS.

My noble and learned friend, Lord Denning, who is unable to be here today, has asked me to say that he concurs in the opinion which I have just delivered.

LORD KEITH OF AVONHOLM. My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal dismissed.

Solicitors: *Wigram & Co.; Solicitor of Inland Revenue.*

F. C.

[CHANCERY DIVISION.]

1958
Jan. 24.
Danckwerts J.

* *In re* ALLAN, DECD.
CURTIS AND ANOTHER *v.* NALDER AND OTHERS.

[1957 A. No. 1624.]

Perpetuity Rule—Dependant or independant trust—Void gift of income —Discretionary trust during widowhood—Gift of capital "on the "determination of" that trust—Whether gift of capital valid.
Trust and Trustee—Uncertainty, trust void for—Discretionary trust—Unascertainable class.

A testatrix by her will left her residuary estate upon trust for sale and directed that her trustees should stand possessed of the proceeds thereof upon trust in the events which happened after the death of the survivor of her sister, A. B. N., and her brother, N. F. N., during the widowhood of any wife of the said N. F. N. "for the maintenance and personal support or benefit of such wife "and the children of the said N. F. N. or remoter issue for the "time being in existence whether minors or adults or any other "person or persons in whose house or apartments or in whose "company or under whose care or control or by or with whom the "widow of the said N. F. N. may from time to time be employed "or residing." "On the determination of the trusts hereinbefore "declared" of the income she gave the sum of £7,350 to one charity and the balance of her residuary estate and the income thereof to another charity.

The testatrix died in 1938; her sister, A. B. N., died in 1954, and her brother, N. F. N., died in 1956 leaving a widow.

By the summons the trustees of the will asked whether the trusts declared during the widowhood of the wife of N. F. N. were void for uncertainty or as infringing the rule against perpetuities, and whether, if they were void on any such ground, the trusts in favour of the charities were also consequently void either as to capital and to income or as to income only:—

Held, that (1) the trusts declared during the widowhood of any wife of N. F. N. were void for uncertainty and as offending the rule against perpetuities.

[Reported by JENNIFER WEST, Barrister-at-Law.]

In re Gresham's Settlement, Lloyds Bank Ltd. v. *Gresham* [1956] 1 W.L.R. 573; [1956] 2 All E.R. 193 followed.

(2) That on their proper construction the words "on the determination of the trusts hereinbefore declared" meant on the death of the widow; and that, since the gifts of capital to the charities had vested in interest, those gifts were valid, although they did not take effect in possession until the death of the widow, but that the gift of income in favour of the second charity during the widow's lifetime failed and passed as on intestacy.

In re Coleman, Public Trustee v. *Coleman* [1936] Ch. 528, 535; [1936] 2 All E.R. 225 followed.

ADJOURNED SUMMONS.

By her will, dated April 21, 1933, Evelyn Julia Allan (hereinafter called "the testatrix") appointed her sister, Alice Beatrice Nalder, William Shakespeare and Thomas Smith Curtis to be her executors and trustees, and left her residuary estate upon trust for conversion. By clause (4) of her will the testatrix directed that the trustees should stand possessed of the income arising from the trust fund upon the following trusts:—

(a) As to one moiety of the said income upon trust to pay the same to the said Alice Beatrice Nalder during her life, and upon her death to hold the same upon the trusts thereinafter declared as regards the second moiety of the said income.

(b) As to the other or second moiety of the said income upon trust during the life of her brother, Noel Francis Nalder, or during such shorter period as her trustees should think fit to pay all or any part thereof for the maintenance and personal support or benefit of the said Noel Francis Nalder and his wife and issue and certain other persons therein referred to and subject to such discretionary trust to hold the same upon trust and for the purposes upon and for which the same would be held if the said Noel Francis Nalder were then dead.

(c) After the death of the said Noel Francis Nalder to apply the last mentioned moiety of the said income during the widowhood of any wife of the said Noel Francis Nalder who might survive him for the maintenance and personal support or benefit of such wife and the children of the said Noel Francis Nalder or remoter issue for the time being in existence, whether minors or adults, and any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the widow of the said Noel Francis Nalder may from time to time be employed or residing.

(d) On the determination of the trusts of the said last mentioned moiety of the said income thereinbefore declared to pay such moiety of the said income to the said Alice Beatrice Nalder during the remainder of her life.

By clause (5) of her said will, the testatrix declared that "on the determination of the trusts hereinbefore declared of the income of the trust funds I give and bequeath to the Royal National Life Boat Institution" (the second defendant to the summons) the sum of £7,350 free of legacy duty to be used and

1958

ALLAN, DECD., *In re.*

devoted to the cost of a lifeboat as therein mentioned, and subject to the payment of such legacy directed her trustees to pay any balance of her residuary estate and the income thereof to the Royal Society for the Prevention of Cruelty to Animals (the third defendants to the summons).

The testatrix died on February 15, 1938, and her will was duly proved by her executors. All the executors and trustees thereafter died, Alice Beatrice Nalder being the last surviving trustee and dying on February 27, 1954. By her (Alice's) will she bequeathed the whole of her residuary estate to her trustees upon trust subject to certain life interests for the Barristers' Benevolent Association, the fourth defendant to the summons, who were joined to represent the persons entitled in the intestacy of the testatrix (Evelyn Julia Allan); her brother, Noel Francis Nalder, and her sister, Alice Beatrice Nalder, were at her death her statutory next-of-kin.

Noel Francis Nalder died on May 27, 1956, intestate and without issue but leaving his widow, Kathleen Nalder, the first defendant to the summons, him surviving. No appointment of new trustees of the testatrix's will had been made and the executors of Alice Beatrice Nalder were accordingly empowered to exercise the trusts thereof and were the plaintiffs to the summons.

The plaintiffs by the summons asked whether the discretionary trusts declared by clause 4 (c) of the will during the lifetime of the widow, the first defendant, were void for uncertainty or as infringing the rule against perpetuities, and whether if the said trusts were void on any such ground aforesaid the trusts declared by clause 5 in favour of the charitable institutions, the second and third defendants, were also void having regard to the failure of the said trusts either as to the gift of income and capital or as to income only.

D. A. Ziegler for the plaintiffs.
J. L. Arnold for the first and fourth defendants.
R. R. A. Walker for the second and third defendants.

Cases cited in argument and not referred to in the judgment: *In re Abbott* *; *In re Mill's Declaration of Trust.*†

DANCKWERTS J., after stating the facts, continued: It is plain that the discretionary trusts contained in paragraph (c) of clause 4 of the will are void for uncertainty, because the form is in substance exactly the same as that which was considered by Harman J. in *In re Gresham's Settlement*,[1] and though Mr. Arnold has submitted that that case was wrongly decided, in order to keep the point alive, it is plain to me that I ought to follow the decision in question and apply it in the present case.

* [1893] 1 Ch. 54.
† [1950] 1 All E.R. 789, D.C.; [1950] 2 All E.R. 292, C.A.
[1] [1956] 1 W.L.R. 573; [1956] 2 All E.R. 193.

The clause, however, also seems plainly to offend against the rule against perpetuities, because Noel Francis Nalder might have married a woman who was not in being at the date of the testatrix's death, and when there is the possibility of that event in regard to a discretionary trust, it is invalid by reason of the rule against perpetuities as has been recognized in a number of cases. The question which then remains is a difficult one: Does it have the effect also of rendering invalid the provisions which were contained in clause 5 of the will in favour of the two charitable institutions?

The principle as stated in Jarman on Wills, 8th ed., vol. 1, at p. 365, is as follows: "It is submitted that if the ulterior "limitation must become vested in interest (though not neces-"sarily in possession) within the perpetuity period and cannot "be divested, accelerated or postponed by any event operating "under the earlier void limitation, then the ulterior limitation "is independent and valid." On the other hand, if it is dependent upon the earlier limitations, then it is well settled that the ultimate limitation is also void under the rule against perpetuities, and the question is whether this is a case in which the final gift is valid or invalid. There is no other gift of capital in this will except that which is contained in clause 5. All the other provisions which preceded that gift are limited to the income.

I have been referred very properly to a number of cases, but it seems to me that there is one case which, on the construction I put upon this will, decides the matter. It seems to me that it is not correct to say that one can regard the provisions of clause 5 of the will as operating without regard to the earlier provisions at all, as in effect was contended by Mr. Walker on behalf of the two charitable institutions. His contention was that as the provisions in question and discretionary trusts were void for uncertainty, they disappeared from the will, and all that finally remained was a gift of the capital, carrying the intermediate income, to these charitable institutions. It seems to me that the proper construction of the words "On the deter-"mination of the trusts hereinbefore declared" is upon the death of such widow, being the widow mentioned in clause 4 (c) of the will. The trusts are limited during, first of all, the life of the testatrix's sister as regards one half; then during the life of the brother as regards the other half, and in the event which happened of him surviving, as regards the whole; and then after his death they operate during the lifetime of his widow whoever she may be.

It seems to me that *In re Coleman*[2] really covers that situation. In that case under the will of a testator a share of residue given to one of his sons, W., was settled upon discretionary trusts for W. during his life, and after his death upon similar discretionary trusts for any widow that W. might leave and for all or any

[2] [1936] Ch. 528; [1936] 2 All E.R. 225.

1958

Allan, decd., *In re.*

Danckwerts J.

of the children of W., and after the death of such widow, upon trust for the children of W. at 21 or marriage, in equal shares; and it was held that though the discretionary trust in favour of W.'s widow was void for remoteness, as W. might marry a woman who was not born at the death of the testator, the ultimate trust in favour of W.'s children being vested, and not contingent or dependent on the void trust, was valid. In this case it will be observed that the children had to attain 21 or marry under that age, but presumably they had already attained the age and, therefore, the persons had attained vested interests; otherwise it is difficult to follow how Clauson J. would refer to them as having "vested shares." In the present case that difficulty, at any rate, does not arise, because the two charitable institutions are, of course, well established bodies and there is no doubt that they have vested interests.

It seems to me that the key to the matter is given by Clauson J. when he says[3]: "Where, as in the present case, "with which I am dealing, the limitation which it is sought to "impeach creates a future interest which becomes vested in "interest (though not in possession) within the limits of the "rule against perpetuities and cannot in any event be subse-"quently divested by the operation of the earlier trust, it would "be entirely inconsistent with the principle on which the decision "in *In re Canning's Will Trusts*[4] proceeds to hold such a future "interest to be adversely affected by the invalidity of the trusts "which it follows, but of which it is wholly independent."

Applying that statement to the present case, it seems to me that while the trusts during the lifetime of the widow are invalid, the gift of the capital which takes effect upon the termination of the widow's life interest is unaffected and is perfectly valid.

Accordingly, while the gift of capital is valid, it does not take effect in possession until the death of the widow who is referred to in the preceding paragraphs. There is, therefore, an intestacy as regards the income during that period.

Declarations accordingly.

Solicitors: *Collyer-Bristow & Co.; Nicholl, Manisty & Co.; Clayton, Leach, Sims & Co.*

[3] [1936] Ch. 528, 535.

[4] [1936] Ch. 309.

[COURT OF APPEAL.]

*HAYNES v. QUALCAST (WOLVERHAMPTON) LTD.

C. A.

1958
Jan. 24.

Lord Evershed M.R., Parker and Sellers L.JJ.

[Plaint No. 1327A.]

Negligence—Safe system of work—General precautions—Metal moulding—Protective clothing available for workman—No orders or advice to wear it—Workman injured—Employers' liability.
Causation—Negligence—Contributory negligence.

The plaintiff, an experienced moulder, was employed in the defendants' foundry. While he was handling a ladle of molten metal the handle slipped and the metal splashed onto his foot and ankle with the result that he suffered injuries. At the time of the accident the plaintiff was not wearing the protective spats which would have saved his foot and legs from injury. The defendants kept a stock of spats at the foundry which could be had for the asking; in addition they had a stock of protective boots which they supplied to their workmen at cost price. The plaintiff knew that spats and boots were available, but he had not been ordered, or indeed advised, by the defendants to wear spats. This was because he was an experienced workman. The county court judge held that the fact that the defendants had made spats available was not a sufficient performance of their duty to take reasonable care for the safety of their workmen, and that the defendants were negligent and were 25 per cent. to blame for the accident and the plaintiff 75 per cent.:—

Held, (1) that in the case of work such as that in which the plaintiff was engaged there was a duty on employers not only to have protective clothing available but to inform anyone coming into their employment that the equipment was available and to take steps to educate the employee to wear the equipment for his own safety, and that the hazard in some employments might be so great and the injury, if it occurred, so serious that it might be necessary to make the wearing of protective clothing a rule of the factory, but that where the matter was not so serious, advice might be sufficient, and that the defendants should have taken some steps to educate their workmen to wear protective clothing.

(2) That, notwithstanding that the defendants were in breach of their duty to conduct their operations so that their workmen were not subjected to unnecessary risks, the county court judge was, on the facts, entitled to hold that their breach of duty was to blame for the accident only to the extent of 25 per cent. and, accordingly, that his decision should not be disturbed.

Extent to which *Bonnington Castings Ltd.* v. *Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 65 had modified the law as stated in *Roberts* v. *Dorman Long & Co. Ltd.* [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428 and *Drummond* v. *British Building Cleaners Ltd.* [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507, C.A.; reversing [1954] 1 W.L.R. 501 considered.

APPEAL from Judge R. H. Norris, sitting at Wolverhampton County Court.

The plaintiff, John Henry Haynes, was employed by the defendants, Qualcast (Wolverhampton) Ltd., as a moulder. On September 22, 1954, the plaintiff was splashed with molten metal

C. A.
1958
Haynes v. Qualcast (Wolverhampton) Ltd.

and his feet and legs were injured. In this action, started on March 16, 1957, he claimed damages, alleging that the defendants had failed to provide a safe system of work and safe and proper plant and equipment. The county court judge rejected the allegations in the plaintiff's particulars of claim as to the circumstances in which the accident occurred. The judge found that the plaintiff was casting and the ladle he was using slipped and metal splashed which went over his leg and foot. At the time the plaintiff, who was an experienced moulder, was not wearing protective spats but ordinary boots. The judge found that the plaintiff knew that there were spats in the defendants' store which could be had for the asking, and that there were in the store protective boots which he could have had on payment.

The judge further found that the defendants had not ordered or advised the plaintiff to wear protective clothing. This omission the judge considered was due to the fact that the plaintiff was an experienced moulder. The judge stated that, if he were not bound by authority, he would decide that the plaintiff was so experienced that he needed no warning and that what he did was with full knowledge of the risks involved and that there was no negligence on the part of the defendants. Having regard, however, to the authorities, he held that, although protective spats were available, since the plaintiff was never told that he must wear them, a safe system of work had not been provided. The plaintiff was entitled to succeed. The major part of the blame rested on him and the judge apportioned three-quarters of the blame for the accident to the plaintiff and one-quarter to the defendants. He assessed the damages at £233, awarding one-fourth of that sum, £58 5s., to the plaintiff.

The defendants appealed upon the ground that the judge misdirected himself in law in holding that the defendants had been negligent. The plaintiff cross-appealed against the apportionment of the damages.

Marven Everett Q.C. and *John Garrard* for the defendants.
John Thompson Q.C. and *Irvon Sunderland* for the plaintiff.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Crookall* v. *Vickers-Armstrong Ltd.*[1]; *Finch* v. *Telegraph Construction and Maintenance Co. Ltd.*[2]; *Richards* v. *Highway Iron Founders (West Bromwich) Ltd.*[3]; *Cooper* v. *K. and L. Steel Founders and Engineers Ltd.*[4]; *Bilsbury* v. *Harrison, McGregory & Guest Ltd.*[5]; *Brooker*

[1] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.
[2] 65 T.L.R. 153; [1949] 1 All E.R. 452.
[3] [1957] 1 W.L.R. 781; [1957] 2 All E.R. 162.
[4] Unreported decision of Lynskey J., April 12, 1951.
[5] Unreported decision of Gerrard J., Manchester Assize, January 18, 1955.

v. *Jenkins Bros., Proprietors Ocean Steamship Co. Ltd.*[6]; *Webb* v. *Smith, Bingley & Evans Ltd.*[7]

LORD EVERSHED M.R. The plaintiff suffered an injury on September 16, 1954, the circumstances of which and the nature of which were as follows: he was then, and had been for some three months, employed in the foundry of the defendants, as a moulder. In the course of that day he was handling a ladle containing molten metal which he was seeking to pour into another receptacle; and, according to the finding of the judge, the ladle slipped and the metal splashed onto his left ankle and foot. The story which he put forward to the judge gave a different account, for he said that he was not pouring from the ladle into the moulding boxes but carrying the ladle along a passage in the foundry and that the spillage was caused by an obstruction over which he stumbled. But that account of the misfortune was entirely disbelieved by the judge. Still, the injury was sustained. The claim was made up of loss of wages, together with general damages, and the total sum found as compensation for the injury was £233—£133 being special damage and the balance general damage. The judge found that responsibility for the accident, though in part proper to be laid at the defendants' door, was, for the greater part, that of the plaintiff himself. He apportioned the blame as to 25 per cent. to the defendants and 75 per cent. to the plaintiff. Thus, the sum actually awarded to the plaintiff was £58 5s., or one-quarter of £233.

The defendants have appealed against that conclusion, upon the ground that in this case, on the facts proved, there was in truth no breach of duty by the defendants; or alternatively, if there was a breach of duty, that the damage was not attributable to the breach. There is a cross-appeal, whereby the plaintiff complains of the apportionment and suggests that there was in truth no, or no such, contributory negligence on the plaintiff's part.

From my statement so far it will be apprehended that there are really two points presented for our decision: first, was there a breach of duty on the defendants' part, and, second, if there was, has the plaintiff established that the damage, in some degree at any rate, must be properly attributed to the breach? I will say at once that of the two I think that the second is the more difficult. Upon the first, the judge was of opinion, according to his judgment (uninstructed by authority), that the plaintiff was himself so experienced a moulder that he needed no warning of the hazard involved in carrying molten metal about; that he did carry it about, unprotected as to his feet, entirely at his own volition; and accordingly, so far as the first

[6] Unreported decision of Gorman J., Liverpool Winter Assize, February 20, 1956.

[7] Unreported decision of Stable J., Birmingham Assize, December 18, 1956.

C. A.
1958
Haynes v. Qualcast (Wolverhampton) Ltd.
Lord Evershed M.R.

point is concerned, that there would be no breach of duty on the defendants' part.

The judge then considered a number of authorities which had been drawn to his attention, some of them unreported cases. Those authorities I do not find it necessary to consider in detail. The conclusion which they compelled him ultimately to embrace is thus expressed: "In the present case, the spats and boots "were there, and the plaintiff knew they were there, but he was "never told that they must be worn. He decided the matter "himself. In view of this I feel that my judgment must be in "favour of the plaintiff"; and he went on to consider apportionment. In other words, I think the judge was of opinion that the cases compelled him to hold that the nature of the occupation in which the plaintiff was engaged and of the hazard which it involved was such that the obligation of the defendants was to make the wearing of protective clothing a necessary—a compulsory—characteristic of the job. There is no doubt whatever that the defendants did not attempt to do that. I have referred to the protective clothing, which, so far as relevant here, consisted of spats—a form of legging which would protect the instep and the lower joints of the leg against splashing of heated or molten metal.

The facts, so far as they seem to emerge and as the judge found, in regard to those items of protective clothing, were these. The defendants kept a stock at their foundry of these spats; and the evidence further established to the judge's satisfaction that they were there for the asking: that is to say, that any workman who said he wished to wear a pair of spats when doing his moulding operations had only to ask for them and they would have been supplied free of any cost. In addition, the defendants were mindful enough of their obligations to those they employed to have in stock and available pairs of a particular type of boots —whether of leather or asbestos I am not quite clear, but at any rate of a kind which were sufficient to keep from the foot splashings of molten metal. In the case of the boots, however, they were not there for the asking in the way that the spats were: they had had these boots supplied and were prepared to let workmen take for themselves a pair on paying only the cost price of the boots to the defendants; and it is to be noted that the defendants put up a notice telling their workmen that these boots could be so had on those terms—though perhaps a little surprisingly (for we all like to be virtuous if we can) they did not put up a notice to say not only that but also "You can have "spats for no charge at all." Indeed, so far as the evidence goes and as I understand the finding, the defendants in truth took no steps at all to bring to the attention of their men the availability of the spats or to advise them that, if they wished to protect their ankles and insteps from possible injury, they would be well advised to take advantage of the offer.

The evidence is, of course, shortly recorded, as is common

in a county court case. As regards the plaintiff, I do not take any particular notice of what he said, because he was not a person whom the judge on other aspects of the matter believed. The defendants' witnesses certainly did not support the view that they had taken any steps to bring the availability of these spats to the attention of the men. True, one witness said that Bloor (who was the foundry foreman) used "to go on to the "men about not wearing spats"; but Bloor himself, when called, by no means supported that statement. Bloor did indeed say that in the case of an inexperienced man, a learner coming to the job, he would advise him to wear spats; from which at least it may be inferred that Bloor appreciated that there was a risk—a risk against which an inexperienced man ought properly to be warned. However that may be, the finding is to the effect I have indicated.

The judge says: "The plaintiff was not ordered or advised "by the defendants to wear protective clothing." He went on, "and I think that was because he was an experienced moulder." Later he said: "He" (the plaintiff) "was never told that they "must be worn." The judge later said: "He" (the plaintiff) "knew that there were spats and boots in the stores; that spats "were to be had for the asking and the strong boots at a price "which the defendants consider to be reasonable; and he decided "to wear ordinary boots"; and so on. I take that to be a finding (and it is well supported by the evidence) that the defendants did not in fact take any steps to inform their men as to the supply and availability of the spats, still less to advise them, and still less again to make the wearing in any sense a condition of the employment. The judge found, and I am fully prepared to accept his finding, that they did not do so because they thought that this plaintiff, being an experienced moulder, should be taken as knowing—as in fact he did know—what the risks were. That, however, goes rather to the second point—the question of causation. The first question is: Was the provision, in the sense of having them available for the asking, of these spats a sufficient performance of whatever be the true measure of the obligation of the defendants in this case?

The test I take to be the general one is that it is the duty of an employer in such a case as this to take reasonable care for the safety of his workmen. Mr. Thompson has pointed out that molten metal is of a temperature of something like 1,300 degrees centigrade. From that fact it is, of course, plain that if it gets upon the skin or the body it is likely to do serious and painful injury; though it may not be (and was not in this case) of any lasting effect.

If, then, that is the nature of the hazard, I think for my part that the obligation of the defendants extended to more than merely having the spats available in case any experienced moulder thought he would like to ask for them. I do not think it is necessary to attempt to define in this case the extent of the

C. A.
1958
HAYNES v. QUALCAST (WOLVERHAMPTON) LTD.
Lord Evershed M.R.

duty to warn or advise. I am certainly not prepared, for my part, to say that this is a case in the class of those, for example, where the eye is at risk and where, having regard to the nature of the hazard, there is a duty on the employer to go to very considerable lengths to try to see that his workmen do take advantage of the protective equipment supplied. Lord Morton of Henryton, in *Paris* v. *Stepney Borough Council*,[1] draws attention to the fact that the extent of the duty will depend in some degree upon the gravity of the hazard which is involved and of the consequences which may ensue if damage is suffered. But here, since, on the judge's finding, the defendants did nothing at all, other than have the gaiters ready for those that asked, I think they did fall short of their duty. I therefore agree with the judge that there was a breach of duty.

I now come to what I consider the more difficult part of the task. There has been much discussion which properly invokes considerations of common sense, and also the point that if an employer tries too much to assume the functions of a matron or grandmother it may be far from good for the safety of the workman; and Mr. Thompson himself said that he would be the last to suggest that in the interests of safety all responsibilities, so far as possible, should be removed from the men themselves. I have, too, in mind that prima facie a plaintiff in an action must establish his case. If, therefore, there is no direct evidence which can be said to link the consequence with the cause, it must, I take it, be a matter of consideration of all the probabilities—Can the damage be fairly attributable to the failure to perform the duty? But I think that aspect of the matter was considered by the judge; because having, contrary to his first impression (and rightly, in my judgment), concluded that there was a duty which had not been performed, he then proceeded to consider to what extent the plaintiff on his part and the defendants on their part were responsible for the accident—which consisted of an injury to the foot, which, prima facie, would have been avoided had protective clothing been worn. Having heard all the evidence (and I do not forget that he was not at all impressed favourably by the plaintiff as a truthful man), he came to the conclusion that to the extent of 25 per cent. he should attribute the damage to the defendants' breach of duty. It is quite true, and I do not forget, that at this stage he seems to have assumed the duty to be of a more extensive character than I am prepared myself to concede; it was a case (if I have read his judgment aright) in which he thought that the defendants should have made the wearing of protective clothing what we called in the arguments a local rule. But I am not satisfied that that disables the conclusion. Thus, if the plaintiff was the type of man who always knows much better than anybody else who tries to advise him —if, knowing all that he did know as an experienced moulder,

[1] [1951] A.C. 387; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

the proper inference ought to be that he would have disregarded any advice and warning—then it does not seem to me, for this purpose, to matter very much, if indeed at all, that the breach consisted not in not making this a local rule but in failing to give any advice at all.

But the judge's conclusion being in the end a conclusion of fact, I am myself unwilling to disturb it; and I would therefore leave the whole of this matter, including apportionment, as the judge concluded it. It will follow from what I have said that I reject the cross-appeal; but I think that the judge was most amply justified, in this case, in holding that this experienced man was, to the extent of 75 per cent., the author of his own calamity.

Dealing with it in that way, I find it unnecessary to express any view upon a question which may have some time to be considered in this court, or indeed the House of Lords—namely, to what extent certain decisions in this court are now entirely reconcilable with the judgments of the House of Lords in *Bonnington Castings Ltd.* v. *Wardlaw.*[2] The decisions of this court which I have in mind are, first, that of *Roberts* v. *Dorman Long & Co. Ltd.*[3] and, second and later, *Drummond* v. *British Building Cleaners Ltd.*[4] In the *Drummond* case[4] the question was as to the use of certain safety devices by a man engaged in cleaning windows; and at the end of his judgment my brother Parker said: "In my view . . . the defendants, having failed "in their duty by not giving him instructions to use the rope, "cannot be heard to say that even if they had, he would not "have used it"; and he relied upon a passage in a judgment of Lord Goddard C.J. when sitting in this court in the earlier case of *Roberts.*[5] As I have said, it may be that that way of expressing the matter, in the light of *Bonnington's* case,[6] may require consideration hereafter; but Mr. Everett has not invited us to say that *Roberts*[7] and *Drummond*[8] must be treated as overruled by the *Bonnington*[9] decision. I therefore leave the matter thus: that in the present case, whatever be the effect of *Bonnington*[9] upon the earlier cases, it seems to me undoubtedly still law that the question of causation is one of fact, to be considered in the light of all the circumstances and the probabilities; so that if, in this case (as I think he did), the judge, properly considering those matters, concluded as a fact that to the extent of 25 per cent. the plaintiff's damage was attributable to the breach of the defendants' duty, I cannot see any ground in law why that conclusion is not to be sustained. There is, no doubt, a suggestion in the evidence, and indeed in the judgment, that the plaintiff was a person of the type who knows better than

[2] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.
[3] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.
[4] [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.
[5] [1953] 1 W.L.R. 942.
[6] [1956] A.C. 613.
[7] [1953] 1 W.L.R. 942.
[8] [1954] 1 W.L.R. 1434.
[9] [1956] A.C. 613.

C. A.
1958
Haynes v. Qualcast (Wolverhampton) Ltd.
Lord Evershed M.R.

everybody else; and, if it were true to say that, according to the fair balance of probabilities, nothing really would have persuaded him to take proper steps for his own protection, then, of course, the answer would be to relieve the defendants; but the judge has not so held; and I do not think that in this court we should be justified in so holding now.

On the whole, therefore, it seems to me that the right answer here is that the careful judgment of the judge, whereby he awarded in the end one-quarter of the damages to the plaintiff, ought not to be disturbed; and I would dismiss the appeal and the cross-appeal.

Parker L.J. I have come to the same conclusion; and in approaching the matter I have done so without very great sympathy with the plaintiff. By his particulars of claim he raised a great number of issues, all based on an allegation that what had happened was that he had stumbled over an obstacle in the gangway. On that he was completely disbelieved. One also cannot ignore the fact that this is what I may call a stale claim. The accident occurred on September 16, 1954, and the particulars of claim were not delivered until March 22, 1957. But the fact remains that there was an allegation that the defendants had "failed to provide any or any proper spats or "other sufficient protective clothing," and that they "failed to "provide a safe system of work and safe and proper plant and "equipment."

The common law duty is, in the words of Lord Herschell in *Smith* v. *Charles Baker & Sons*,[10] to take reasonable steps so to conduct the operations that the men are not subjected to unnecessary risk. It is quite clear that in an operation of this sort there is a risk, and a risk of serious injury—true, not injuries which are likely to be fatal or to affect the eyes, but clearly such as are likely to produce injury by burning; and it seems to me perfectly clear, in those circumstances, that there is a duty on employers not only to have protective clothing available but to inform anybody coming into their employment that they have got that equipment, and to take some steps to educate the man to wear the equipment for his own safety. Exactly what those steps should be I find it unnecessary to determine. In some cases the hazard may be so great, and the injury, if it occurs, so serious, that it might be necessary to make the wearing of the protective clothing a rule of the factory. Again, where the matter is not so serious, mere advice might be sufficient. But at any rate in this case some steps, as it seems to me, had to be taken to educate men for their own protection to wear this clothing.

In the present case the employers did nothing. True, they had in their store protective equipment; but when the plaintiff

[10] [1891] A.C. 325, 362; 7 T.L.R. 679.

came into their employment he was not told by them that that equipment was available; nor was he in any way advised to wear it. The answer given is: That is true, but that was because this man was an experienced moulder: he was 38, and he had been all his life in the trade. But even so, from the employers' point of view, when he came into their employment they would not know that he knew or would have any chance of knowing that they had equipment available. Undoubtedly by the time of the accident he did know that that equipment was available in store, and with his experience he must have known that that equipment was there for use for his own safety. I say that he knew that the equipment was there: that is the finding of the judge, which I accept, despite Mr. Thompson's suggestion that there was no evidence upon which the trial judge could make such a finding. It is true that the evidence on that is not altogether clear, but read as a whole I should have thought there was ample evidence on which the judge could make that inference.

That being so, the employers having been originally in breach, did that breach play any causative part in the accident which occurred? I confess that it is that point, and that alone, which has given me some difficulty in this case. Mr. Thompson has relied strongly on the decision in this court (to which my Lord has referred) of *Roberts* v. *Dorman Long & Co. Ltd.*[11] In that case, Lord Goddard C.J., presiding in this court, said[12]: "The "fact that they"—that was, safety belts in that case—"were "not available gave him no opportunity of exercising his election. "Had one been available, and had he elected to use it, while it "might not have prevented him meeting with some injury, it "would certainly have prevented him from falling to his death. "Some actions for negligence are based on the failure of a person "to make inquiries when the circumstances are such as to show "that he was put on inquiry." Then the Chief Justice refers to *Alderwood Ltd.* v. *Bank of Liverpool*,[13] and he goes on: "If "a person who has to make an inquiry fails to do so, he cannot "be heard to say: 'But even if I had, it would have led to no "'useful result.' So, I think that if a person is under a duty to "provide safety belts or other appliances and fails to do so, he "cannot be heard to say: 'Even if I had done so they would not "'have been worn.'" That case and that passage was followed again in this court in *Drummond's* case.[14]

It is true that since then there has been the decision in *Bonnington Castings Ltd.* v. *Wardlaw*,[15] in the House of Lords; but that case, as I understand it, has not overruled *Roberts* v. *Dorman Long & Co. Ltd.*[16] Nevertheless, I think for my part that there may be special circumstances in *Roberts'* case[16]

[11] [1953] 1 W.L.R. 942.
[12] Ibid. 946.
[13] [1924] 1 K.B. 775; 40 T.L.R. 302.
[14] [1954] 1 W.L.R. 1434.
[15] [1956] A.C. 613.
[16] [1953] 1 W.L.R. 942.

C. A.
1958
HAYNES v. QUALCAST (WOLVERHAMPTON) LTD.
Parker L.J.

justifying that conclusion. It is to be observed that it was a decision on regulation 97 of the Building (Safety, Health and Welfare) Regulations, 1948, which provides that safety belts in certain circumstances should be available to enable such persons as elect to use them to carry out the work without risk of serious injury; so that there was a specific regulation providing that there had to be provision of apparatus which the man could elect to use. The second point was that in that case the injured man died and there was no opportunity for him to say: "If I "had had an election I should have chosen to wear a safety "belt."

For my part, I would accept the finding (and it must have been a finding) of the county court judge in this case that the original breach did play some part. I say he must have found that because, having found the plaintiff himself guilty of contributory negligence, he apportions the blame and holds that the defendants, by reason of their original breach, were to blame, but only to the extent of 25 per cent. On the whole of the evidence in this case, I do not see any ground for interfering with that finding of the judge. It follows that I would accordingly dismiss the appeal and the cross-appeal.

SELLERS L.J. I have felt some doubt in this case, and unaided by the views of my Lords I might well not have come to the conclusion which I now express—that I, too, agree that the appeal should be dismissed.

The case, I think, is a difficult one, and the county court judge so regarded it. The plaintiff was an experienced moulder, who (as was found) well knew of the danger or dangers which beset the operation that he had to carry out: indeed, he himself made provision to meet them by wearing strong working boots which he bought himself. Mindful as he must have been, and as he has been found to have been, that molten metal might splash upon his legs, he did not avail himself of the protection provided, in the sense that suitable spats were kept in the stores by the employers. He well might have done. If the judge is right (and I think he must be held to be right) that the workman knew that the spats were there, the workman could, if he had so chosen, have worn them. But his attitude, as revealed in his evidence, was that he did not think it necessary to wear spats for his protection, and that is why he did not wear them. One interpretation of the evidence is—and one that was made by the judge—that he did not even wear them after he had met with the injury which is the subject-matter of this claim. But it cannot be overlooked that the employers might have done a little more. They might have put (as my Lord has said) an accompanying notice about the availability of spats alongside the notice about the boots which were for sale; or they might, through the usual channels, have sought to impress upon their workmen that they should wear them.

In those circumstances, although I regard it as a narrow and border-line matter, I am not prepared to dissent from the view which my Lords have taken, that there is material here to establish a duty to this workman and a breach of it. But I think it is a very slight breach, and that becomes perhaps more material in considering whether, having regard to that, the second finding ought to have been made, that the plaintiff's injury had been shown to have been caused by the defendants' breach of duty. There is, I think, material on which the county court judge could have found affirmatively that this particular plaintiff, even if he had had considerable pressure put upon him, having regard to the way he acted and his views on this matter and what he said, would not have worn the protective spats and, therefore, at the time of this accident, he would not have been protected by them, and the defendants' breach of duty would not thereby have caused his accident. But there is no such affirmative finding, and I must accept that there is material for inferring, from the apportionment which the county court judge made when he felt himself driven to find by authority a breach of duty, that he must have thought that some part of the defendants' breach brought about this injury.

Somewhat reluctantly, because I feel that this is an extreme case and one where the workman might have been held, from any general point of view, responsible for his own injuries—he could so easily have prevented them by taking those precautions of which he knew and which he knew some of his colleagues were taking—I feel I am bound to support the judge and dismiss this appeal.

Appeal and cross-appeal dismissed.

Solicitors: *Berrymans for T. Haynes Duffell & Son, Birmingham; W. H. Thompson.*

B. A. B.

[COURT OF APPEAL.]

* SAMROSE PROPERTIES LTD. *v.* GIBBARD.

[Plaint No. MP. 222.]

C. A.
1957
May 2, 3.
Lord Evershed M.R., Morris and Pearce L.JJ.

Landlord and Tenant—Rent restriction—Premium—Commuted rent—Rent reduced below two-thirds of rateable value—Lump sum payment—Whether premium or rent in advance—Whether tenant protected—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (7).[1]

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7): "Where the rent "payable in respect of any tenancy "of any dwelling-house is less than "two-thirds of the rateable value "thereof, this Act shall not apply to "that rent or tenancy nor to any

C. A.

1957

SAMROSE PROPERTIES LTD. v GIBBARD.

The plaintiffs were the owners of an old block of flats in which was a flat consisting of two rooms, the tenant sharing a kitchen and lavatory. In August, 1955, the defendant, a lorry driver, when he applied for a tenancy of that flat, was required to sign an application form giving particulars of his financial circumstances and the state of his family and the names of two referees. By an agreement dated August 23, 1955, made between the landlord and the tenant, after reciting that the landlord was not prepared to grant a lease so that the Rent Acts would apply to the premises, in consideration of the sum of £35 paid by the tenant the landlords agreed to grant a lease of the flat for the term of one year from August 30, 1955, at the quarterly rent of £1 1s., being a rent less than two-thirds of the rateable value of the flat, such lease to be in the form of the draft annexed. The agreement was conditional on the landlords being satisfied in their absolute discretion that the tenant was a suitable tenant. That agreement was endorsed with a certificate signed by a solicitor that the agreement had been explained to the tenant, who understood it. By a lease dated August 30, 1955, the flat was demised to the tenant for a term of one year. On a claim by the landlords for possession:—

Held, that, on the true construction of the agreement and lease of 1955, the sum of £35 paid by the tenant was commuted rent and that the reality of the matter was that the landlords had let the premises to the tenant for an annual rent of £39 and, accordingly, that the tenant was entitled to the protection of the Rent Acts.

Observations of Cohen L.J. in *Regor Estates Ltd.* v. *Wright* [1951] 1 K.B. 689, 698; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219, and of Evershed M.R. in *Woods* v. *Wise* [1955] 2 Q.B. 29, 44; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767, 776 applied.

APPEAL from Judge Clothier, sitting at Lambeth County Court.

The plaintiffs, Samrose Properties Ltd., were the owners of a block of flats in Waterloo Square, Lomond Grove, Camberwell, which included No. 117 Waterloo Square. The block of flats was an old block and flat No. 117 consisted of two rooms, with a right for the tenant to use a kitchen and lavatory in common with other persons. In these proceedings the landlords sought to recover possession of flat No. 117 from their tenant, Kenneth Gibbard, who was a lorry driver.

The tenant had applied in August, 1953, to the landlords' agent for a tenancy of the flat. He signed an application form dated August 16, 1955, giving particulars of his wages, those of his wife, the state of his family and the names and addresses of two persons as references. An agreement dated August 23, 1955, was entered into between the landlords and the tenant in the following terms: "Whereas: (1) the applicant is desirous of "being granted a lease of the premises hereinafter mentioned "(2) the company is not willing to grant a lease such that the "Rent and Mortgage Interest (Restrictions) Acts would apply to "the said premises Now it is hereby agreed as follows:—1. In "consideration of the sum of £35 now paid by the applicant to

"mortgage by the landlord from "whom the tenancy is held of his "interest in the dwelling-house, and "this Act shall apply in respect of "such dwelling-house as if no such "tenancy existed or ever had "existed."

"the company (the receipt whereof the company hereby acknow-"ledges) the company agrees to grant and the applicant agrees "to take a lease of all that flat No. 117 Waterloo Square, Lomond "Grove, Camberwell, London, S.E.5, for a term of one year "from the 30th day of August 1955 at the quarterly rent of "£1 1s. payable in advance . . . 2. The said lease shall be in "the form of the draft annexed hereto. 3. Completion of the "said lease shall subject as hereinafter provided take place on "the 30th day of August 1955. The said lease and a counter-"part thereof shall be prepared by the company's solicitors . . . "4. This agreement is conditional upon the company being "satisfied in its absolute discretion that the applicant will in all "respects be a suitable tenant and the applicant shall accordingly "furnish references forthwith. In the event of the company not "being satisfied as aforesaid with the suitability of the applicant "then the company shall refund to the applicant the said sum "of £35 and this agreement shall be null and void. 5. On "completion the applicant shall pay to the company the sum "of £5 5s. as a contribution towards the company's costs in "respect of this agreement and the said lease."

That agreement was endorsed with a certificate of a solicitor signed by him in the following terms: "I ..... solicitor "hereby certify that I have explained the above proposed agree-"ment to the applicant therein named and that he appeared "fully to understand the same. I further certify that he has "instructed me that he is entering into such agreement in "reliance only on its contents and he acknowledges that there "is no verbal agreement or representation relating to the subject-"matter thereof."

By a lease dated August 30, 1955, the landlords demised the flat to the tenant for the term of one year from August 30, 1955, at the quarterly rent of £1, which was less than two-thirds of the rateable value of the flat. The flat had formerly been let at approximately 6s. 4d. a week.

In his defence the tenant alleged that the agreement was a sham and an unlawful attempt to circumvent the provisions of the Rent Act of 1920 and he claimed to be entitled to the protection of the Acts.

The county court judge held that the sum of £35 paid by the tenant was commuted rent and not a premium, and dismissed the landlords' claim to possession.

The landlords appealed on the following grounds: (1) that the judge had misdirected himself in law in holding that the terms of the tenant's tenancy of the premises were not fully and exclusively set out in the lease of August 30, 1955, between the landlords and the tenant and that the rent of the premises under the lease was not therefore less than two-thirds of the rateable value of the said premises; (2) that the judge had misdirected himself in law in holding that the sum of £35 paid under the agreement of August 23, 1955, in consideration whereof

C. A.
1957
SAMROSE PROPERTIES LTD. v. GIBBARD.

the landlords agreed to grant the lease was commuted rent; (3) that there was no evidence on which the judge could find that the said sum was commuted rent.

R. E. Megarry Q.C. and *E. Ashley Bramall* appeared for the landlords.

The tenant did not appear and was not represented.

The following cases were cited in argument which are not referred to in the judgments: *Ford* v. *Langford* [2]; *Hill* v. *Booth* [3]; *Samuel* v. *Salmon & Gluckstein Ltd.* [4]; *Rush* v. *Matthews* [5]; *Property Holding Co.* v. *Clark* [6]; *Hughes* v. *Waite.* [7]

LORD EVERSHED M.R. The sole question raised in this appeal is whether the rent payable in respect of certain premises (which were the subject of a tenancy made in August, 1955), was less than two-thirds of the rateable value of the premises. It is not in doubt for the purposes of this appeal that the rateable value of the premises is or was at all relevant dates £7 per annum; so that if the rent payable in respect of the tenancy was less than two-thirds of £7, then the inevitable effect of section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is that the tenant cannot claim, as he has sought to do, the protection of the Rent Acts. The tenant, having succeeded before Judge Clothier in the county court, has not thought it necessary to appear in person or by counsel to support the judgment in this court. I have come to the conclusion that we cannot disturb the conclusion at which the county court judge arrived.

The premises consist of a flat known as 117, Waterloo Square, Lomond Grove, Camberwell; but even that description might be thought to be in some degree euphemistic, for the subject-matter of the tenancy was two rooms, the tenant having the right to share with other occupants the kitchen and the lavatory. The subject-matter being of this somewhat meagre character, the tenant must, if he reflected upon it, have been somewhat surprised by the extraordinary elaboration of the arrangements for the letting with which he was presented. The documents which we have to look at were three in number, and a period of a week separated the second from the first and the third from the second. Anticipating for a moment the oral evidence which was given before the judge, this elaboration was the declared policy of the landlords and, as the second of the three documents plainly and quite properly declares, their object was to avoid the impact upon the premises in question of the rent restriction

[2] [1949] W.N. 87; 65 T.L.R. 138; [1949] 1 All E.R. 483.

[3] [1930] 1 K.B. 381; 46 T.L.R. 50.

[4] [1946] Ch. 8; 62 T.L.R. 28; [1945] 2 All E.R. 520.

[5] [1926] 1 K.B. 492; 42 T.L.R. 287.

[6] [1948] 1 K.B. 630; 64 T.L.R. 76; [1948] 1 All E.R. 165.

[7] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

legislation. But it is plainly a matter to which this court must properly address itself in matters where the Rent Restrictions Acts might be said to apply, whether the transaction, viewed as a whole and according to the substance of it, is in truth one which, to use Mr. Megarry's phrase, is on that side of the line which frees the premises from the impact of the Act, or whether, so regarded, the transaction is one which is of the mischief which the Acts were designed to avoid.

My authority for that view I take from the language of Cohen L.J. in *Regor Estates Ltd.* v. *Wright.*[1] The particular passage was cited in this court by me in *Woods* v. *Wise.*[2] I think it unnecessary to read again the passage which I cited there; but I may perhaps venture to refer to my own language rather later in *Woods* v. *Wise,*[3] which the county court judge in the present case also invoked. "In cases," I said,[3] "under the "ordinary law, unaffected by the Rent Acts, the question, how "much rent should be payable under, and what other con-"siderations there should be for, a demise were matters for free "bargaining. A landlord might charge any sum that he could "get for rent. If he preferred, he could charge a low rent and "demand a 'premium' or lump-sum payment. There was no "such purpose as now exists in any attempt to disguise the "one in the shape of the other. In these circumstances, the "word 'rent,' even though not confined to the old common law "meaning of that for which distress might be levied, would "naturally and ordinarily be used to signify the periodic pay-"ments under a demise in contrast to lump-sum or other kinds "of consideration." And then a little later, after considering whether a lump-sum payment called a "premium" might none the less be rent, I said[4]: "I cannot, for my part, think that the "arm of the law would be so short as to disable it from dealing "appropriately with such a case as that last suggested, if it "appeared that the so-called premium was, in truth and sub-"stance, nothing more or other than the rent quantified and "provided for in 'an abnormal form.'"

I therefore approach the present case with that matter of principle to guide me. I, of course, fully accept the proposition which Mr. Megarry made the foundation of his case, that a landlord is entitled so to arrange his affairs that the legal result will bring him outside the statutory provisions; but, on the other hand, merely giving a label to a particular type of payment will not by any means necessarily have the effect indicated by the label; for the truth and substance, in cases of this kind, must be examined. There are, I think, three circumstances which convince me that the judge here was well entitled to reach the

[1] [1951] 1 K.B. 689, 698; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219.
[2] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767, 776.
[3] [1955] 2 Q.B. 29, 44.
[4] Ibid. 45.

C. A.
1957
SAMROSE PROPERTIES LTD. v. GIBBARD.
Lord Evershed M.R.

conclusion he did: The first is the disproportion which the arrangements made appear to me to bear to the subject-matter of that arrangement. I am dealing here with two rooms, and for a term, a period of occupation, which was limited to 12 months. This is not a case of a lease of some piece of land or a house for 14 years or some other long period at a ground rent upon payment of a sum designed to produce the effect that the periodic rent will be small; we are not dealing with that kind of case; and, tempting though Mr. Megarry's arguments always are, I do not find it necessary to indicate where any line should be drawn. We are here dealing with a period of one year—no more—and with two rooms, but with the right to share the kitchen and the lavatory. That is the first point.

The second point is that, when you examine it, the vital document upon its face seems to have not only indeed the declared object which it is intended to serve, but also an important inconsistency in itself. And, thirdly, I think that on further examination it is seen that this vital second document in truth is very largely, if not altogether, unnecessary. The cumulative effect of those reasons is, as I think, to justify the judge's conclusion. Let me, however, repeat that I am not for a moment suggesting that there is any deception or impropriety on the part of these landlords. They acquired these premises (it appears) in 1952, and they adopted this method of procedure which they instructed their agents to require from all proposed tenants, in the hope, belief and expectation, if you will, that thereby they would not be within the scope and restrictive effect of the Rent Restriction Acts. If they fail, that does not therefore reflect upon the ethics of their business methods.

In order to make clear those grounds which I have indicated, I can do no better than refer in such detail as is necessary to the three documents which were executed and which form the three stages of this elaborate superstructure for the letting of two rooms, together with the use of the kitchen and lavatory in Waterloo Square. The first was a document called "Application "for tenancy," signed by the tenant, and bearing the date August 16, 1955. It is addressed to the landlords' agents: "I "hereby apply for a tenancy of a flat at Waterloo Square, "Lomond Grove, Camberwell." He gave his name in full and his present address. He stated how long he had been where he was; that he was married and had one son aged five years living with him. He stated that he required two rooms; that his occupation was that of a lorry driver; he gave the name and address of his employer, his weekly wages, the income of his wife, and the name and address of his present landlord. Finally, he stated the rent which he was then paying and gave two references. It will be observed that the questions which were asked enabled the landlords to obtain quite a lot of information about the proposed tenant's status and circumstances; but, most important of all, the proposed tenant gave the names

and addresses of two referees. A week then passed, and on August 23 the document, which is the real foundation of the landlords' case, was executed. [His Lordship read clauses 1–4 of the agreement and continued:] Then there were two features which might have been regarded by the tenant as "stings in the "tail." Paragraph 5: "On completion the applicant shall pay "to the company the sum of £5 5s. as a contribution towards "the company's costs in respect of this agreement and the said "lease." And, finally, it was part of the arrangement that, in addition to paying those sums for legal costs, the tenant should himself consult a solicitor, who was required to sign the following certificate at the foot of this agreement: "I"—then the name of the solicitor appears—"hereby certify that I have explained "the above proposed agreement to the applicant therein named "and that he appeared fully to understand the same. I further "certify that he has instructed me that he is entering into such "agreement in reliance only on its contents and he acknowledges "that there is no verbal agreement or representation relating "to the subject-matter thereof."

That was on August 23, and on August 30, one week later, there is executed the lease bearing that date. It is a lease of the same flat at the rent of £1 per quarter. There is no reference in it in fact to the previous agreement. There are certain covenants in common form, though not commonly found in tenancies for one year only for two rooms in a building of this kind; but they included a covenant: "On the expiration or "sooner determination of the said term"—that is one year—"to deliver up the said premises."

Those are the three documents, and upon the first of the three points I mentioned I think I need add little, if anything. When the subject-matter is borne in mind, this superstructure is clearly disproportionate. But, secondly, I draw attention particularly to this, as I think, very important circumstance: by the second recital in this agreement the landlords stated that they were not willing to grant a lease such that the Rent and Mortgage Interest Acts would apply. The landlords were saying—perfectly properly, of course: "What we are doing is asking you to embark upon this "elaborate arrangement because we are not willing, if we can "help it, to grant such a lease as will bring the Rent Restriction "Acts into force as regards the premises." Having, therefore, declared that that was what they were about, it is interesting to see how they proceeded to achieve it; for the consideration for the £35 was stated to be the landlords' agreement to grant the lease. But it will not be forgotten that two clauses later there is a provision that the agreement to grant the lease was not, as might here be supposed, a positive agreement so to do; for the whole instrument was expressed to be conditional on the landlords being satisfied, in their absolute discretion, that the tenant will be a suitable tenant; and presumably so long as the landlords acted bona fide, they could, for any reason at all, say that they

C. A.
1957
SAMROSE PROPERTIES LTD. v. GIBBARD.
Lord Evershed M.R.

were not satisfied that the proposed tenant would be a suitable tenant. So that it manifestly is not really true to say that the £35 was paid as consideration for a promise, in any real sense of the term, on the landlords' part to grant a lease. And then it will be observed that this clause went on to say that "the "applicant shall accordingly furnish references forthwith."

That brings me to the third of my grounds, for it will not be forgotten that the tenant a week before had already produced the references. Whether a week would have been sufficient in order that those referees might be consulted is a question on which I think some light is thrown by the fact that the completion date of the lease in this document was stated to be a week—no more—from the date when the document was executed. As here earlier stated, in truth this agreement practically serves no useful purpose at all. It was stated (and I have no doubt it was the fact) that the form of the lease was already agreed; it was to be prepared by the landlords. No real purpose then was served by making these intermediate arrangements, the landlords already being in possession of all the information they required about the tenant, including the name of his referees.

As I have said, I think these considerations amply justify the conclusion to which the judge arrived; but before I make a brief reference to the way in which he expressed that conclusion, I should say that two witnesses were called for the landlords. It is a point made and made with force by Mr. Megarry that though the tenant said in his defence that the vital agreement or the general substance of it was a sham, he did not come forward to say so; nor did he call any evidence himself; and if by the use of the word "sham" he was suggesting that there was some deception on the part of the landlords, I of course entirely disagree with him: the matter was entirely above board in that sense. It was made plain to the tenant that this was the means whereby the landlords were openly saying that they were proposing to keep outside the scope of the Rent Acts. But the witnesses showed, I think, two things: first, that the scheme of operations, which resulted in these three documents, was part of the deliberate policy of the landlords, designed, as was freely admitted, for the purpose expressed in the recital. But there was one other matter also, appearing in an answer to cross-examination of the first witness, the agent of the landlords, which I think is of some significance. The evidence as recorded by the judge is this: "We have made lettings of other flats in block "at about 13s. a week. On expiration of term of lease the tenant "can apply for a new lease. The terms of the new lease 'might "'not be the same.'" I ask myself what is really the effect of that? If the landlords are right, what will happen at the end of the year in what I take as a hypothetical case, where the tenant says: "Can I please have another year"? This performance will have to be gone through again. Will it be found that there will be a series of arrangements whereby for a payment

of £X down and the promise to pay a periodic rent of say £1 a quarter, these tenants will on such occasion get the right to occupy for a year—no more—their respective premises? Looked at over a period of time, I think it would be impossible to avoid the conclusion that the whole 12-monthly consideration in each succeeding case formed in truth the compensation, the money payment, for the use of the flat; that is to say, was the rent. I think that consideration clearly entered into the conclusions of the judge, for he referred to the evidence which had been given before him. His conclusion is summarized in these terms: "Whilst giving every consideration to the argument, that the "landlords are entitled to evade the Acts, I feel it is my duty "to scrutinize very carefully the scheme proposed for this "purpose. In my view the scheme fails. In my judgment, if "the agreement and the lease are viewed together, it becomes "clear that the real substance of the transaction is the landlords' "demand of £39 for a year's occupancy, and that this is simply "divided into an immediate payment of £35, and the balance "by quarterly instalments of £1 each. I regard the £35 as "commuted rent, which, in my view, together with the quarterly "rent, is the true consideration for the letting. If I am right, "this tenancy is one protected by the Acts."

I think on consideration of all the evidence—the intrinsic evidence of the documents and the evidence of the witnesses—the judge was well entitled to reach the conclusion that he did. And, I, independently agree with it. It is perhaps to be noted —and this is my last point—that £39 a year happens to be 15s. a week. I am not saying that that was at all an excessive rent, but that may have a bearing upon the way in which this sum was calculated. However that may be, I think the judge was entitled to reach the conclusion he did, that he rightly reached it, and I would therefore dismiss the appeal.

I hope Mr. Megarry will forgive me if I do not travel through the many cases which he rightly brought to our attention. None of them, I think, can be said to form any authority governing the present case. The principle I have taken from the decision of *Woods* v. *Wise*[5] in this court, as did the county court judge, and I do not find it necessary to refer to any of the many other cases cited.

MORRIS L.J. I have reached the same conclusion. When the landlords brought their claim for possession, the tenant relied upon the Rent Restriction Acts. The landlords, in turn, said that the tenancy was not subject to the Rent Acts, and reliance was placed upon the provisions of section 12 (7) of the Act of 1920. As Mr. Megarry has pointed out, that subsection is in quite general terms: "Where the rent payable in respect of any "tenancy of any dwelling-house is less than two-thirds of the "rateable value thereof, this Act shall not apply to that rent or

[5] [1955] 2 Q.B. 29.

C. A.
1957
Samrose Properties Ltd. v. Gibbard.
Morris L.J.

"tenancy . . . and this Act shall apply in respect of such "dwelling-house as if no such tenancy existed or ever had "existed." Mr. Megarry submits that Parliament has by that subsection drawn a line. He points out that the provision so enacted has remained ever since 1920. That, of course, if I may say so, is all entirely correct; but the question that is raised in this case is whether the tenant's rent was a rent of £4 or whether in fact it was a higher rent, namely, a rent of £39. In the documents the so-called rent is £4. That amount was fixed because it was just below two-thirds of the rateable value, which was £7. If the true state of affairs was that the rent was £4 and only £4, then it is clear that the Rent Acts did not apply to the tenancy. If that was the true state of affairs, then the fact that the parties had ordered their dealings with the intention that the Rent Acts should not apply would be immaterial. On that basis the parties would be availing themselves openly of the provisions of the Acts; they would not be evading the Act: they would be making it operative.

In *Foster* v. *Robinson*,[6] my Lord, the Master of the Rolls, referred with approval to some words which are to be found in Mr. Megarry's book on the Rent Acts, 5th ed., p. 10: "There "is nothing to prevent the parties from so arranging matters "that there is nothing to which the Act can apply, provided "the transaction in question is a genuine transaction and not a "mere sham." And rather to the same effect were some words that were used in the earlier case of *Maclay* v. *Dixon*[7] by Scott L.J.: "There was no shadow of deception practised by the "landlord upon the tenant. In my opinion, they were both "entitled so to arrange the matter, as not to attract the control "of the Acts, or, putting it positively, as to prevent the Acts "from applying. If the actual transaction was not within the "Acts, it made no legal difference that the parties had intention-"ally kept it out of the Acts."

I think, if I may say so, that a most helpful approach to the problem presented in this case was contained in the words used by my Lord in his judgment in *Woods* v. *Wise*.[8] My Lord has referred to the passage and I do not refer to it again.

In another case, *O'Connor* v. *Hume*,[9] where the facts were rather different, Somervell L.J. had also indicated that in cases of this kind a measure of care in approach is necessary. I do not refer to the facts in this case, but in his judgment Somervell L.J. said this[10]: "If the proper construction of this agreement, "with any admissible extrinsic evidence, were that the £47 was "a premium and the rent, with any sums which could properly "be treated as rent, was only 2s., then it is plain—and this was "the view of the county court judge—that the landlord is

[6] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.
[7] [1944] 1 All E.R. 22, 23.
[8] [1955] 2 Q.B. 29, 44.
[9] [1954] 1 W.L.R. 824; [1954] 2 All E.R. 301.
[10] [1954] 1 W.L.R. 824, 826.

"entitled to an order for possession." And then, a little further on he said: "if the court is satisfied that the document pur-"porting to set out the rights between the parties is a sham—"and I am not attempting to define what a sham is—then the "court will accept and consider evidence as to the real bargain "between the parties. I see no ground, having had the evidence "and the letters read to us, for regarding this agreement as a "sham, whatever that may mean. It is clear that there was no "trickery or anything of that sort. The landlord made it "perfectly plain that he wished the transaction arranged in this "way at this low rent because he did not desire to part with "possession for more than a year. The tenant's replies and the "letters indicate, as, indeed, counsel agreed, that that was well "understood." And then Somervell L.J. added: "Although "there is nothing contrary to the Act in agreeing to a premium "in the case of a tenancy where the rent is below two-thirds of "the rateable value, the court would scrutinise a sum in such "a case which was put forward as a premium."

Mr. Megarry has submitted to us in this case that, there being here no substantial extrinsic evidence and there being no rule of law, as he submits, governing the matter, the judgment of the county court judge ought not to stand unless by intrinsic examination of the documents his conclusion can be supported. It seems to me that all that one can do in a case of this kind is to seek to ascertain what was the true nature and effect of the transaction; what was the substance of the matter; what was the reality of it, not being guided unduly by any labels that may have been used. My Lord has stated the facts of this case, and the decision depends upon an appreciation of these facts. The property in question, called a "flat," in fact consists only of two rooms in oldish property, there being a right to share a kitchen and lavatory accommodation with others. We have these three documents, and, like my Lord, I pose the question: what possible useful purpose was served by the second of the three documents in this case? One must consider all the facts and see whether they afford some pointers towards forming a conclusion as to what was the reality of the matter. The permissible rent of these two rooms, we are informed by the evidence, would have been something over 6s. 4d. a week. The so-called rent, the stated rent, was put at £4, which I think is approximately 1s. 6d. a week. There is a £35 premium and then this so-called rent of £4, equivalent to 1s. 6d. a week. The contrast between those two figures in relation to a tenancy for a short period of one year is one pointer. Furthermore, the formality and the elaboration of these documents, which effect a letting for this relatively short time of these two rooms in this oldish property at a so-called rent equivalent to about 1s. 6d. a week, constitute another pointer, which in my judgment one can consider when forming a conclusion as to what was the real substance of the matter, without being deluded by its form. Looking at the

C. A.
1957
SAMROSE PROPERTIES LTD. v. GIBBARD.
Morris L.J.

totality of the circumstances, I am led to the view that was reached by the county court judge. I think the reality of the matter was that the tenant was paying £39 by way of rent. The real substance of the transaction was that the landlords required £39 rent and the tenant was willing to pay that rent and to pay £35 of it in advance as commuted rent. I am therefore of the opinion that the county court judge was amply warranted in his conclusion and that he came to a correct conclusion.

PEARCE L.J. I agree.

Solicitors: *Meaby & Co.*

B. A. B.

[LIVERPOOL CONSISTORY COURT.]

1957
Dec. 13.
Steel Ch.

* *In re* MATHESON, DECD.

Ecclesiastical Law—Faculty—Burial ground—Disinterment—Jurisdiction to grant faculty for disinterment of body from consecrated ground for cremation and subsequent re-interment of ashes.

M. died on May 20, 1946, and was buried in the Churchyard of St. Luke's, Orrell, Wigan, on May 23, 1946. Ten years later his widow, having decided that her own body should be cremated when she died, wanted to have M.'s remains disinterred and cremated after her death, and to have her ashes placed with those of M. The widow died before she was able to present a petition for a faculty to enable this to be done, and the application was made by her son:—

Held, that the court had jurisdiction in a proper case to grant a faculty to enable remains to be disinterred from consecrated ground for subsequent cremation and a faculty should issue as prayed.

In re Dixon [1892] P. 386; 8 T.L.R. 744 considered.

PETITION for faculty.

A faculty was sought to enable the body of the late Dr. Alexander Matheson to be removed from the Churchyard of St. Luke's, Orrell, so that the remains might be cremated and that the ashes might be placed with the ashes of his widow, Mrs. Mary Margaret Matheson.

R. P. Heaton (solicitor) for the petitioner.

STEEL Ch. In this case the court is asked to grant a faculty to enable the remains of the late Dr. Alexander Matheson to be removed from the consecrated churchyard of St. Luke, Orrell, so that the remains may be cremated and the ashes placed with the ashes of Mrs. Mary Margaret Matheson who was his widow.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

Dr. Matheson died on May 20, 1946, and his remains were interred on May 23, 1946, in St. Luke's Churchyard. I understand that the decision as to the place of interment was made by his widow and it seems fair to assume that in making such decision she was either carrying out what she knew to be the wishes of the deceased or what she at that time believed to be the wishes of her late husband. In 1955 and 1956 it would appear that Mrs. Matheson was considering what arrangements she wished to make for the disposal of her own remains after death and decided in favour of cremation. Having reached this decision Mrs. Matheson desired, if it were possible, to have the remains of her late husband disinterred, such remains cremated and, when the time came, for her own ashes to be placed with the ashes of her husband. Having reached this decision Mrs. Matheson wrote to the registrar of this court with a view to presenting a petition for a faculty. However, before she was able to present a petition she died and the present application is made by her son. Having seen and heard the petitioner I am satisfied that his motive in presenting the petition is the laudible desire to carry out his mother's wishes, and that if this petition were refused considerable distress would be caused to him.

The vicar and churchwardens of St. Luke have signified their consent to the removal of the remains should a faculty be granted. The petitioner stated in evidence that so far as he was aware his late father had never expressed any desire to be cremated.

At the outset I felt some doubt as to whether the faculty prayed for was one which I could lawfully grant. Such doubt arose from consideration of *In re Dixon.*[1] That was an application in the Consistory Court of London which was heard by Tristram Ch., and the facts were almost identical with the facts in the present case. The applicant was the widow and she desired to disinter the remains of her husband with a view to cremation. Evidence was given by the widow that her late husband had told her that she might either bury his body or have it cremated as she wished. To that extent the applicant in that case was in a rather stronger position than the present petitioner, for I know that Dr. Matheson had never expressed any views at all with regard to cremation.

At first sight it would appear from the headnote to this report that the learned Chancellor refused the application on the ground that it was one which he could not lawfully grant, and this view is supported on a first reading of the report itself.

I am very much indebted to the petitioner's solicitor, Mr. Heaton, for the assistance which he gave me and for the research which he conducted. As a result of his researches he informed me that he believed that faculties for the removal of bodies from consecrated ground with a view to cremation had been granted in recent years in the Dioceses of Carlisle, Winchester

[1] [1892] P. 386; 8 T.L.R. 744.

1957

MATHESON, DECD., *In re.*

Steel Ch.

and Bath and Wells, and the correctness of this information has been confirmed by the registrar of this diocese. It follows from this that at least three Chancellors have decided that in a proper case and for sufficient reasons there is no legal impediment to the granting of a faculty for the disinterment of remains from consecrated ground for the purpose of cremation. I have taken time to consider the matter and have re-read *In re Dixon* [1] several times and with great care. Although the language used in the report is not free from difficulty, I have come to the conclusion that Tristram Ch. did not refuse the faculty prayed because he was satisfied that he was precluded by law from granting it, but because, in the exercise of his discretion, he was not satisfied that it should be granted.

From the earliest time it has been the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire because no body so buried could lawfully be disturbed except in accordance with a faculty obtained from the Consistory Court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the Chancellor must decide as a matter of judicial discretion whether a particular application should be granted or refused.

[The Chancellor then proceeded to examine the facts of the particular case and concluded that, in the exercise of his discretion, this was a proper case in which a faculty could be granted.]

Faculty as prayed.

Solicitors: *Ackerley, Heaton & Pigot, Wigan.*

[1] [1892] P. 386.

[QUEEN'S BENCH DIVISION.]

1958 *Jan.* 23, 24.

Diplock J.

* HEAVEN & KESTERTON LTD. *v.* SVEN WIDAEUS A/B.

Arbitration—Costs—Discretion of arbitrator—Successful party normally entitled—Claimants awarded one-tenth of their claim—Ordered to pay whole costs of arbitration — Whether judicial exercise of discretion—Based on mistake of law—Whether judge may consider mistake of law.

Various quantities and descriptions of timber having been delivered by the sellers under a contract of sale, the buyers claimed damages for defects of quality in some of the goods and the right to reject certain other goods. An umpire awarded the buyers

£73 but ordered them to pay the total costs of the arbitration, amounting to £179 10s. The buyers gave notice of motion to set aside the award on the ground, inter alia, that the umpire misconducted himself in failing to exercise his discretion in a judicial manner on the matter of costs. In an affidavit, the umpire said that in coming to his decision on costs he had regard to all the facts and circumstances of the case, including the fact that (a) he found against the buyers on their claim for rejection; (b) in respect of their total claim for nearly £700 damages he only found them entitled to £73; (c) he formed the view that the buyers had presented an exaggerated claim; and (d) had the buyers claimed a sum similar to that awarded, it was unlikely that the costs of the arbitration would have been incurred. Counsel for the buyers claimed that the umpire (as was indicated by his affidavit) was wrong in law in dismissing the claim for rejection, and that, therefore, his four reasons for awarding costs against the buyers disappeared and his order as to costs should be set aside:—

Held, that although a court had jurisdiction to set aside the part of an arbitrator's award dealing with costs where it appeared (whether on the face of the award or by affidavit) that the arbitrator had exercised his discretion in a non-judicial manner, the court could not take into consideration the fact that the exercise of the arbitrator's discretion was based on a mistake of law; accordingly, although the umpire might have been wrong in law in holding that there was no right to reject the goods, as the court had no jurisdiction to set aside the substance of the award on the ground of mistake of law, the court had to judge the umpire's exercise of discretion as to costs by putting itself in the umpire's position when he made his award, and, on the facts and the law as the umpire understood them, the court could not say that he exercised his discretion unjudicially.

Per curiam. Where an umpire was not asked to state an award in the form of a special case there was no reason why he should have given any reasons for any part of his award.

Observation in *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 2)* [1953] 1 W.L.R. 1481; [1953] 2 All E.R. 1588 explained.

MOTION to set aside an umpire's award.

By a contract dated March 8, 1957, the buyers, Heaven & Kesterton Ltd., ordered from the sellers, Sven Widaeus A/B, various quantities of upper gulf redwood timber described by dimensions only, except as to the dimension 3 ins. by 5½ ins., to which was added the description "2 ex log," which meant that the timber of that description was not to include the heart of the tree for reasons which affected its usefulness.

The contract was on the "Albion" 1955 terms and whereas there was a special condition, clause 7, which related to the right of rejection in the event of over-shipment and under-shipment, and varied what would otherwise be the rights of the parties under the Sale of Goods Act, 1893, there was no provision which affected the normal rights of the parties relating to the rejection of goods for failure to comply with the description. The arbitration clause (clause 20) in so far as relevant was in the following terms: "Any dispute and/or claim regarding shipped goods "which it may be found impossible to settle amicably shall be

1958

Heaven and Kesterton Ltd. v. Sven Widaeus A/B.

"referred to arbitration to be held in the country of destination "of the goods and, except as otherwise herein provided, to be "conducted according to the laws of the country . . . Where the "claim is for quality and/or condition and has not been settled "amicably within 10 days after receipt of claim as stated in the "first paragraph of clause 18 either party may at once proceed "to arbitration. The reference shall be to a sole arbitrator "mutually agreed upon. In default of such agreement claims of "more than £100 or on more than 25 standards shall be referred "to two arbitrators, one to be appointed by each party, and "claims of smaller amounts or on smaller quantities to a sole "arbitrator to be appointed as stipulated in the next para-"graph. . . . Should the arbitrators fail to agree upon an award "they shall appoint an umpire. . . . Inspection by the arbitra-"tor(s) or the umpire, as the case may be, of the goods claimed "upon shall take place within 14 days after their appointment, "unless they consider inspection unnecessary. An award shall "be final and binding upon both parties. The costs of such "arbitration shall be left to the discretion of the arbitrator(s) or "umpire. In deciding as to costs, the arbitrator(s) or umpire "shall take into consideration the correspondence between the "parties relating to the dispute and to their respective efforts to "arrive at a fair settlement."

The goods under the contract were delivered in August, 1957, and shortly afterwards, by a letter dated August 22, 1957, to the sellers' agents, the buyers made a claim in general terms, which was acknowledged by the sellers' agents on August 23, 1957. On August 26, a detailed claim was put forward by the buyers regarding various complaints as to quality in relation to a large number of different sizes and that part was quantified at £455 4s. 4d. There was also a claim to reject certain quantities of two particular sizes for failure to comply with contract specifications, it being alleged that the 3 ins. by 5½ ins. were not "2 ex log" and that the 2 ins. by 3 ins. were not of the dimensions specified and described, the width being under size and the thickness varying from 1⅝ ins. to 2½ ins. That part of the claim was quantified at £495 9s. 10d. with an additional claim for damages and loss of profits bringing the total claim under that head to £573 8s. 4d. The claim was put in the alternative, if rejection was not upheld, in the form of damages for breach of warranty, which were quantified at £231 4s.

An agent of the sellers subsequently inspected the goods, and there was some desultory conversation about the first part of the claim, during which the buyers offered to reduce that part of the claim for £455 by £50. The sellers' agent indicated that he might be prepared to recommend to his principals a figure in the region of £125. That was all that happened in the way of attempts to settle the claim and arbitrators were appointed by the two parties. The arbitrators, on September 11, 1957, made an inspection of the goods which took them the greater part of

the day, and having failed to reach agreement, they appointed an umpire. They discussed the matter with him and each of them left with him written submissions of their views and contentions. In the course of the afternoon of September 12, the umpire made his own inspection of the goods. His award dated September 14, after reciting that a dispute had arisen regarding quality, condition and manufacture of the goods shipped by the Westfjord and reciting the submission, read, so far as relevant, as follows: "Now I, the undersigned, having "carefully considered the findings of the arbitrators, examined "the goods as stored in Hull Docks, and studied the correspon-"dence, hereby, decide and award that sellers shall forthwith pay "to the buyers the sum of £73, that buyers shall pay the total "costs of the arbitration amounting to £179 10s."

The buyers gave notice of motion to set aside the award on three grounds. The second ground was: "That the said arbitrator "misconducted himself in that he made no proper judicial inspec-"tion of the goods the subject-matter of the dispute and arrived "at the conclusion set out in his award on the basis of an inspec-"tion which was not a proper and judicial inspection and which "has caused a substantial injustice to the applicants."

The third ground, with which alone this report is concerned, was: "That the said umpire misconducted himself in that he "did not in dealing with the costs of the reference exercise his "discretion in a proper judicial manner in that he made an award "in favour of the applicants but nevertheless ordered them to "pay the whole of the costs of the reference and stated no reason "therefor."

The umpire then swore an affidavit. In reference to the second ground of motion he stated (inter alia): "Regarding the 3 ins. "by 5½ ins. sold as 2 ex log . . . I readily found that part of "them were not 2 ex log and awarded accordingly"; and "With "regard to the 2 ins. by 3 ins. . . . although they were some-"what unevenly sawn, in the main I found them to be over "measure."

With regard to costs he stated: "I gave considerable thought "and attention to the question of costs and I had clearly in mind "that normally it would be right to award the whole or part of "the costs of the arbitration to the successful party. In the "present arbitration in coming to my decision upon costs I had "regard to all the facts and circumstances of the case, including "the following: (a) I had found against the claimants upon their "claim for rejection; (b) in respect of their total claim for "damages amounting to £686 8s. 4d. I had only found them "entitled to recover £73; (c) I formed the view that the buyers "had presented an exaggerated claim; (d) it was my view that "if the claimants had only put forward a claim for a sum "approximately equivalent to that which I had awarded it is "unlikely that the substantial costs of this arbitration would "have been incurred."

1958

HEAVEN AND KESTERTON LTD. v. SVEN WIDAEUS A/B.

Michael Kerr for the buyers, the applicants.
Mark Littman for the sellers, the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Heaven & Kesterton Ltd.* v. *Etablissements Francois Albiac & Cie* [1]; *Czarnikow* v. *Roth, Schmidt & Co.*[2]; *Cooper* v. *Whittingham* [3]; *Lipman* v. *George Pulman & Sons Ltd.*[4]; *French Government* v. *Owners of S.S. Tsurushima Maru* [5]; *In re Fuerst Bros. & Co. Ltd. and R. S. Stephenson* [6]; *Finlayson* v. *M'Leod* [7]; *Leckhampton Quarries Co. Ltd.* v. *Ballinger and Cheltenham Rural District Council* [8]; *Pettey* v. *Parsons* [9]; *Ellesmere* v. *Inland Revenue Commissioners* [10]; *Pitkin* v. *Sanders and Forster Ltd.*[11]; *Bradshaw* v. *Air Council* [12]; *Stotesbury* v. *Turner* [13]; *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Industries Ltd.*[14]; *Lloyd del Pacifico* v. *Board of Trade* [15]; *Donald Campbell & Co. Ltd.* v. *Pollak* [16]; *Williams* v. *Stanley Jones & Co. Ltd.*[17] and *Wootton* v. *Central Land Board.*[18]

DIPLOCK J., having stated the facts and held that there was no reason for setting aside the award on two other grounds in the notice of motion, continued: The third ground on which it is sought, not that the award should be set aside, although that is how it is put in the motion, but that part of the award should be set aside which directed the buyers to pay all the costs of the arbitration, is: "That the said umpire misconducted himself in "that he did not in dealing with the costs of the reference "exercise his discretion in a proper judicial manner in that he "made an award in favour of the applicants but nevertheless "ordered them to pay the whole costs of the reference and stated "no reason therefor."

I think I might perhaps first deal with the last four words that I have read, "and stated no reason therefor." This is not an award in the form of a special case, and I am bound to say that I can see no possible reason why an umpire who has not been asked to state an award in the form of a special case should give any reasons for any part of his award, whether the substantive part or the costs part. I suspect that that particular part of the objection is founded on the words of Devlin J. in *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.*

[1] [1956] 2 Lloyd's Rep. 316.
[2] [1922] 2 K.B. 478; 38 T.L.R. 797.
[3] (1880) 15 Ch.D. 501.
[4] (1904) 91 L.T. 132.
[5] (1921) 37 T.L.R. 961.
[6] [1951] 1 Lloyd's Rep. 429.
[7] (1818) 1 B. & Ald. 663.
[8] (1905) 93 L.T. 93.
[9] [1914] 2 Ch. 653; 30 T.L.R. 655.
[10] [1918] 2 K.B. 735; 34 T.L.R. 560.
[11] (1923) 128 L.T. 789.
[12] [1926] Ch. 329; 42 T.L.R. 197.
[13] [1943] K.B. 370.
[14] [1951] W.N. 205; [1951] 1 All E.R. 873.
[15] (1930) 46 T.L.R. 476.
[16] [1927] A.C. 732; 43 T.L.R. 787.
[17] [1926] 2 K.B. 37.
[18] [1957] 1 W.L.R. 424; [1957] 1 All E.R. 441.

(*No. 2*).[1] In that case Devlin J. was dealing with a case stated in which there was an unusual order made for costs. While in that case Devlin J. said[2] that where an arbitrator makes an unusual award as to costs in a case stated he ought to give the reasons for it, I certainly do not understand those words as applying to ordinary awards as well and not merely to awards in a case stated. I have no doubt that the umpire in an arbitration of this kind has power to deprive a successful claimant of his costs and, indeed, to order a successful claimant to pay the costs of the other side in appropriate circumstances. The mere fact, therefore, that on the face of the award the buyers have succeeded as to the sum of £73 but have nevertheless been ordered to pay the costs of the sellers would, in my view, of itself be no ground for setting aside the award. If, in reply to this notice of motion, nothing had been said by the umpire, who is of course not a party to these proceedings, as to the reasons why he had made an order of that kind, I do not think that there are any grounds on which I could have interfered with his award. In *In re Fearon and Flinn*[3] the question arose as to whether an umpire was entitled, having made an award in favour of the claimants, to direct them to pay the other side's costs, and Bovill C.J. said this[4]: "The parties have selected the "tribunal which is to settle the disputes between them, and "have agreed that the costs of the submission, reference and "award shall be in the discretion of the arbitrators or umpire. "The umpire, who had all the facts before him, has exercised "his discretion. Assuming his judgment to be wrong, what "power have we to interfere, or how can we exercise a discretion "in the matter? I am far from saying that the umpire has not "arrived at a just conclusion. It may be that there was no "dispute about the smaller sum, and that all the costs incurred "in the reference resulted from the excessive claim made by "Fearon: and in that case the umpire might well be justified "in imposing all the costs upon him. But, be that as it may, "we cannot sit in judgment upon his decision." Keating J. came to the same conclusion.

Mr. Kerr has urged that since that decision, which was in 1869, the law has changed in that the court has exercised a wider power to interfere with the exercise by an arbitrator of his discretion as to costs. To a certain extent I think that is true because in *Foster* v. *Great Western Railway Co.*[5] the Court of Appeal accepted the view that an arbitrator or umpire must exercise his discretion in awarding costs judicially on the same principles, subject to any exceptional circumstances, as a judge must do. *Foster* v. *Great Western Railway Co.*[5] was certainly not referred to with any great enthusiasm by the House of Lords

[1] [1953] 1 W.L.R. 1481; [1953] 2 All E.R. 1588.
[2] [1953] 1 W.L.R. 1481, 1485.
[3] (1869) L.R. 5 C.P. 34.
[4] Ibid. 36.
[5] (1882) 8 Q.B.D. 515.

1958

HEAVEN AND KESTERTON LTD. v. SVEN WIDAEUS A/B.

Diplock J.

in *Gray* v. *Ashburton*,[6] but it is an authority which is still binding on me, and it is an authority which has been followed recently in two cases in the Queen's Bench Division—*Smeaton's* case,[7] to which I have already referred, a decision by Devlin J., and *Lewis* v. *Haverfordwest Rural District Council*,[8] a decision of Lord Goddard C.J.

Those cases, on which Mr. Kerr strongly relies, were cases in which the court set aside an award of an umpire or arbitrator as far as it related to costs on the grounds that it appeared from the material before the court that the arbitrator or umpire had exercised his jurisdiction unjudicially; that is to say, that he had, in the *Smeaton* case,[9] failed to have regard to an important matter to which he should have had regard, namely, who won or who lost the action, and in the *Lewis* case [10] that he had had regard to something to which he ought not to have had regard, namely, that he had no evidence that during the long time between the event, which was compulsory acquisition, and the date of the arbitration, any serious effort had been made by either party to settle the question.

Two things are clear from those authorities. First, that the court has jurisdiction, where it appears on the material before it that an arbitrator has exercised his discretion in a non-judicial manner as to costs, to set aside his award so far as it relates to costs. The second proposition which follows from those cases, and, I think, also from *Gray* v. *Ashburton*,[11] is that it matters not whether the material on which the court comes to the conclusion that there has been a non-judicial exercise of discretion appears on the face of the award, as it did in *Smeaton's* case,[12] or appears by affidavit evidence which comes before the court, as I have ascertained from looking at the official file, it did in *Lewis's* case [13] and, indeed, as it appears it did from the report in *Gray* v. *Ashburton*.[14] While, therefore, it may be that, had the umpire in this case put in no affidavit and given no reasons, the applicants would have had little that they could say to me, as he has in fact given his reasons for doing so, I am entitled to look at those reasons and see whether he has exercised his discretion judicially.

Before I look at those reasons, I think it is desirable to consider what is the principle that lies behind the now established right of the court to interfere with the exercise of the discretion of an arbitrator as relates to costs. The basis and utility of arbitration as a method of determining disputes is that the parties select their own tribunal and agree to be bound by its decision not only on fact but also in so far as they do not take advantage of the special remedies by way of case stated, on law. In general, an award of an arbitrator cannot be set aside for error,

[6] [1917] A.C. 26.
[7] [1953] 1 W.L.R. 1481.
[8] [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599.
[9] [1953] 1 W.L.R. 1481.
[10] [1953] 1 W.L.R. 1486.
[11] [1917] A.C. 26.
[12] [1953] 1 W.L.R. 1481.
[13] [1953] 1 W.L.R. 1486.
[14] [1917] A.C. 26.

whether of fact or of law, except by the machinery which is supplied through case stated, save that if he chooses to make a speaking award, it may be set aside for error on its face. But an award can always be set aside for misconduct. That word, as many judges have pointed out, is rather an unfortunate word in that it suggests moral blame, whereas it covers irregularities of a kind which involve no moral blame, although it is conduct which is not proper in relation to a quasi-judicial proceeding. It seems to me that misconduct in that wide sense in which it is used in relation to arbitration is also a ground on which the court can interfere with the exercise by the arbitrator of his discretion as to costs. Indeed, I am inclined to think that an appellate court, as a matter of practice, in interfering with the exercise by an inferior court of its discretion as to costs only, does interfere in the sort of case which would amount to misconduct in the sense of arbitration law, but with this difference of course, that an appellate court can always correct an inferior court on matters of law, and alter any order as to costs which is ancillary to an error of law.

I think, therefore, that in considering whether I have a right to set aside the umpire's award as respects costs in this case, I must apply the same sort of principles as I would apply to setting aside any other part of the award, reminding myself that if the umpire exercises his discretion as to costs in the sort of way which a High Court judge ought not to do, that would amount to misconduct, subject to this, that if the terms of reference direct him that he may or should take into consideration matters which a High Court judge should not take into consideration, he can, and indeed if so directed must, do so.

The umpire's reasons for making the award which he did as to costs in this case are set out in his affidavit. [His Lordship read them.]

So far as the first three reasons are concerned, they are really to this effect: "I came to the conclusion that the claimants "had put forward an unjustifiable claim for rejection and that "they had put forward a claim for damages exaggerated by "nearly ten times." That to fail upon one important issue in a case is a matter which can and should be taken into consideration in dealing with costs needs no authority; that to put forward an exaggerated claim on which the claimant succeeds on only a small part is a matter which can result in his being ordered to pay the costs, despite his success as to a small part, again, I think, needs no authority, but if authority be needed it is to be found as long ago as 1879 in *Harris* v. *Petherick*.[15]

The fourth ground put forward, namely, that the umpire thought that the matter could have been settled if what he regarded as an unexaggerated claim had been put forward, is a matter which Mr. Kerr suggested was an extraneous matter which ought not to be taken into consideration. He relied

[15] (1879) 4 Q.B.D. 611.

1958

HEAVEN AND KESTERTON LTD. v. SVEN WIDAEUS A/B.

Diplock J.

on the decision in *Lewis* v. *Haverfordwest Rural District Council.*[16] I think there would be a good deal to be said for that if it were not for the special terms of the submission and the umpire's discretion as to costs in the final sentence of the arbitration clause: "In deciding as to costs the arbitrator(s) "or umpire shall take into consideration the correspondence "between the parties relating to the dispute and their respective "efforts to arrive at a fair settlement." If the umpire took the view, as it appears from his affidavit he did, that this was a grossly exaggerated claim, exaggerated by ten times, and if he looked at the correspondence where such a claim was put forward, I think that he might legitimately take the view that the putting forward of an exaggerated claim of the kind he thought it was, was a matter which made it highly unlikely that any fair settlement could be arrived at by the other side, and that is a matter he is entitled to take into consideration. It seems to me that taking the view that he did as to the failure of the right to reject and as to the amount of damages, he was entitled on that view to make the award as to costs which he in fact made. I am not saying for a moment that it is the same award that I should have made, but he has a discretion in the matter, and it does not seem to me that there is shown here sufficient ground for saying that I should interfere with the umpire's discretion on the facts as he found them.

But, says Mr. Kerr, assuming that to be right—and he has contested strenuously that it is not—it is apparent on the material before the court that the umpire was wrong in law, in deciding that there was no right to reject those goods which formed the subject-matter of something more than half the total amount claimed in the action. He relies on passages in the affidavit which were put in in order to deal with the allegation that he had not inspected the goods properly, such as: "Regarding the 3 ins. by 5½ ins. sold as 2 ex log referred to in "paragraph 19 in the affidavit of Mr. Blackburn, I readily found "that part of them were not 2 ex log and awarded accordingly"; and, says Mr. Kerr, if that is what he found, there is an elementary error of law in that he has found against the right to reject the goods which he in terms found did not comply with the description. Similarly, says Mr. Kerr: As regards the 2 ins. by 3 ins. timber, the umpire says in his affidavit: "With regard "to the 2 ins. by 3 ins. referred to in that paragraph "although they were somewhat unevenly sawn, in the main I "found them to be over measure." That shows that he has found that they were not in accordance with the description which included, among other things, the dimensions. It may be that as regards the 2 ins. by 3 ins. there are customs in the trade as to tolerances and the like of which I am not aware and which are not mentioned in the affidavit because the umpire was primarily dealing with an inspection, and he was not bound to

[16] [1953] 1 W.L.R. 1486.

deal with the merits, but it does seem fairly clear that he has made an error of law as regards the 3 ins. by 5½ ins. 2 ex log description; and, said Mr. Kerr, if he had corrected that error of law then probably all four of his reasons for awarding costs against the buyers would go. The first must go because he should not have found against them on their claim for rejection. The second must also go because on their total claim for damages he would have found a much larger sum in their favour. The third must go, or at any rate must go in part, because he formed the view that the buyers presented an exaggerated claim. The fourth, I think, must go because he says it was his view that if the claimants had only put forward a claim for a sum approximately equivalent to that awarded, it is likely that the costs of the arbitration would not have been incurred, whereas if they had put forward such a claim they would have put forward a claim for less than they were entitled to. On the true position in law, therefore, the reasons for ordering the buyers to pay the costs of the sellers disappear. I do not know what the umpire would have done if he had not made that mistake as to rejection, but if I am entitled to look at the real position in law, then I should set aside the award as respects costs and, I think, probably remit it back to the umpire to deal with the costs, since I do not think that I have all the material on which I could deal with costs myself.

Mr. Kerr urges that in exercising my jurisdiction to set aside the award as regards costs, I am entitled to look at the real position and to ask myself, on the true position in law, whether it was a judicial exercise of his discretion by the umpire. Mr. Littman, on the other hand, perhaps encouraged by me, says: No, arbitrators are entitled to make mistakes, they are entitled to make mistakes of fact, they are entitled to make mistakes of law, and in considering whether or not there has been a proper exercise of judicial discretion as respects costs this court has got to put itself in the position of the arbitrator at the time at which he was making his award, and has got to make the same errors in law and the same errors of fact, if there were any, as the arbitrator. I think the matter can be tested in this way: Assuming that the only issue which had gone to arbitration in this case was whether or not the buyers were entitled to reject the 3 ins. by 5½ ins. 2 ex log timber, and the umpire had made the same mistake in law as he has made in the present arbitration, and had accordingly awarded that the buyers were not entitled to reject and awarded the sellers their costs of the arbitration, if on a motion to set aside the award as respects costs—not on a special case—for misconduct there appeared on the evidence before the court what appears now in this case, that there was an error in law on the part of the arbitrator in deciding in favour of the sellers, I find it very difficult to see how I could have any jurisdiction to set aside his award as to costs which is ancillary to his substantive award when, quite plainly, I would have no jurisdiction to set

1958

Heaven and Kesterton Ltd. v. Sven Widaeus A/B.

Diplock J.

aside his award as to the substance. I think the reason I would have no jurisdiction to do so would be because there is nothing in that case which amounts to misconduct on the part of the arbitrator. What there is, is a mistake or mistakes, and the mistakes of arbitrators are what the parties agree to accept when they go to arbitration. I think here, therefore, that I am not entitled to say: "With the material before me it is apparent that the "umpire has made a mistake as to his award and that mistake "has also affected his judgment as to costs." I think I must judge his exercise of discretion as to costs by putting myself in the position in which he was when he made his award with all the errors in law or fact he made. If I do that, for the reasons I have already given, I cannot say that he on the facts and law as he understood them exercised his discretion unjudicially or, as I would prefer to put it, because I think it is the right way of looking at it, I cannot say that he was guilty of misconduct in the way he exercised his discretion as to costs. This motion, therefore, fails.

Motion dismissed.

Solicitors: *Theodore Goddard & Co. for Andrew M. Jackson & Co., Hull; William A. Crump & Son.*

C. J. E.

[PROBATE, ETC., DIVISION.]

1958
Feb. 14.

* PRACTICE DIRECTION (MAINTENANCE AGREEMENTS).

Husband and Wife—Maintenance—Agreement—Death of party—Alteration of agreement after death of one party—Permission of court to apply—Application to be included in summons for directions—Maintenance Agreements Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 35), *s.* 2 (1).

Where it is necessary to obtain the permission of the court to apply for an order under section 2 of the Maintenance Agreements Act, 1957, in a case in which more than six months have elapsed since the date of the grant of representation, the application for leave should be included in the summons for directions under rule 58A (6) of the Matrimonial Causes Rules, 1957.

B. Long,
Senior Registrar.

February 14, 1958.

[COURT OF APPEAL.]

* SILVER v. SILVER.

C. A.

1958
Feb. 4, 5.

Lord Evershed M.R., Parker and Sellers L.JJ.

[Plaint No. 4091.]

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*House purchased for home—Purchase in name of wife—Mortgage instalments paid by husband—Presumption of advancement — Husband's claim to share in house — Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Advancement — Presumption — Husband and wife—Purchase of matrimonial home in name of wife.

A husband and wife had purchased successively four dwelling-houses for use as their matrimonial home. In each case, the property had been purchased in the name of the wife and in each case the purchase had been financed by building society mortgages the instalments payable thereunder being paid as to their entirety by the husband. On the sale of the earlier purchased premises substantial profits had been realised which in part had been used to finance the next purchase and in part had been paid to the wife. After the last dwelling-house was purchased in the wife's name and when £1,300 remained unpaid on the building society's mortgage, the husband left the wife and he applied under section 17 of the Married Women's Property Act, 1882, for an order that the house was held by the wife upon trust for herself and himself jointly. The county court judge held that there was nothing in the evidence to rebut the equitable presumption that in having the house purchased in his wife's name and in paying the instalments due under the mortgage, the husband intended to make an advancement and the wife was not a trustee of the house in whole or in part for the husband:—

Held that, on the facts, the findings of the county court judge should not be disturbed and that, since the matrimonial home was purchased in the name of the wife it was presumed to be a gift by the husband to the wife in the absence of evidence of a contrary intention.

Rimmer v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863 and *Fribance* v. *Fribance* (*No. 2*) [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357 distinguished.

Per Parker L.J. In the case of a family asset, such as the home or the furniture acquired for the joint use of a husband and wife, the presumption of advancement which arises from the property being put in the name of the wife can be easily rebutted, for that case is different from that where what is acquired is for the wife's personal use.

APPEAL from Judge A. H. Armstrong, sitting at Bournemouth County Court.

The plaintiff, Harry Silver, by this application under section 17 of the Married Women's Property Act, 1882, sought a declaration that No. 11, St. Ledger's Road, Bournemouth, being freehold premises standing in the name of his wife, Lena Silver, was held by her upon trust for him and herself jointly.

The premises, which had been the matrimonial home until the husband left the wife, were purchased in part out of the

C. A.
1958
Silver
v.
Silver.

proceeds of sale of an earlier dwelling-house also purchased in the name of the wife, and in part with the assistance of a building society mortgage. All the instalments payable under the mortgage and also under previous mortgages had been paid by the husband. The wife had no income of her own. The facts are fully stated in the judgment of Lord Evershed M.R.

The county court judge held that the husband had not rebutted the equitable presumption which arose from the husband having purchased the property in his wife's name and paid all the instalments and he had no beneficial interest in the property.

The husband appealed.

Michael King for the husband.
T. R. Crawford for the wife.

The following cases were referred to in argument but are not mentioned in the judgments: *In re Salisbury-Jones, Hammond* v. *Salisbury-Jones* [1]; *Marshal* v. *Crutwell* [2]; *Dunbar* v. *Dunbar* [3]; *Thornley* v. *Thornley* [4]; *Gascoigne* v. *Gascoigne* [5]; *McNaught* v. *McNaught*.[6]

Lord Evershed M.R. This was an application made under section 17 of the Married Women's Property Act, 1882, by a husband seeking an order to the effect that certain property in Bournemouth, known as 11 St. Ledger's Road, was held by the respondent, the wife, upon trust either for him, the husband, or for the two of them jointly. In this court the husband has confined his claim to the latter alternative, and he has also in this court said that if such an order were made, he would regard himself as under a continuing obligation to discharge certain mortgage instalments. The house in question, 11 St. Ledger's Road, Bournemouth, is in fact the fourth of what I might call a series of houses which constituted the matrimonial home over a long period of time of the husband and the wife and their children. It is indeed a peculiar tragedy of this case that husband and wife having been married in 1931 and having lived together for more than a quarter of a century, their marriage came to grief at the end of 1956, when the husband left the wife and the matrimonial home in St. Ledger's Road, Bournemouth.

The first of the premises bought was a house in North Wembley, Middlesex. The sum required was £895, and of it £90 was paid in cash and the balance was the subject of a mortgage repayable in instalments to the Burnley Building Society, who have remained mortgagees in these transactions throughout. The house some 10 or 11 years later was sold at a substantially improved price, namely, £1,700; and then another house was bought at a price of £2,000. In that case £1,500 of the £2,000 was left on mortgage. That house, which was in Bournemouth,

[1] [1938] 3 All E.R. 459.
[2] (1875) L.R. 20 Eq. 328.
[3] [1909] 2 Ch. 639; 26 T.L.R. 21.
[4] [1893] 2 Ch. 229.
[5] [1918] 1 K.B. 223; 34 T.L.R. 168.
[6] (1909) 54 S.J. 135.

was sold four years later at a very greatly enhanced figure, namely, £4,500; and, cutting the matter short, as I can, the two last items in the series, Brockenhurst Road, Bournemouth, and St. Ledger's Road, Bournemouth, were again houses of increasing values according to the figures, bought as to part by using the proceeds of sale of what preceded them, the remainder being left on mortgage. It is, however, to be noted that in the one case of Richmond Wood Road, Bournemouth (the second house bought), where, as I have said, a very greatly enhanced price was obtained on the sale, there was available after the purchase of the new house a sum of something in the neighbourhood of a thousand pounds, which might be described, to use language which was used in *Rimmer's* case,[1] as a windfall. It was a substantial profit which had been made by good fortune in the purchase of these houses, though it must be emphasized that they were bought not for investment purposes but as the matrimonial home. I shall come back to show something more about that £1,000 later. It remains only at this stage to say that in every case the houses were conveyed to the wife and into her name. She accordingly was the mortgagor, but the husband joined in the mortgage deed as a guarantor—a transaction which I imagine is common enough. His obligations as guarantor, we were told—though there is very little evidence about it—were secured by the deposit of a policy of insurance on his life. The mortgage instalments have throughout been paid directly or indirectly by the husband. I use that phrase, "directly or "indirectly," for this reason: it seems that the husband throughout the time that husband and wife lived together, paid his wife a weekly sum out of which she paid, among other things, the household expenses, and so forth. She also provided out of it—either by handing the money back to him or otherwise—the mortgage instalments.

Those are the broad circumstances, and the question is, now that unhappily the husband and wife are parted, in what shares ought this house to be treated as being held beneficially? Where there is a subject-matter such as the matrimonial home or what might be called part of the matrimonial joint stock—furniture and so forth—it is obviously tempting to say that equity delighteth in equality, and that one should treat the subject-matter as a joint investment in the true sense, so as to allow each to share equally in it. But, however tempting it is, there are difficulties in the way of so broad and general a view. If Parliament had thought that that would be a fair solution in these cases, it could have so provided. There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal—a rule that if a husband makes a payment for or puts property into the name of a wife he intends to make an advancement to her. As was said by Sir George Jessel M.R. some time ago, such a

[1] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

C. A.
1958
Silver
v.
Silver.
Lord Evershed M.R.

disposition by the husband, unless otherwise explained, will be treated in equity as intended to effect a gift.

In the case before us the question is, as I have said, one to be determined according to section 17 of the Married Women's Property Act, 1882, the language of which, so far as relevant, is: "In any question between husband and wife as to the title to ". . . property, either party . . . may apply" to a judge named, who "may make such order with respect to the property in "dispute . . . as he shall think fit." In this case the judge heard the husband and the wife. Upon one very important matter of fact he showed a clear preference for the wife's evidence; and having heard all the evidence, he came to the conclusion—bearing in mind, as he was bound to do, the existence of the equitable rule—that there was here no reason established on the husband's application for saying that this property, vested as it is exclusively in the name of the wife, belonged wholly or in part to the husband. We are invited in this court to take a different view, but I must say at once that, having given the case anxious consideration—not the less anxious because, as has been pointed out, there is a certain air of unreality in these cases in trying to discern an intention in acts and circumstances which occurred when the present events were quite outside contemplation—I have in the end concluded that we should not be justified in disturbing the judge's conclusion.

This, let me say, is not a case which is commonly met with today in which husband and wife are both wage-earners, where both may contribute, either equally or unequally, to some subject-matter of acquisition. In *Rimmer* v. *Rimmer*[1] the husband and wife had both so contributed, though in unequal shares. The property was there vested in the husband, not the wife, and the question was, in the circumstances how ought the property to belong beneficially? At first instance it had been thought proper to make the beneficial interests proportionate to the figures of the total contributions; but we thought in this court that that was too artificial a result and that in the circumstances the appropriate order to make under the section and the one most in accordance with what the two parties should be taken as having meant was to say that they were entitled equally. The judge thought that the present case was not covered by *Rimmer*[1] and to be distinguished from it, and I think rightly. To begin with, in *Rimmer's* case[1] the property was in the husband's name and both had contributed out of their earnings towards it. Here the property was—as were all the preceding items in the series—in the wife's name. On the other hand, the wife contributed in cash herself nothing. She was not a wage-earner and unfortunately now is obviously incapable of being one, since she appears to be crippled by arthritis; but the judge has, I think rightly, looked back to the beginning of the series of transactions to try to see what the right answer is.

[1] [1953] 1 Q.B. 63.

Of the price of the first house, amounting to £875, £90 had to be provided in cash. That sum in fact was provided by the wife's parents. The husband said that he had repaid that sum. The wife disagreed with that evidence, and on this matter the judge expressed a preference for the wife's evidence. Thus one starts with the fact that here is a property in the name of the wife, the cash requisite for which had been provided by the wife's father or parents; and she was herself as owner the mortgagor, though the husband was the guarantor. On the face of it, it was plainly the wife's property. But over this long period the husband paid the mortgage interest and instalments, and the matter which the judge had to determine was, what was the proper inference from that long continuing conduct? His conclusion was that, in so far as he made these contributions, he must be taken to have been advancing to the wife, since they were to the benefit of the equity of redemption, which belonged to the wife. I mention again at this stage the important matter of the sale of the second house in the series, when there was what I have called a cash windfall. The evidence about that is to this effect: it was not put into joint names; it was handed to or taken by the wife; but she provided out of it a sum of £400 or thereabouts towards the purchase by the husband for himself and for his own use of a new motor-car; and we are also told, though there is no recorded evidence about it, that the wife utilized other parts of the £1,000 in making provision for the children; and it is said that of that figure there is virtually nothing left now.

In cases of this kind where one is concerned with the matrimonial home, there is an obvious temptation to hold that a fair result would be to say that it was a joint enterprise and the two should be jointly entitled; but, if we so concluded in this case, I have come to the conclusion that we should be in effect inventing a case. The material before us in the way of the record of evidence is extremely slender. Unfortunately the judge was not even invited to look at the note taken of his reasons for judgment, and upon such note as we have it would be usurping the functions which more properly belong to the trial judge for us to say that he should have found facts which he did not find. Indeed, I feel that if in this case the Court of Appeal were to say that equity favoured equality, we should determine by anticipation that nearly all cases relating to the matrimonial home should likewise follow suit. I do not think that would be right. The judge did not find, on the material before him, sufficient to justify that conclusion, and he thought that, following the principles which still apply and having regard to the fact that the house was in the wife's name, he should treat the case as one in which the husband had not rebutted the presumption that arose from his having paid in the wife's favour all these instalments.

One result, which Mr. Crawford accepts, of such a conclusion is this: after the unhappy separation the husband did not pay off

C. A.
1958
Silver
v.
Silver.
Lord Evershed M.R.

mortgage instalments, at any rate for a little time; arrears accumulated. Later he did pay because the mortgagees drew his attention to his obligation as guarantor so to do. But Mr. Crawford concedes that from the date of the separation sums which the husband paid and will have to pay as guarantor are sums which as between husband and wife he can treat as charged upon her interest. It would appear as a matter of figures that some sum like £1,300 will eventually have to be so charged, and to that extent the husband will be entitled, in effect, to be subrogated to the mortgagees' rights against the wife. This is conceded. It was, on the other hand, conceded by Mr. King that if we were persuaded to hold that the right answer was to treat the beneficial interests as joint and equal, then he should continue at his own cost and out of his own resources to pay off the rest of the mortgage. That is no doubt a sensible result, but it rather emphasizes, I venture to think, that we really should be substituting for the facts proved, such as they appear from the note before us, what we should regard as a sensible settlement of the unhappy differences between husband and wife; because I find great difficulty in discerning any basis on this material for such an arrangement, such an obligation on the husband's part, to go on in such circumstances paying all the instalments; and if there were no such obligation, I am not quite clear what, on the husband's view, the result would be as regards the future payments. However, I need not pursue that further. I have on the whole come to the conclusion in this case, having regard to the very slight material we have, that we should not be justified in interfering with the conclusion which the judge reached after hearing and observing the parties. I think he did without error apply the principles which are applicable in cases of this kind.

I would therefore dismiss the appeal.

Parker L.J. I have come to the same conclusion, though I confess with considerable reluctance. We are here considering what I may call a family asset, the matrimonial home, something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage break down. In these circumstances, it seems to me that in the present age common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary. This view is well expressed by Denning L.J. in *Fribance* v. *Fribance* [2]; and also in *Rimmer* v. *Rimmer*.[3] I need only refer to the passage in his judgment in the latter case where he said [4]: "It seems to me that when the parties, by their joint efforts, "save money to buy a house, which is intended as a continuing "provision for them both, the proper presumption is that the "beneficial interest belongs to them both jointly. The property "may be bought in the name of the husband alone, or in the

[2] [1957] 1 W.L.R. 384, 387; [1957] 1 All E.R. 357.
[3] [1953] 1 Q.B. 63.
[4] Ibid. 74.

"name of the wife alone, but nevertheless if it is bought with "money saved by their joint efforts and it is impossible fairly "to distinguish between the efforts, of one and the other, then "the beneficial interest should be presumed to belong to them "both jointly."

Now, both those cases were cases where the family asset, the matrimonial home, was bought in the husband's name and not in the wife's name. When, however, the house is bought in the wife's name, as here, there is no doubt that the presumption of advancement applies: it is presumed to be a gift, in the absence of evidence of a contrary intention. That principle is too well established to be disregarded, and Denning L.J. in dealing obiter in *Rimmer's* case[4] with a house put into the wife's name, could not I think have had that principle in mind. It is quite true, as my Lord has said, that section 17 of the Act leaves a very wide discretion in the court; but, as Bucknill L.J. said in *Newgrosh* v. *Newgrosh*,[5] which is quoted in *Rimmer* v. *Rimmer*,[6] it does not entitle the court to make an order which is contrary to any well-established principle of law.

Turning to the present case, it seems to me that the county court judge properly directed himself. The question posed was whether the husband had satisfied him that the parties had a contrary intention. He answered that question in the negative and I do not see how on this question of fact this court can interfere. For myself, I think that in the case of a family asset, such as the home or the furniture, acquired for their joint use, the presumption of advancement can be easily rebutted. It is different from a case where what is acquired is, for instance, for the wife's personal use. Here the instalments of principal and interest payable to the building society all came out of the husband's pocket. When a house was sold and a new one was purchased, the full proceeds of sale were not invested in the new house: part was retained and expended—true by the wife, but, broadly speaking, for the joint benefit of the spouses; and again in regard to the new house the husband undertook the payment of the instalments to the building society. Those actions to my mind are much more consistent with a joint endeavour by the spouses to save by building up a family asset rather than with a succession of gifts by husband to wife, as was held to be the case in *Moate* v. *Moate*.[7] However, the county court judge saw the witnesses; he heard a considerable amount of evidence of which we have but a very scanty note; and, in those circumstances, I cannot see how this court can interfere. Accordingly, I also would dismiss the appeal.

SELLERS L.J. I agree, but I do so with no feeling of satisfaction. In the abbreviated note of the judge's judgment there appears towards the end of it a note to the effect that "there

[5] June 28, 1950, unreported.
[6] [1953] 1 Q.B. 63, 68.
[7] [1948] 2 All E.R. 486.

C. A.
1958
Silver v. Silver.
Sellers L.J.

"is no evidence here that the parties ever thought it was to be "their joint property. The matter was not raised." Were it not for those observations of the judge, I should have been more ready to take the view that the matter was open for consideration by this court, and would have striven, I think, to have applied the statement of the law to which Parker L.J. has referred enunciated by Denning L.J. in the two cases which were quoted. It seems to me, on the facts of this case, that those observations might well have been applied and have resulted in a decision that there was here a joint holding of this property. However, in all the circumstances, the county court judge having taken a different view and not having misdirected himself and the facts being for him, I agree with regret that this court cannot interfere. Therefore this appeal in my view must be dismissed.

Appeal dismissed.

Solocitors: *Sharpe, Pritchard & Co. for Andrews, Wetherall, McQueen & Co., Bournemouth; Peacock & Goddard for Trevanion, Curtis & Walker, Bournemouth.*

B. A. B.

[COURT OF APPEAL.]

C. A.
1958
Feb. 4, 5.
Lord Denning, Hodson and Pearce L.JJ.

*REID *v.* THOMAS BOLTON & SONS LTD.

[Plaint No. N. 432.]

Costs—County court action—Action for "payment of money"—Claim for unliquidated damages—Costs incurred by plaintiff before issue of summons—Fixed costs marked on summons by court officers—Payment into court within eight days—Whether plaintiff can recover taxed costs—Whether claim for damages an action for "the payment of money"—County Court Rules, 1936 (*S.R. & O.,* 1936, *No.* 626/*L.*17), *Appendix D—County Court (Amendment) Rules,* 1957 (*S.I.* 1957, *No.* 174 (*L.*1)), *Ord.* 11, *r.* 1 (1) (*b*).

Order 11, r. 1 of the County Court Rules, 1936,[1] as amended by the County Court (Amendment) Rules, 1957,[2] provides: "(1)

[1] County Court Rules, 1936 (S.R. & O. 1936, No. 626/L.17), Ord. 5, r. 19: "(1) In any action in which "money or damages is or are claimed "by or on behalf of or for the benefit "of an infant or a person of unsound "mind. . . ." Ord. 6, r. 2: "(1) "An action other than an admiralty "action may be—(*a*) an ordinary "action, which may be brought "against any person in respect of any "cause of action; or (*b*) a default "action, which may, subject to the "next succeeding paragraph, be "brought to recover any debt or liqui-"dated demand."

[2] Ord. 11, r. 1 (as amended by the County Court (Amendment) Rules, 1957 (S.I. 1957, No. 174 (L. 1)): "1. (1) Where the only relief "claimed in an action is the payment "of money, the defendant may, with-"in eight days of the service of the "summons on him inclusive of the "day of service, pay into court in "satisfaction of the claim—(*a*) the "whole amount of the claim and the "costs stated on the summons; or "(*b*) so much of the claim as he "admits to be due from him to the "plaintiff, together with the costs "(including court fees) which would

"Where the only relief claimed in an action is the payment of "money, the defendant may, within eight days of the service of "the summons on him . . . pay into court in satisfaction of the "claim . . . (*b*) so much of the claim as he admits to be due "from him to the plaintiff, together with the costs (including court "fees) which would be entered on a summons for that amount "under Part I of Appendix D."

Appendix D [3] sets out under the heading of "Fixed Costs" tables which "show the amount to be entered on the summons "in respect of solicitor's charges—(*a*) in an action for the recovery "of a sum of money for the purposes only of Order XI, rule 1 "and Part II of this Appendix."

A plaintiff issued a summons in the county court, claiming damages from his employers for personal injuries suffered in the course of his employment as a result of their alleged negligence. Before issuing the summons he had incurred costs for doctors' and counsel's fees and other charges. His summons claimed damages (as set out in the attached particulars) for a sum not exceeding £400; and the court officers inserted on the summons an amount of £7 for court fees and solicitor's charges. Within eight days of service of the summons the defendants paid into court the sum of £91 5s. plus the amount of fixed costs marked on the summons. The plaintiff accepted the sum in full settlement of his claim, and thereafter applied to the registrar for the taxation of his costs. The registrar allowed taxed costs of £24 1s. 6d. The employers appealed, contending that on the true construction of the County Court Rules they were liable only for the fixed costs marked on the summons:—

Held, that this action for unliquidated damages was within Ord. 11, r. 1 (1) (*b*), as the only relief claimed was "the payment "of money"; accordingly, as the defendant had complied with the requirements of the rule the plaintiff could not recover costs in excess of the amount properly entered on the summons by the court officers.

APPEAL from Judge Harold Brown, sitting at St. Helens and Widnes County Court.

The plaintiff, on December 5, 1956, sustained an accident in the course of his employment with the defendant company as a

"be entered on a summons for that "amount under Part I of Appendix "D."

Ord. 47, r. 5: "(1) For the regulation of solicitors' charges and disbursements other than court fees "there shall be four scales, namely, "Scale 1, Scale 2, Scale 3, and "Scale 4. (2) The Scale of Costs "applicable to a sum of money only "shall be as follows:—Sum of money "Exceeding £2 and not exceeding "£10—Scale 1; Exceeding £10 and "not exceeding £30—Scale 2. . . . "(3) Where the sum of money does "not exceed £2, no solicitors' charges "shall be allowed, unless a certificate "is granted under Rule 13 of this "Order." R. 6: "(1) Subject to "Rules 7, 8, 9 and 13 of this Order, "the Scale of costs in an action for "the recovery of a sum of money only "shall be determined—(*a*) as regards "the costs of the plaintiff, by the "amount recovered; and (*b*) as regards the costs of the defendant, by "the amount claimed; and (*c*) as "regards costs payable to a third "party, by the amount claimed "against him; and (*d*) as regards "costs payable by a third party, by "the amount recovered against him. ". . ."

[3] Appendix D.: "Fixed Costs, "Part I Summonses Directions 1. "Tables I to VI of this part of this "Appendix show the amount to be "entered on the summons in respect "of solicitor's charges—(*a*) in an "action for the recovery of a sum of "money for the purposes only of "Order XI, Rule 1 and Part II of "this Appendix; . . ."

C. A.
1958
Reid
v.
Thomas
Bolton
& Sons
Ltd.

result of their alleged negligence. The usual letter before action was written on behalf of the plaintiff on December 18, 1956, and he was medically examined by his own specialist and by a doctor instructed by the employers' insurers. Particulars of his claim were settled by counsel in March, 1957.

On March 14, 1957, the plaintiff issued a summons—"ordinary summons"—in the county court on the usual form supplied by the court officials. It was as follows: "The "plaintiff claims debt or damages—see particulars. Costs: Court "fee £3. Solicitor's charge £4." The figures as to fixed costs were, according to usual practice, inserted by the court officials. Damages claimed in the particulars of claim were stated to be "not exceeding £400," and that maximum included £41 5s. special damages. The summons was served on the employers on March 20, 1957, and within eight days of service, namely, on March 27, 1957, they paid into court the sum of £91 5s., plus £7, the amount of the costs marked on the summons. The employers did not deny liability. On March 30 the plaintiff's solicitors gave notice of acceptance of the sum of £91 5s. "in full satisfaction "of the claim in respect of which it is paid in."

On May 30, 1957, application was made by the plaintiff's solicitors for taxation of his costs; and on June 24, 1957, notwithstanding opposition by the employers, the registrar of the court held that he was entitled to tax the plaintiff's costs, and did tax and allow them at £24 1s. 6d.; and he ordered that the employers should pay that amount to the plaintiff.

The employers appealed to the county court judge, contending that they were not liable for any costs beyond those stated in the summons.

The county court judge allowed the appeal. He said: "The "payment into court without a denial of liability was an admis-"sion of liability limited to the sum paid in. Accordingly, the "case falls within Ord. 11, r. 1 (1) (*b*) . . . and the registrar "had no right to tax costs. . . . The determining factor is the "speed with which payment into court is made. While the "point is one of difficulty, this appeal must be allowed, and I "find support for my view in the fact that I am following what "I understand to have been the regular practice in the Liverpool "and neighbouring county courts."

The plaintiff appealed.

Norman Brodrick for the plaintiff.

Montague Berryman Q.C. and *Raymond Kidwell* for the defendants.

Lord Denning stated the facts and continued: The importance of this case is that it raises the question as to what is the proper practice in the county court. When the county court officers are presented with particulars of a claim for personal injuries, are they to put in the appropriate fixed costs, as they

did in this case, or are they to put in "costs to be taxed"? Reading through all the County Court Rules, it seems to me that it all depends on whether an action for damages for personal injuries is an action for "the recovery of a sum of money" within Appendix D of the County Court Rules, 1936, dealing with fixed costs, or, put in other words, is the only relief claimed "the payment of money" within Ord. 11, r. 1? The argument, which has been attractively put before us by Mr. Brodrick, is that the word "money" there means a liquidated sum or demand such as a claim for goods sold and delivered or money lent, and that it cannot be intended to apply to actions for unliquidated damages such as these which everyone knows often do involve considerable costs far in excess of the fixed costs given by Appendix D. Mr. Brodrick indeed referred us to a rule [Ord. 5, r. 19] which in regard to infants shows a distinction between a claim for money and a claim for damages. But, on the other hand, Mr. Berryman has drawn our attention to a number of rules where, when the makers of the rules intend to refer to a liquidated sum, they do so specifically, such as Ord. 6, r. 2, about a default action; and indeed in Appendix D (Part 2) itself. Further (and I think most significantly) he referred us to the rules relating to the scale of costs, such as Ord. 47, rr. 5 and 6, which show that in an action of this kind the amount of costs that may be recovered depends on the amount of the sum that you recover in the action; and indeed, as everyone with any practice in the county court knows, that is the case. In an action of this kind it does not matter what your claim is. Your claim may be up to £400, but if you get only £90, you get your costs on the appropriate scale unless some special order is made.

Weighing the arguments on both sides I have come to the conclusion that Mr. Berryman's argument is right. This action is an action for the recovery of a sum of money. It is an action in which the only relief claimed is a sum of money. What the plaintiff wants is money and nothing else, and therefore it is an action which comes within the rule as to fixed costs. It all comes to this, that in an action for personal injuries—which is an action for the recovery of money—it is the proper course for the fixed costs to be entered by the county court officers in the summons. If the defendant pays in a proper sum within the stated period plus those fixed costs, and the plaintiff accepts the sum paid in, those are the only costs recoverable, and the action is at an end. The convenience of the system may outweigh the apparent injustice of the result. I think that the decision of the county court judge was right, and I would dismiss the appeal.

Hodson L.J. I entirely agree. I think the judge was right, for the reasons which he gave and those which my Lord has given. The order under consideration (Ord. 11, r. 1) uses the phrase: "Where the only relief claimed is the payment of "money." Prima facie that covers not only payment of money

C. A.
1958
Reid v. Thomas Bolton & Sons Ltd.
Hodson L.J.

where the claim is liquidated, but also unliquidated claims. I see nothing in the other rules in the context of which this rule appears to displace the prima facie meaning of the word "money" except that Mr. Brodrick was able to point out that in one rule—Ord. 5, r. 19—there was a reference to money or damages as if there were a distinction between a claim for a liquidated sum and a claim for general damages. But apart from that, I think that the rules consistently throughout, where they wish to refer to a liquidated payment, do so. As Pearce L.J. pointed out in the course of the argument, Ord. 47, r. 6, really clinches the matter, because the recovery of money is dealt with, and a scale of charges is fixed. If the argument for the appellants is right there is no provision at all made for the scale of charges in respect of unliquidated claims, such as the claim in this case, except the general discretion in the county court judge to award costs. I agree that this appeal fails, and should be dismissed.

Pearce L.J. I agree with what my Lords have said. Although this is an unliquidated claim I think that it must come within the words of Ord. 11, r. 1, and that the relief claimed is "the "payment of money." It appears to me that there is no answer to the point founded on Ord. 47, r. 6, which lays down the scale of costs which shall be allowed in an action for the recovery of a sum of money only. If that is to be construed as limited to liquidated demands and as not including unliquidated claims, then nothing at all is laid down with regard to the costs of a very large and very important class of actions. I cannot believe that to have been intended. I doubt if plaintiffs as a class lose by the rule as we construe it. It gives an incentive and an impulse to defendants to dispose of an action at an early stage by a sufficiently generous payment in. They know that they can do so then without risk of finding that the case has already been overloaded with costs. Of course, in cases where costs cannot be avoided before the action, it may create hardship. In liquidated claims under the rule there are admittedly hardships for plaintiffs who have to incur rather unusual costs, and I think that the hardship here is no greater than in those cases. In general the rule works to keep down the costs and to bring about a speedy settlement. Viewed on a more general basis, and not on the facts of a particular case, I think that it is perfectly reasonable if one gives to it the construction which we have given. For these reasons, and those that my Lords have given, I agree that the appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts for Silverman & Livermore, Liverpool; Gardiner & Co. for Barrell & Co., Liverpool.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

*LONDON EXPORT CORPORATION LTD. *v.* JUBILEE COFFEE ROASTING CO. LTD.

1958
Feb. 7, 10.

Diplock J.

Arbitration — Arbitrator — Misconduct — Trade custom — Agreement to arbitrate according to rules of trade association—Trade custom that umpire should remain with appeal board in the absence of parties—Communication by umpire to board—Provision in rules that umpire not to be member of board or to elect members of board—Whether adoption of custom contrary to natural justice—Whether custom excluded by implication from terms of arbitration agreement.
Contract—Custom or usage. Natural justice—Arbitration.

A contract for the sale of ground nuts incorporated all the terms, conditions and rules of Contract Form No. 75 of the Incorporated Oil Seed Association [I.O.S.A.], which contract contained a clause providing for arbitration according to the rules appended thereto. By those rules, "Any dispute arising out of a contract embodying "these rules shall be referred to arbitration in London, each party "appointing one arbitrator . . . and such arbitrators shall have "the power if and when they disagree to appoint an umpire," both arbitrators and umpire to "be a member of the association, "or a partner in a member's firm, or a director of a company "represented by a member." The rules also gave a right of appeal to a board of appeal consisting of four members of the association's committee of appeal and provided that "No member of the com-"mittee of appeal who has an interest in the matter in dispute, "or who has acted as arbitrator or umpire in the case and no "member of the same firm or company to which either of the "arbitrators or the umpire shall belong, shall vote on the question "of the appointment of members of the board of appeal or shall "be appointed a member of the board of appeal." The rule did not detail the procedure to be adopted at the hearing of an appeal. A dispute between the parties to a contract was referred to arbitration and an umpire was appointed in accordance with the rules. The umpire awarded in favour of the sellers and the buyers appealed to the board of appeal. Throughout the hearing by the board of appeal the umpire was present and at the conclusion of the hearing, at the request of the chairman and after protest by the buyers, he remained with the board. It was the customary practice in I.O.S.A. arbitrations, and had been so for about 50 years, for the umpire to remain with the board of appeal in the absence of the parties. After the parties had retired the chairman asked the umpire if the evidence and contentions put before the board differed from those before him; the umpire replied "No" and volunteered the information that he had taken a certain view of the contract. The board of appeal upheld the umpire's award. On a motion by the buyers that the award be set aside on the ground that the board of appeal had misconducted themselves in asking the umpire to remain and communicating with him in the absence of the parties:—

Held (1) that the court would normally refuse to imply into a contract a term permitting an arbitrator or an appeal board to hear evidence or receive argument from a stranger in the absence of the parties, but that where the parties had agreed to arbitration by arbitrators and umpires with an appeal to a board of appeal who must all be members of a trade association there must be taken

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

to be incorporated into the arbitration agreement an agreement to accept that association's customary procedure in so far as it was not unreasonable or in conflict with the written terms of the agreement; that the custom of the I.O.S.A. in allowing the umpire to remain with the board of appeal after the parties had retired, which had commended itself to commercial men for 50 years and apparently worked to their satisfaction, was not so unreasonable (as opposed to unusual) as to exclude in principle its incorporation into the arbitration agreement as a custom; and that it followed that its adoption afforded no ground for setting aside the award on the grounds of public policy as contrary to natural justice.

Mediterranean and Eastern Export Co. Ltd. v. *Fortress Fabrics (Manchester) Ltd.* (1948) 64 T.L.R. 337; [1948] 2 All E.R. 186 and *W. Naumann* v. *Edward Nathan & Co. Ltd.* (1930) 37 Ll.L.Rep. 249 applied.

(2) That a trade custom or practice might be excluded from an arbitration agreement by express terms and also by necessary implication from those terms; that since the rules provided not only that the umpire was not to be a member of the board of appeal but also that he was not to have any voice in its selection and made it clear that he was to be a stranger to the decision of the board, the necessary implication from the express terms of the contract was that the umpire was to have no influence direct or indirect on the board in reaching its decision and that the board had no right to seek any information from the umpire in the absence of the parties or to allow him to attend their deliberations after the conclusion of the hearing; and that, therefore, the board's conduct in asking the umpire to remain was contrary to the implied terms of the contract and, accordingly, the award must be set aside on that ground.

Per curiam. One of the commonest types of arbitration contemplated by the agreement is a quality arbitration in which the umpire not merely weighs expert evidence given before him, which may be repeated before the appeal board, but is entitled to exercise his own expertise; if he communicates to the board the views that he has formed as a result of such expertise that is in no different category from any other expert evidence given at the hearing before the board.

Motion.

By a contract in writing, dated April 3, 1957, sellers, the London Export Corporation Ltd., agreed to sell, and buyers, the Jubilee Coffee Roasting Co. Ltd., to buy, 10 long tons (5 per cent. more or less) Chinese groundnuts in Shell H.P.s no count shipment from China Port during April/first half May, 1957, to London at £120 per long ton c.i.f. On May 6, 1957, an amendment to the contract was signed on behalf of both parties which provided "Shipment per s.s. *Ursula Rickerms* scheduled to sail "about May 18, 1957."

By the contract "All the terms, conditions and rules con- "tained in contract Form No. 75 of the Incorporated Oil Seed "Association [I.O.S.A.] . . . shall . . . be deemed to be incor- "porated in and to form part of this contract note."

By clause 16 of the I.O.S.A. contract form No. 75: "All "disputes from time to time arising out of this contract, including "any question of law appearing in the proceedings . . . shall

"be referred to arbitration according to the rules appended to "this contract . . ."

Rule 1 of the rules appended to the contract provided for reference to arbitration in London, each party to appoint one arbitrator "who shall be a member of the association, or a "partner in a member's firm, or a director of a company repre-"sented by a member, and such arbitrators shall have the power "if and when they disagree to appoint an umpire, who shall be "a member of the association, or a partner in a member's firm, "or a director of a company represented by a member, whose "decision is to be final." Rule 5 gave to a party dissatisfied with the award a right of appeal to the committee of the I.O.S.A. By rule 6: "The appeal shall be determined by a board of "appeal consisting of four members of the committee of appeal "of the association . . . No member of the committee of "appeal who has an interest in the matter in dispute or who "has acted as arbitrator or umpire in the case and no member "of the same firm or company to which either of the arbitrators "or the umpire shall belong, shall vote on the question of the "appointment of members of the board of appeal or shall be "appointed a member of the board of appeal." By rule 8: "The board of appeal shall confirm the award appealed from "unless not less than three members of the board of appeal "decide to vary such award."

A dispute arose between the parties to the contract and the sellers claimed arbitration. The arbitrators were unable to agree and an umpire was appointed who made an award in favour of the sellers. The buyers appealed. At the hearing of the appeal representatives of both parties addressed the board of appeal, and at the conclusion of the hearing, when the parties were about to retire, the chairman asked the umpire, who had been present throughout the appeal, to remain with the board. In I.S.O.A. arbitrations it was the customary practice, and appeared to have been so for many years, for the umpire to remain with the board of appeal in the absence of the parties, but the buyers' representative protested and asked permission to remain so as to hear what the umpire said. Permission was refused, and the buyers' representative left under protest. After the parties had retired the chairman asked the umpire whether the evidence and contentions before the board differed from those before him and the umpire replied "No," and volunteered the information that in making his award he had taken the view that the contract as amended was for shipment by a named steamer.

The board of appeal confirmed the award of the umpire in favour of the sellers. The buyers now moved the court that the award of the board be set aside or remitted to a differently constituted board on the ground that the board of appeal misconducted themselves in that, after the close of the hearing and before making their determination, they held communication with the umpire and allowed or requested him to address them

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

with reference to the appeal in the absence of the parties and without giving the parties an opportunity to comment on what was said.

The facts are more fully stated in the judgment.

H. Fisher for the buyers.

John Donaldson for the sellers.

The following cases were cited in argument: *In re Fuerst Brothers & Co. Ltd. and R. S. Stephenson's Arbitration*[1]; *Walker* v. *Frobisher*[2]; *Dobson and Sutton* v. *Groves*[3]; *Royal Commission on Sugar Supply* v. *Trading Society Kwik-Hoo-Tong*[4]; *Duke of Buccleugh* v. *Metropolitan Board of Works*[5]; *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Committee*[6]; *Rex* v. *Sussex justices, Ex parte McCarthy*[7]; *Reg.* v. *Barry (Glamorgan) Justices, Ex parte Kashim*[8]; *W. Naumann* v. *Edward Nathan & Co. Ltd.*[9]; *Local Government Board* v. *Arlidge*[10]; *In re Hopper*[11]; *Mediterranean and Eastern Export Company Ltd.* v. *Fortress Fabrics (Manchester) Ltd.*[12]; *E. E. & Brian Smith (1928) Ltd.* v. *Wheatsheaf Mills Ltd.*[13]; *In re Badger*[14]; *Hutton* v. *Warren*[15]; *L. Sutro & Co.* v. *Heilbut, Symons & Co.*[16]; and *Produce Brokers Company Ltd.* v. *Olympia Oil and Cake Co. Ltd.*[17]

The following cases not cited in argument are referred to in the judgment: *Spence* v. *Eastern Counties Railway Co.*[18]; *Czarnikow* v. *Roth, Schmidt & Co.*[19]; and *David Taylor & Son Ltd.* v. *Barnett Trading Co.*[20]

Cur. adv. vult.

February 10. Diplock J. This is a motion to set aside an award of a Board of Appeal of the Incorporated Oil Seed Association (which I shall call "I.O.S.A.") on grounds of misconduct—that is to say, irregularity. The facts are simple. The applicants (who were the buyers) and the respondents (who were the sellers) entered into a c.i.f. contract for the sale of ground nuts. The contract expressly incorporated all the terms, conditions and rules of Contract Form No. 75 of the I.O.S.A.

[1] [1951] 1 Lloyd's Rep. 429.
[2] (1801) 6 Ves. 70.
[3] (1844) 6 Q.B.D. 637.
[4] (1922) 38 T.L.R. 684.
[5] (1872) L.R. 5 H.L. 418.
[6] [1937] Ch. 361; 53 T.L.R. 365; [1937] 1 All E.R. 403.
[7] [1924] 1 K.B. 256; 40 T.L.R. 80.
[8] [1953] 1 W.L.R. 1320; [1953] 2 All E.R. 1005.
[9] (1930) 37 Ll.L.Rep. 249.
[10] [1915] A.C. 120; 30 T.L.R. 672.
[11] (1867) L.R. 2 Q.B.D. 367.
[12] (1948) 64 T.L.R. 337; [1948] 2 All E.R. 186.
[13] [1939] 2 K.B. 302; 55 T.L.R. 599; [1939] 2 All E.R. 251.
[14] (1819) 2 B. & Ald. 691.
[15] (1836) 1 M. & W. 466.
[16] [1917] 2 K.B. 348; 33 T.L.R. 359.
[17] [1916] 1 A.C. 314; 32 T.L.R. 115.
[18] (1839) 7 Dowl. 697.
[19] [1922] 2 K.B. 478; 38 T.L.R. 799.
[20] [1953] 1 W.L.R. 562; [1953] 1 All E.R. 843.

This contract form appears to have been drafted in its present terms in 1956; it is probably the latest modification of several predecessors. The only clause in the contract to which I need refer is clause 16, the arbitration clause, the relevant portions of which read as follows: "All disputes from time to time "arising out of this contract, including any question of law "appearing in the proceedings, whether arising between the "parties hereto, or between one of the parties hereto and the "trustee in bankruptcy of the other party, shall be referred to "arbitration according to the rules appended to this contract." There follow provisions making this a *Scott* v. *Avery* clause.

The rules appended to the contract are fifteen in number, only a portion of which need I read. Rule 1 is as follows: "Any dispute arising out of a contract embodying these rules "shall be referred to arbitration in London, each party appoint-"ing one arbitrator, who shall be a member of the association, "or a partner in a members' firm, or a director of a company "represented by a member, and such arbitrators shall have the "power if and when they disagree to appoint an umpire, who "shall be a member of the association, or a partner in a "member's firm, or a director of a company represented by "a member, whose decision is to be final."

Rule 2 deals with fees; rule 3 with a refusal by one party to appoint an arbitrator; rule 4 with the form of the award and costs; and rule 5 provides for a right of appeal. Rule 6 is an important rule; it provides: "The appeal shall be deter-"mined by a board of appeal consisting of four members of "the committee of appeal of the association in accordance with "the regulations of association for the time being of The "Incorporated Oil Seed Association, and the rules of the "executive committee for the time being in force. No member "of the committee of appeal who has an interest in the matter "in dispute or who has acted as arbitrator or umpire in the "case, and no member of the same firm or company to which "either of the arbitrators or the umpire shall belong, shall vote "on the question of the appointment of members of the board "of appeal or shall be appointed a member of the board of "appeal." I do not think that I need read the second part of that rule.

Rule 7 provides as follows: "The parties to an arbitration "or an appeal to the committee of appeal shall not be repre-"sented or appear by counsel or solicitor on the hearing of such "arbitration or appeal unless in the sole discretion of the "arbitrator, or umpire, as the case may be, or board of appeal, "the case is of special importance or questions of law are likely "to arise upon which the opinion of the High Court of Justice "may be required." By rule 8: "The board of appeal shall "confirm the award appealed from unless not less than three "members of the board of appeal decide to vary such award. ". . ." Then there are provisions as to costs and expenses.

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

Diplock J.

Rule 9 deals with withdrawals of appeals; rule 10 with fees on appeal; rule 11 with the stating of a special case and similar matters; and rule 12 with the return of fees where an appeal is lodged by both parties. Rule 13 provides that an award shall not be invalidated because of a disqualification of the parties unless objection is made. Rule 14 deals with notices; and rule 15 with the posting of names of defaulters.

I would observe that these rules do not deal in detail with the procedure at the hearing, but it is implicit from rule 7, which I have read, that unless the parties waive the right there is to be a hearing by the board of appeal.

A dispute having arisen between the parties as to whether there was good tender of documents by the sellers under this contract, it went to arbitration. The arbitrators failed to agree; and the umpire appointed awarded against the buyers. The issue involved was primarily, I think, a question of law—namely, whether the contract as amended called for shipment by a named vessel or for shipment by a named vessel on or before a fixed date. The buyers duly appealed to the appeal board. At the hearing, their representative, a director, and the sellers' representative, the original arbitrator appointed by them, argued the respective contentions of the parties. The umpire was present at the hearing. It does not appear whether during the actual hearing he said anything, but at the close of the hearing the chairman of the appeal board asked the umpire to remain behind. The buyers' representative protested and asked to be allowed to be present to hear what was said by the umpire. Permission was refused, and he left under protest. He was later informed by the umpire that the umpire had given the appeal board his reasons for making his award. That has now been amplified by the evidence and apparently the chairman of the board asked the umpire whether the evidence and contentions put forward at the hearing before the board differed from those put before him. The umpire replied "No," and volunteered the information that he had taken the view that the contract as amended was for shipment by a named vessel. That was, of course, the issue that had been fully argued by the parties at the preceding hearing.

There is undisputed evidence that for very many years it has been a common practice in the I.O.S.A. appeal board arbitrations for the umpire to stay behind with the appeal board after the conclusion of the hearing. A similar practice is adopted with the London Oil and Tallow Trades Association. It is not quite an invariable practice, since, although the buyers' representative has in the past protested against it in vain on a number of occasions, there was one occasion when he was allowed to remain while the board asked the umpire questions.

There is no suggestion that any moral opprobrium attaches to the members of the board or to the umpire: but it is said that what occurred on this occasion (and, it would follow, on hundreds

of other occasions) amounts to what in arbitration law is called "misconduct," or, to use a more appropriate term, an irregularity in procedure which entitles the buyers to have the award set aside.

The buyers put their case this way: It is misconduct, they say, for an arbitral tribunal to receive evidence or argument in the absence of the parties irrespective of whether the tribunal's award is in fact influenced by such evidence or argument; and, they add, the sellers cannot rely upon any custom for the umpire to remain with the appeal board to answer questions after the parties have retired from the hearing, because, first, such a custom is contrary to the rules of natural justice and, secondly, it is inconsistent with the terms to be implied from the written agreement submitting the dispute between the parties to arbitration. To this the sellers reply that, whatever may be the position as regards the receipt of evidence or argument in private from the parties themselves or from a stranger to the arbitration, similar considerations do not apply to its receipt from the umpire from whose award the appeal is brought: the court should therefore uphold the custom unless it is excluded by an express term of the arbitration agreement, and there is no such express term here.

I must deal with each of these contentions; but since, as has frequently been said, the use of the expression "misconduct," with its suggestion of moral values, to include the kind of alleged irregularity in procedure with which this case is concerned tends to misunderstanding, I think it helpful—at any rate to myself—to start by analysing what are the tasks of the court when asked to set aside an award on the ground that the proper procedure has not been followed in the arbitration.

The first task of the court is to construe the arbitration agreement—that is, to ascertain to what procedure the parties have agreed. At this stage of its task the court is not directly concerned with whether the agreement "violates any rules of "what is so often called natural justice," to use the phrase of Lord Goddard C.J. in *Mediterranean & Eastern Export Co. Ltd.* v. *Fortress Fabrics (Manchester) Ltd.*[1]; although, as I shall point out later, the court's views as to what procedure tends to achieve a just result will be one of the considerations which will influence it in deciding what terms as to procedure are to be implied where the written agreement is silent. Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted. Contrast *Spence* v. *Eastern Counties Railway Co.*[2]

When the arbitration agreement has been construed and no

[1] [1948] 2 All E.R. 186, 189; 64 T.L.R. 337.

[2] (1839) 7 Dowl. 697.

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

Diplock J.

breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a mattter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for an arbitrator's award, unless set aside, entitles the beneficiary to call upon the executive power of the State to enforce it, and it is the function of the court to see that that executive power is not abused.

It is in relation to this second and separate question that the rules of what is so often called natural justice may arise directly. There may be a variety of grounds of public policy on which an award may be set aside. That it has sought to oust the statutory jurisdiction of the court to direct a special case to be stated is one example: see *Czarnikow* v. *Roth, Schmidt & Co.*[3] That its effect is to enforce an illegal contract is perhaps another: see *David Taylor & Son Ltd.* v. *Barnett Trading Co.*[4]; and I apprehend that an award obtained in violation of the rules of natural justice even where there was no breach of the agreed procedure would be set aside on grounds of public policy: as, for instance, where an arbitrator manifested obvious bias too late for an application for his removal to be effective before he made his award. Contrast "*Catalina*" (*Owners*) v. "*Norma*" (*Owners*).[5]

Much of the confusion is caused by the fact that the expression "misconduct of the arbitrator" is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases upon which of these two grounds a particular award has been set aside.

If my analysis is correct, it follows that where the court in a case such as this is engaged in its first task of construing the arbitration agreement it must first look to see if there is an express term authorizing the particular procedure impugned. If there is such an express term, it will not set aside the award except upon grounds of public policy, which may include violation of the rules of natural justice in the strict sense in which I have sought to use it above. But arbitration agreements seldom contain a complete code of procedure, and where there is no express written term relating to the point of procedure impugned the court has to ascertain the term to be implied, which it does from the language the parties have used in their written agreement, the provisions of the Arbitration Act, 1950, the surrounding circumstances, and—particularly in the kind of arbitration which comes before this court—any custom or trade practice which must be taken to be incorporated in their agreement. A custom or trade practice is not, however, to be incorporated in an agreement if it is unreasonable—not because the parties to a contract cannot expressly agree to something unreasonable, but because the court will not draw the inference that they have done so by silence.

[3] [1922] 2 K.B. 478; 38 T.L.R. 797.

[4] [1953] 1 W.L.R. 562; [1953] 1 All E.R. 843.

[5] (1938) 61 Ll.L.Rep. 360.

It is in this connexion that something like "the rules of natural justice" are blown in by a side wind.

In considering whether a particular customary procedure in the determination of a dispute is unreasonable, a relevant test must be whether it tends or may tend to an unjust result. It may well be that the test of what is unreasonable in this sense so as to exclude a proved custom from being incorporated in an arbitration agreement is broader than the test of what is a "violation of the rules of natural justice" which entitles the court to set aside, on grounds of public policy, an award made in accordance with the procedure expressly provided for in the arbitration agreement. It was, I think, because he regarded it as unreasonable and therefore not to be treated as incorporated in the arbitration agreement that Croom-Johnson J. in *Re Fuerst Brothers & Co. Ltd. and R. S. Stephenson's Arbitration*,[6] doubted the validity, as a matter of procedure, of a practice whereby, in a commercial arbitration, the umpire saw one of the parties' advocate-arbitrator in the absence of the other party's arbitrator, leaving it to the one arbitrator to keep the other informed. I doubt very much, had such a procedure been expressly provided for in a written arbitration agreement, whether the court would have set aside the award on grounds of public policy.

With those principles in mind, I turn now to see whether the arbitration agreement with which I am concerned impliedly authorizes (for it is not suggested that it does so expressly) the procedure of the appellate board which was adopted in this case. I start, naturally, with the express terms of the agreement, the most relevant of which I have already recited, upon which I make the following comments. First: Every arbitrator, umpire and member of the appeal board must be a member of the association —that is to say, commercial men of experience and special knowledge of the subject-matter of any disputes likely to arise under the contract. Secondly, it is implicit in rule 7 that on an appeal there is to be a "hearing" before the board of appeal, but save that the parties prima facie are not entitled to legal representation at the "hearing" there are no express provisions as to the procedure to be adopted at the hearing. Thirdly, it is expressly provided by rule 6 that neither the umpire nor any member of his firm or company may be a member of the board of appeal, or even vote as to its constitution.

Where an arbitration agreement is silent as to the procedure, what attitude should the court adopt in seeking to imply terms? Obviously it does not imply terms which tend or appear to tend to an unjust award; but the court, particularly in commercial arbitrations, does not now, as perhaps once courts did, start on the assumption that the parties, except as otherwise expressly agreed, intended to adopt in its full rigour the procedure which long experience, helped by natural conservatism, has commended

[6] [1951] 1 Lloyd's Rep. 429.

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

Diplock J.

itself as most appropriate to the courts of law themselves. Rather should the courts start with the presumption that, in confiding their disputes, not to the courts of law, but to an arbitral tribunal of their own choice, the parties intended to confer upon that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion, unless the mode of exercising it tends, or appears to tend, to an unjust result. Thus, where it was agreed that the arbitrators should be "commercial men of experience and special knowledge of the "subject-matter," it was held a proper exercise of their discretion to use their own expertise without restricting themselves to evidence given by the parties—see the *Mediterranean and Eastern Export Co.* case[7] cited above—although, as appears from the judgment of Lord Goddard C.J.[8] in that case, it would have been otherwise if the arbitrator had not been an expert but, say, a lawyer.

Mr. Fisher does not dispute the general proposition that commercial arbitrators have a wide discretion as to their procedure; but he says that it does tend or appear to tend to an unjust award if the arbitral tribunal receives evidence or argument in the absence of the parties. There is ample authority, extending over 150 years, from Lord Eldon in *Walker* v. *Frobisher*,[9] decided in 1801, to Croom-Johnson J. in *In re Fuerst Brothers & Co. Ltd. and R. S. Stephenson's Arbitration*,[10] decided in 1951, that it is misconduct for an arbitrator to hear evidence or receive argument on behalf of one party in the absence of the other; or, as I prefer to put it, the court will not imply a term permitting him to do so; and there is also ample authority that where evidence or argument is so received it is immaterial whether it in fact affected the arbitrator's decision. The rule that an arbitrator must not receive evidence or argument in the absence of one of the parties, whether it be regarded as "misconduct" or as a term to be implied in the arbitration agreement, applies even to evidence or argument given, not on behalf of either of the parties, but by a disinterested stranger: see *Royal Commission on Sugar Supply* v. *Kwik-Hoo-Tong*.[11] The umpire, says Mr. Fisher, is at least in no better position than a disinterested stranger, for having made his award he is functus officio, and although not interested in any financial sense he is not free of the natural human interest in being shown to be right. In the absence of a proved custom or trade practice to the contrary, I should have no hesitation in acceding to this argument; but the real strength of the sellers' case lies in the "custom," for by agreeing to arbitration by arbitrators and umpires who must be members of the I.O.S.A., with an appeal to a board of appeal also members of the committee of appeal of that body, there must be taken to be

[7] [1948] 2 All E.R. 186.
[8] Ibid. 187.
[9] (1801) 6 Ves. 70.
[10] [1951] 1 Lloyd's Rep. 429.
[11] (1922) 38 T.L.R. 684.

incorporated in the arbitration agreement an agreement to accept the association's customary procedure except in so far as such procedure is unreasonable or conflicts with the written terms of the agreement.

Mr. Donaldson, on behalf of the sellers, says that there is nothing unreasonable in the umpire communicating his views in private to the appeal board: he is not in the position of a stranger, he has exercised a quasi-judicial function in relation to the dispute, and there is nothing unreasonable in a judge of first instance communicating his views privately to the Court of Appeal. Indeed, Mr. Donaldson points out that section 8 of the Criminal Appeal Act, 1907, and rule 15 (*b*) of the Criminal Appeal Rules, 1908, made thereunder provide that the opinion of a judge upon a case tried before him shall be given to the Court of Criminal Appeal and that, except by leave of the court, neither party shall be furnished with a copy. I doubt if this presents any very helpful analogy to commercial arbitrations. Leaving aside appeals against sentence, to which very special considerations obviously apply, the judge in a criminal case, where there is a right of appeal to the Court of Criminal Appeal was not the judge of fact in the court of first instance—the jury was: whereas in a commercial arbitration the umpire is the judge of fact and in quality arbitrations (which are the commonest type of arbitration under this kind of agreement), the umpire, in coming to his decision of fact, is not restricted to evidence given before him but entitled to make use of his own expertise. Furthermore, the Court of Criminal Appeal, unlike a board of appeal of the I.O.S.A., does not hear the evidence de novo.

But while I do not accept Mr. Donaldson's analogy, I would not be prepared to reject the practice of the I.O.S.A. as unreasonable if the arbitration agreement merely provided (as it did in *W. Nauman* v. *Edward Nathan & Co. Ltd.*[12]) that disputes should be settled "by arbitration by the I.O.S.A. in the usual "way." I should be very hesitant to condemn as "unreason-"able" a practice which has commended itself to commercial men versed in the trade for 50 years and, with some exceptions, apparently worked to their satisfaction. If parties or their arbitrators have selected an umpire, presumably because they have confidence in his expert knowledge and independence, I see nothing unreasonable, as opposed to unusual, in their agreeing that the tribunal to whom they appeal from his decision may consult him without the parties being present, thus in effect making him an advisory but non-voting member of the tribunal of appeal. If there is nothing unreasonable—and I think clearly there is not—in making the umpire a full member of an arbitral tribunal to which an appeal from his award may be made, there is nothing unreasonable in making him a non-voting member. And if, as I think, such practice is not so unreasonable as to

[12] (1930) 37 Ll.L.Rep. 249.

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

Diplock J.

exclude in principle its incorporation in the arbitration agreement as a custom, it follows a fortiori that its adoption affords no ground for setting aside the award on grounds of public policy as contrary to the rules of natural justice.

But while I am not prepared to say that the practice is unreasonable, there remains the question whether it is inconsistent with the terms of the written agreement; and although I have evidence that the practice has gone on for very many years and has been adopted by another well-known trade association, I have no information as to how long the arbitration rules appended to the I.O.S.A. contract forms have been in their present form or as to whether the arbitration rules of the other association are in identical form. There is no express term in the arbitration agreement forbidding the practice; and Mr. Donaldson has argued in the first instance that a proved custom can be excluded only if it is consistent with an express term. I think, however, that this is not the correct view, and that a custom or trade practice may be excluded by the express terms of the contract or by necessary implication from those express terms. This seems to me to be well established. See *Hutton* v. *Warren*[13]; *L. J. Sutro & Co.* v. *Heilbut, Symons & Co.*[14]; and *Produce Brokers Co. Ltd.* v. *Olympia Oil & Cake Co. Ltd.*,[15] to which Mr. Fisher referred.

It is here that rule 6 of the arbitration rules appended to the contract is important. The parties have made it clear, not only that the umpire is not to be a member of the board of appeal which hears the appeal from his decision, but also that he is to have no voice even in the selection of that board; and these prohibitions apply not only to the umpire himself but to any member of the firm or company to which he belongs. This at least suggests that it was the intention of the parties that the umpire, having made his award, was to have nothing to do with any appeal from it.

There are other considerations which support this conclusion. One of the commonest types of arbitration contemplated by the arbitration agreement is a quality arbitration. In such an arbitration the umpire is not merely weighing expert evidence given before him which may be repeated before the appeal board and on which they can form their own judgment, but is entitled to exercise his own expertise; and if he communicates to the appeal board the views that he has formed as a result of such exercise this is in no different category from any other expert evidence given at the hearing before the appeal board, for the appeal board re-hears evidence de novo and does not hear the evidence given before the umpire save in so far as the parties choose to re-present it before them. By rule 6 the parties have expressly confided the decision of any appeal to an

[13] (1836) 1 M. & W. 466.
[14] [1917] 2 K.B. 348; 33 T.L.R. 359.
[15] [1916] A.C. 314, 324; 32 T.L.R. 115.

appeal board appointed in the manner there set out and to no one else. They have expressly provided that the umpire and any person closely connected with him in business shall not be a member of that board or have any voice in its selection. He, together with the arbitrators, is, of all members of the committee of appeal of the association, to be a stranger to the board of appeal's decision. I think that it is a necessary implication from this that the umpire is to have no influence, direct or indirect, upon the board of appeal in reaching its decision, and that the board of appeal have no right to seek any information, whether of fact or of opinion, from him in the absence of the parties, or to allow him to attend their deliberations after the conclusion of the hearing. If they do so, that is contrary to the implied terms of the arbitration agreement, and it matters not whether the information he gives them in fact has influenced their decision, or indeed, if they allow him to attend their deliberations after the hearing, whether they in fact ask him for any information at all.

For these reasons, I think that the award must be set aside. The effect of so doing, since the award was an appellate award, is to reinstate the award of the umpire from which the buyers appealed. This can only be set aside by a decision of a board of appeal of I.O.S.A.; and it is agreed by the parties that the proper order in these circumstances is that I should remit the matter to a fresh appeal board to be differently constituted.

Order accordingly.

Solicitors: *Coward, Chance & Co.; Gaster & Turner.*

J. F. L.

[COURT OF APPEAL.]

C. A.
1958
Jan. 30, 31; *Feb.* 3.
Jenkins, Romer and Ormerod L.JJ.

**In re* A DEBTOR, No. 472 of 1950. *Ex parte* SWIRSKY.

Bankruptcy—Inquiry as to debtor's dealings—Summons against solicitor—Proceedings under R.S.C., Ord. 52, *r.* 25 *for an account against bankrupt's former solicitor and attorney—Failure by solicitor to furnish information concerning certain property transactions—No order made in the proceedings—Subsequent issue of summons by trustee under Bankruptcy Act,* 1914*—Whether matter res judicata—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.
Estoppel—Per rem judicatam.

A debtor commenced proceedings, which on his subsequent bankruptcy were carried on by his trustee, under R.S.C., Ord. 52,

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

r. 25,[1] for an account against his former solicitor and attorney with the object, inter alia, of obtaining information in respect of certain dealings in property carried out by the solicitor as such attorney whilst the debtor was in prison. This information was not forthcoming, whereupon the trustee issued a summons against the solicitor under section 25 of the Bankruptcy Act, 1914[1]:—

Held, (1) that on the facts the doctrine of res judicata did not prevent the trustee from availing himself of section 25 of the Bankruptcy Act, 1914. There is a wide difference between proceedings under R.S.C., Ord. 52, r. 25, and proceedings under section 25 of the Bankruptcy Act, 1914.

Greenhalgh v. *Mallard* [1947] 2 All E.R. 255 considered.

(2) That the section 25 proceedings did not constitute an abuse of the process of the court.

In re North Australian Territory Co. (1890) 45 Ch.D. 87; 6 T.L.R. 348 and *In re Metropolitan Bank* (1880) 15 Ch.D. 139 distinguished.

(3) That the proceedings were not oppressive since the solicitor by his conduct in not giving the information required had brought them upon himself.

Appeal from Mr. Registrar Bowyer.

This was an appeal by George Swirsky, a solicitor, from an order of Mr. Registrar Bowyer dated July 31, 1957, whereby he refused to set aside as oppressive, frivolous, vexatious and an abuse of the process of the court a summons issued against the appellant, under section 25 of the Bankruptcy Act, 1914, in the bankruptcy of the debtor.

The facts are fully set out in the judgment of Jenkins L.J.

Neil McKinnon Q.C. and *M. O'C. Stranders* for the appellant.
Muir Hunter for the Senior Official Receiver, the trustee.

The following cases, in addition to those referred to in the judgments, were cited in argument: *In re Mapleback*[2]; *In re Gold Company*[3]; *In re Greys Brewery Company*.[4]

[1] R.S.C., Ord. 52, r. 25: "*Account by Solicitor*: Where the "relationship of solicitor and client "exists, or has existed, a summons "may be issued by the client or his "representatives for the delivery of "a cash account, or the payment "of moneys, or the delivery of "securities, and the court or a judge "may from time to time order the "respondent to deliver to the appli-"cant a list of the moneys or securi-"ties which he has in his custody "or control on behalf of the appli-"cant or to bring into court the "whole, or any part of the same, "within such time as the court or "a judge may order. In the event "of the respondent alleging that he "has a claim for costs, the court or "judge may make such provision for "the taxation and the payment or "security thereof or the protection of "the respondent's lien (if any) as "the court or judge may think fit."

Bankruptcy Act, 1914, s. 25: "(1) "The court may, on the application "of the official receiver or trustee, at "any time after a receiving order "has been made against a debtor, "summon before it the debtor or his "wife, or any person known or sus-"pected to have in his possession any "of the estate or effects belonging to "the debtor, or supposed to be in-"debted to the debtor, or any person "whom the court may deem capable "of giving information respecting the "debtor, his dealings or property, "and the court may require any such "person to produce any documents in "his custody or power relating to the "debtor, his dealings or property."

[2] (1876) 4 Ch.D. 150, 155, 156.

[3] (1879) 12 Ch.D. 77, 87.

[4] (1883) 25 Ch.D. 400.

Jenkins L.J. This is an appeal from an order of Mr. Registrar Bowyer, dated July 31, 1957, whereby he refused to set aside as oppressive, frivolous, vexatious and an abuse of the process of the court a summons issued against the appellant, who is a solicitor, under section 25 of the Bankruptcy Act, 1914, in the bankruptcy of the debtor.

[His Lordship read section 25 (1) of the Bankruptcy Act, 1914, and continued:] The particular matter to which the summons was directed was the purchase of "certain land at "Denham Bucks comprised in two contracts both dated June 12, "1947, and made between Willmot Pendleton and Horace James "Hewlitt of the first part Suburban Park Estates Limited of "the second part and the bankrupt . . . of the third part." The appellant's concern in those transactions was that he in fact entered into the two contracts as attorney for the debtor.

The grounds on which the summons is said to have been vexatious, an abuse of the process of the court, oppressive and frivolous are derived from certain other proceedings which were brought by the debtor against the appellant and after the debtor's bankruptcy were continued by the Official Receiver as trustee in the bankruptcy.

It appears that the appellant during the period from March 12, 1947, to November 29, 1947, acted as attorney to and solicitor of the debtor, who had been sentenced to a term of imprisonment for some offence or offences under the Prevention of Fraud (Investments) Act, 1939. At the conclusion of his sentence the debtor revoked the power of attorney under which the appellant had been acting and he also determined his retainer of the appellant as his solicitor. Apparently the appellant, while he was attorney and solicitor of the debtor, carried out various transactions concerning land, and in particular entered into the two contracts to which I have referred. The appellant having thus ceased to act as solicitor and attorney to the debtor, the debtor conceived that he was entitled to an account against the appellant. The debtor accordingly towards the end of the year 1947 commenced proceedings against the appellant under R.S.C., Ord. 52, r. 25.

[His Lordship read rule 25 and continued:] On the application of the debtor under that provision, an order was made by Master Grundy on December 13, 1948, "that the said solicitor "do within twenty-eight days from the service of this order, "deliver to . . . the applicant the bills of costs in all causes "and matters wherein he has been concerned for the [debtor] "and at the same time deliver to the said applicant the cash "account showing all moneys received by him for or on account "of or paid on behalf of said applicant and to pay to the said "applicant the amount due from him. And it is further ordered "that the said solicitor do deliver up to the applicant all deeds "books papers and writings in his possession custody or power "belonging to the applicant"; and liberty to apply was reserved.

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Jenkins L.J.

On that order it appears that the appellant did deliver an account of a sort and certain bills of costs, and handed over certain documents.

It is to be observed that as early as October 20, 1949, the appellant was writing to the debtor's then solicitors in these terms: "With reference to our telephone conversation this "morning in regard to the land at Denham Green, I would "confirm that I did not receive any money in respect of this "property on behalf of your client." That indicates that from an early stage in the proceedings the debtor was claiming information as to the matter of the land at Denham Green, and the appellant was contesting his right to such information.

On September 18, 1950, a receiving order was made against the debtor and he was adjudicated bankrupt on October 24, 1950, and in due course the official receiver became his trustee in bankruptcy. On December 15, 1953, the trustee applied to be substituted for the debtor as applicant in the proceedings under R.S.C., Ord. 52, r. 25, and the order for his substitution was made on January 7, 1954. Following upon that, the trustee, on January 8, 1954, gave notice to the appellant of his intention to proceed with the application under R.S.C., Ord. 52, r. 25, and to press for compliance with the order.

On October 15, 1954, the trustee applied for a further order as to accounts and so forth. That application came before Master Baker on October 22, 1954, and the form of the order he made was this: "It is ordered that the respondent George "Swirsky having failed to comply with the order made against "him herein on December 13, 1948, he do deliver to the applicant "the trustee of the property of William Thomas Norman a "bankrupt within 21 days after service of this order a full account "of all moneys received or paid by him on behalf of the said "William Thomas Norman, such account to be verified by "affidavit and to deal with all matters placed in the hands of "the said George Swirsky by the said William Thomas Norman. "And that the costs of this application together with the costs "reserved by the order herein dated January 7, 1954, be the "applicant's in any event."

The appellant appealed from that order, and his appeal came before Slade J. in the first instance on October 29, 1954. The judge's order of that date recited the order under appeal and ordered that "the said order of Master Baker be varied by "directing that the account therein referred to, be delivered "within three calendar months of this order, such account to be "verified by affidavit." Then it was further ordered "that the "said notice of appeal after delivery of the account be referred "to Slade J. if so desired. And that the costs of this appeal "and the hearing before the master be reserved until after the "account has been delivered and that there be no order as to "costs of the order dated January 7, 1954. Liberty to restore."

Extensions of time for delivery of the account were obtained

by the appellant, and the matter again came before Slade J. on June 22, 1956. On that occasion Slade J. made an order in these terms: "No order is made upon the said appeal save that "the said appellant, George Swirsky, do pay to the respondent "the trustee of William Thomas Norman, a bankrupt, the costs "of this appeal and the costs of the application to Master Baker "above-mentioned, such costs to be taxed"; and there was a certificate for counsel.

It appears that on that occasion Slade J. expressed his views as to the position with respect to the account which had been delivered. The judge apparently tested the accuracy of the account by looking at the supporting evidence in respect of various items, and it appeared to him, so far as it went, to be a compliance with the order for the delivery of an account; but he expressed himself on the position regarding the account at some length and in terms which made it quite plain that he did not consider the account as by any means final. He certainly, I think, envisaged further proceedings on the part of the trustee to verify the account and challenge any items which appeared to the trustee to be unjustified. But, the appeal having ended in no order being made, the matter was left in the air, and it was not clear to the trustee or his advisers what steps they should next take.

In fact on June 29, 1956, they took out a summons for directions. That summons came before Master Clayton. I think there were a number of hearings before him, but the effective hearing took place on April 10, 1957. On that occasion Master Clayton made no order except that costs were to be the appellant's in any event.

That description of his order requires some explanation. It appears that the trustee or his advisers considered that the proper step next to be taken was to obtain an order giving leave to cross-examine the appellant on his account and to surcharge and falsify the account if so advised. It seems that there was a long argument about this on April 10, 1957, and on the appellant's side it was urged that no such order should be made, because, for one reason, the matter had been disposed of by Slade J. and for another reason (and I think this must have been the dominant reason) that he had no jurisdiction on an application under R.S.C., Ord. 52, r. 25, to make the order sought.

Throughout the proceedings since the trustee became interested the trustee had quite clearly been pressing for information concerning the Denham transactions and the appellant had been consistently denying the trustee's right to such information. Accordingly, although the appellant knew full well what was the information which the trustee wanted, he consistently refused to give it, and in accordance with that attitude none of the accounts or purported accounts which he delivered contained any reference to the Denham property. His case was that he did not in respect of the Denham transaction receive any money of

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Jenkins L.J.

the debtor, and that, he said, concluded the matter. It was, of course, plain that, the appellant having delivered a series of accounts, none of them from first to last containing any reference to the Denham property, the trustee could not pursue that matter further unless he was given leave to cross-examine. The master taking the view he did and refusing such leave, the trustee was baulked of the relief which he was hoping to obtain with respect to that matter. He was in no way remiss in raising the matter of the Denham property, for, as I have said, he had been raising it from time to time ever since he had become interested in the proceedings.

It is said on the part of the appellant that the trustee could have insisted on an order for cross-examination of the appellant, and it is said that he could have done that under R.S.C., Ord. 37, r. 20. That rule includes the following provision: "any party "or witness having made an affidavit to be used or which shall "be used on any proceeding in the cause or matter shall be "bound on being served with such subpoena to attend before "such officer or person for cross-examination." I think it is clear that it is not possible to secure the attendance of a witness for cross-examination and claim to cross-examine him as of right; an order for cross-examination must first be obtained and when it has been obtained the attendance of the person concerned can be secured by subpoena. So it does not seem to me that the trustee was remiss in pursuing his claim in that he did not seek—as it was, wrongly, I think, suggested that he could have sought—the automatic attendance and cross-examination of the appellant under that rule.

Then it is suggested, as I understand it, that the trustee might have carried Master Clayton's decision to the judge on appeal. It does not seem to me that the trustee was necessarily or at all remiss in failing to do that. He may have thought that, Master Clayton having ruled, in effect, that the proceedings under R.S.C., Ord. 52, r. 25, were not appropriate proceedings in which to raise an extraneous matter such as the Denham land, he, the trustee, would accept that decision and pursue whatever other remedy might be open to him. He did in fact pursue the remedy open to him, or which he claimed to be open to him, under section 25 of the Bankruptcy Act, 1914, and the registrar ordered that a summons in the terms I have noticed should issue against the appellant. The appellant applied to set aside that summons, the registrar made the order of July 31, 1957, to which I have already referred, and the present appeal ensued from that order.

I think I have stated sufficient of the facts to enable me to deal with the issues which were argued before us.

It is said by Mr. McKinnon, for the appellant, that the issuing of the summons under section 25 of the Bankruptcy Act, 1914, was wrong, in effect, on four grounds. First, it is said that the outcome of the proceedings under R.S.C., Ord. 52, r. 25, was such as to make the matter sought to be pursued by the

trustee under section 25 res judicata which the trustee should not be allowed to reopen in proceedings in the bankruptcy. Then it was said that this was an abuse of the process of the court inasmuch as the trustee, having unsuccessfully pursued the appellant under R.S.C., Ord. 52, r. 25, in proceedings which dragged on over many years, was now seeking to reopen the matter and go over all the old ground again in the proceedings under section 25. Then it was said that the trustee's recourse to section 25 was oppressive, and finally it was pointed out that this litigation, if one treats it as relating to the Denham property, concerns a transaction now some 11 years old. It is said that there has been such inordinate delay that the trustee should not be allowed to put in motion against the appellant what has been called the inquisitorial machinery provided by section 25 of the Bankruptcy Act, 1914.

To deal with these various points, first of all as to res judicata, the parties were, I think, agreed that the statement of principle from *Greenhalgh* v. *Mallard* [1] was a sufficient statement of res judicata for the purposes of this case; but, while accepting the principle as stated, Mr. McKinnon, for the appellant, says that it concludes the present case in his favour, whereas Mr. Muir Hunter, for the trustee, says that the circumstances in this case are such that the trustee is not precluded, under the principle stated, from pursuing his proceedings under section 25 of the Bankruptcy Act, 1914. *Greenhalgh* v. *Mallard* [1] concerned a conspiracy and was an entirely different kind of case from the present one; but there is this convenient statement of principle in the judgment of Somervell L.J. He says [2]: "That, I think, "would be enough to dispose of this case, but counsel for the "defendants put his case in two ways, and I will deal with "them. He relied, first, on res judicata, and then said that, "if there was any doubt about that, he was entitled to succeed "on the ground that it would be vexatious and an abuse of the "process of the court to allow this transaction to be brought "before the court again on the basis of the present statement "of claim. I think that on the authorities to which I will refer "it would be accurate to say that res judicata for this purpose "is not confined to the issues which the court is actually asked "to decide, but that it covers issues or facts which are so clearly "part of the subject-matter of the litigation and so clearly could "have been raised that it would be an abuse of the process of "the court to allow a new proceeding to be started in respect of "them. In *Green* v. *Weatherill* [3] Maugham J. quoted some "observations by Wigram V.-C., in *Henderson* v. *Henderson* [4]: "'I believe I state the rule of the court correctly when I say "'that, where a given matter becomes the subject of litigation "'in, and of adjudication by, a court of competent jurisdiction,

[1] [1947] 2 All E.R. 255.
[2] Ibid. 257.
[3] [1929] 2 Ch. 213, 221; 45 T.L.R. 494.
[4] (1843) 3 Hare 100, 114, 115.

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Jenkins L.J.

" ' the court requires the parties to that litigation to bring
" ' forward their whole case, and will not (except under special
" ' circumstances) permit the same parties to open the same
" ' subject of litigation in respect of matter which might have
" ' been brought forward as part of the subject in contest, but
" ' which was not brought forward, only because they have, from
" ' negligence, inadvertence, or even accident, omitted part of
" ' their case. The plea of res judicata applies, except in special
" ' cases, not only to points upon which the court was actually
" ' required by the parties to form an opinion and pronounce a
" ' judgment, but to every point which properly belonged to the
" ' subject of litigation, and which the parties, exercising reason-
" ' able diligence, might have brought forward at the time.' "

As to the application of that principle to the present case, it is to be observed at the outset that there is a wide difference between the two forms of proceeding with which we are here concerned both as to their subject-matter and as to their effect. R.S.C., Ord. 52, r. 25, deals with cases where the relationship of solicitor and client exists or has existed and where the client seeks an account from his solicitor or former solicitor. The whole object and scope of it is directed to providing a summary means of causing solicitors to account for cash and securities in their hands and the like. Section 25 of the Bankruptcy Act, 1914, is by no means confined to persons who are accountable to the trustee through their relationship with the debtor. The section is couched in wide language and it covers cases in which it appears that the person proposed to be examined is in a position to give information which is material for the purpose of getting in the debtor's estate and winding it up. The two forms of proceeding, as I have said, are widely different, and it seems to me that it would be very difficult to hold that refusal of a claim against a solicitor for an account based on the relationship of solicitor and client which existed between a debtor and the solicitor concerned would necessarily and in all circumstances preclude the trustee from having recourse to the provisions of section 25 of the Bankruptcy Act, 1914, with respect to the same individual if the court had solid ground for the opinion that that individual was in a position to provide material information in regard to the bankrupt's affairs.

Further, I find it very difficult to see what the res is which is said to be judicata. I have referred to the course of the proceedings under R.S.C., Ord. 52, r. 25, and it seems to me very difficult to say that anything at all was decided in those proceedings, save that Master Clayton was of opinion that an order could not properly be made for cross-examination and that Slade J. was of opinion that the trustee was entitled to an account. Mr. McKinnon put the res, as I understood him, as being, in effect, the right to require information from the appellant regarding the Denham transaction. It is difficult to accept a right of that character as a res well capable of being judicata;

but, accepting that definition of the res, I cannot find in the proceedings under R.S.C., Ord. 52, r. 25, anything remotely approaching a decision to the effect that the trustee had no right in any circumstances or in any proceedings to obtain information from the appellant with respect to the Denham transaction. There was nothing approaching a decision to that effect. The nearest approach to it was that Master Clayton took the view that the appellant could not properly be cross-examined in those proceedings and that, in the result, disabled the trustee from pursuing this particular matter in those proceedings; but that is the nearest one can get to the res judicata suggested by Mr. McKinnon.

Then Mr. McKinnon argued that he did not go so far as to put his case on the ground of strict res judicata or estoppel by record, because he admitted, I think, that two kinds of proceeding, the section 25 proceeding and the Order 52 proceeding, were wholly distinct in their character; but he said that the case did come within the extension of the doctrine indicated by Somervell L.J. in *Greenhalgh* v. *Mallard*,[5] where Somervell L.J. said that the doctrine of res judicata "covers issues or facts which are so "clearly part of the subject-matter of the litigation and so clearly "could have been raised that it would be an abuse of the process "of the court to allow a new proceeding to be started in respect "of them." Then I take this from the passage quoted from *Henderson* v. *Henderson*,[6] where it says: "The plea of res "judicata applies, except in special cases, not only to points "upon which the court was actually required by the parties to "form an opinion and pronounce a judgment, but to every point "which properly belonged to the subject of litigation, and which "the parties, exercising reasonable diligence, might have brought "forward at the time." It is said that the trustee might have brought forward at the time his claim for information about the Denham transaction and he has failed to do so, and he ought not to be allowed to raise that matter again in other proceedings.

But there is no question but that the trustee did his very best to raise in the proceedings under R.S.C., Ord. 52, r. 25, the matter of obtaining information about the Denham transaction. It is true that he failed of his object, but he failed of his object not because he was remiss in bringing the matter forward but because the appellant consistently denied his right to bring it forward and consistently kept the matter of the Denham transaction out of such accounts as he delivered. The matter was raised, in my view, and quite clearly raised, but it was never adjudicated. The trustee had to be content as regards the proceedings under R.S.C., Ord. 52 with such account as the appellant delivered, and that account included no information about the Denham property. He thus succeeded on part of his claim but failed to pursue the other part of his claim to a successful

[5] [1947] 2 All E.R. 255, 257. [6] 3 Hare 100, 115.

C. A.

1958

A DEBTOR, No. 472 OF 1950, *In re. Ex parte* SWIRSKY.

Jenkins L.J.

conclusion, not because it was decided against him but because the master did not think, in effect, that it was proper to raise it in those proceedings by cross-examination of the appellant.

For the reasons which I have endeavoured to state, I cannot see that the doctrine of res judicata, on the facts and in the circumstances of this case, prevents the trustee from availing himself of section 25 of the Bankruptcy Act, 1914.

Next, as to the proceedings under section 25 being an abuse of the process of the court, in my view there is no substance at all in that contention. Recourse to section 25 was necessitated by the appellant's consistent refusal to give any information about the Denham property in the proceedings under R.S.C., Ord. 52, r. 25. It seems to me that the trustee was, in effect, faced with the alternatives of abandoning his attempt to get information about the Denham property altogether or of applying under section 25. If the appellant dislikes the idea of facing proceedings under section 25 he has only himself to thank. It appears to me that a quite short and simple explanation in an affidavit would have completely averted the necessity.

The appellant alleges that, with respect to the land at Denham, the sale was in fact completed by conveyance to somebody else in such a way that no money became due to the debtor, and, as I understand it, no money of the debtor's was expended. He says that he furnished a completion statement to the debtor's former solicitors showing that that was so. But, even if he did, that statement is not available to the trustee, who has not been able to get a sight of it, and I see no reason why the appellant should not simply have stated his account of that matter in an affidavit. As I have said, I think that that could have been quite shortly and simply done.

In connexion with the plea of abuse of process of the court, we were referred to two cases in particular. *In re North Australian Territory Co.*[7] was the first of them. That was a case under what was, broadly speaking, a corresponding provision of the Companies Act, 1862, that is to say section 115 of that Act, which is broadly similar in its intention to section 25 of the Bankruptcy Act, 1914. In that case a liquidator in a voluntary winding-up of a company brought an action with the leave of the court against another company and obtained an order for an affidavit of documents in the action, but the court refused to order the production of documents or the examination of the company's secretary on interrogatories on the ground that in the present stage of the action, no defence having been put in, the discovery was premature. The liquidator then obtained an order under section 115 of the Companies Act, 1862, for the examination of the secretary before an examiner. Then the matter came before the Court of Appeal through the secretary, in the course of his examination, refusing to answer a question. It was held

[7] (1890) 45 Ch.D. 87; 6 T.L.R. 348.

"that, as the liquidator had shown no reason for seeking the "discovery except to assist him in the action, and so to evade "the order of the judge postponing discovery in the action, the "witness was justified in refusing to answer the question."

That appears to me to be a very different case from this one, for in that case the inquisitorial procedure of the right to invoke section 115 of the Companies Act, 1862, was sought to be used for the ulterior purpose of obtaining in the action against the very person whose examination was sought an advantage in a matter of discovery which had been denied to the liquidator in the action, and I should have thought that that was a very good example of an abuse of the process of the court, the process of one court being, as it were, played off against that of another and used to defeat the order of that other court.

In re Metropolitan Bank[8] was a similar case. The headnote reads: "A voluntary liquidator who applies to the court under "the 138th section of the Companies Act, 1862, for an order "under the 115th section to examine a person in respect of the "affairs of the company is not entitled as of right to the order, "but must satisfy the court that it will be just and beneficial "for the purposes of the winding-up. Where a voluntary liqui-"dator has brought an action on behalf of the company against "an officer of the company, and has exhibited interrogatories "which have been fully answered by the defendants, he will not "be entitled to an order under the 115th section for the "examination of the defendant unless he satisfy the court that, "notwithstanding the interrogatories already exhibited, he has a "strong case for a further examination."

We were referred to a number of other authorities, and in particular to *In re A Debtor* (*No.* 3 *of* 1909), *Ex parte Goldstein.*[9] That is a case which shows that an order under section 25 of the Bankruptcy Act, 1914, should not be made unless there is reasonable ground for supposing that the person sought to be examined is in a position to give some material information.

We were also referred to *In re Maundy Gregory*,[10] which, so far as material to the present purpose, relates to the same point as *Ex parte Goldstein*,[11] that is to say that it is not legitimate to put the inquisitorial power of section 25 into operation merely upon a speculative inquiry; there must be some ground for supposing that the person sought to be examined has information.

Then there was *In re Great Kruger Gold Mining Co.*[12] That was cited to us for some cautionary observations by Lindley L.J. as to the exceptional character of this inquisitorial jurisdiction and the care with which it should be exercised.

Accordingly, it does not seem to me in this case that abuse of the process of the court has been made out. The appellant brought these further proceedings upon himself, and it appears

[8] (1880) 15 Ch.D. 139.
[9] [1917] 1 K.B. 558.
[10] [1935] Ch. 65.
[11] [1917] 1 K.B. 558.
[12] [1892] 3 Ch. 307; 8 T.L.R. 688.

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Jenkins L.J.

to me that, inasmuch as he himself, in his capacity as attorney for the debtor, signed the two contracts relating to the land at Denham, there is a prima facie case that he is in a position to give material information with respect to the affairs of the debtor. I therefore reject the objection that the summons under section 25 was an abuse of the process of the court.

Then there is the allegation of oppression. For similar reasons it seems to me that there is really no substance in that. The appellant from first to last knew what was expected of him, and, indeed, ought to have known that, as the former solicitor and attorney of the debtor, he was under a duty to give the information sought, and he chose not to give it, and so he now finds himself faced with the prospect of an examination under section 25 which, if he had carried out his plain duty, would have been averted.

Finally, there is the matter of delay. I confess that when this case was first opened I was impressed by the great lapse of time which has occurred since the events now sought to be investigated; but Mr. Muir Hunter took us through the history of the matter, and he has succeeded in satisfying me that over the whole period the delay was really caused more by the Fabian tactics of the appellant in his determination to avoid giving any information if he could help it than by any remissness on the part of the trustee. In the earlier part of the period the trustee was in the difficulty that he could not move in the matter without funds, and that accounts for a certain amount of initial delay; but when once he was fully seised of the matter and possessed of funds it does not seem to me that he can really be saddled with any great part of the responsibility for the delay which, for my part, I think was mainly due to the appellant.

Accordingly, I reject the four objections which have been advanced by the appellant to the summons under section 25 of the Bankruptcy Act, 1914.

The matter of granting or refusing summonses under section 25 is eminently a matter for the discretion of the registrar. Having considered the facts of this case with some care, it appears to me that there is no reason whatever for holding that the registrar in this case did not exercise his discretion in a perfectly correct manner.

In conclusion, I would say that I have no fault whatever to find with the careful judgment of the registrar, and, in my opinion, this appeal fails and should be dismissed.

Romer L.J. I quite agree; and there is very little that I wish to add to the judgment of my Lord. One thing that is clear about this case above all others is that there are no merits whatever possessed by the appellant, and, indeed, Mr. McKinnon hardly contended on his behalf to the contrary. The position was that the appellant had acted as solicitor to the bankrupt, and he does not deny that he has in his possession, as Mr. Muir

Hunter pointed out to us, vital information as to transactions which he effected as solicitor and attorney to the debtor, who was in prison at the time. The appellant has for many years past adopted the attitude that he is under no obligation to give the trustee in bankruptcy this information, or, indeed, to give it to the bankruptcy court, he saying that there was a time when he gave the information to the solicitors who were then acting for Mr. Norman, though why that should constitute a reason for not giving it again now is past my comprehension.

But, notwithstanding all that, his case is that he is entitled to relief from this summons which the trustee in bankruptcy has issued under section 25 of the Bankruptcy Act, 1914, on the principles enunciated and explained in *Greenhalgh* v. *Mallard*,[13] to which my Lord has referred. It is not necessary to decide it, but it may be that, if in the Queen's Bench proceedings the Official Receiver could have got the relief which he is seeking by his summons and had failed to ask for it, then that principle, that is to say the principle of *Greenhalgh's* case,[13] might have applied; but that is not at all what happened. What he is trying to do by this summons, in effect, is to interrogate the appellant with regard to two particular contracts relating to some land at Denham. Both before Slade J. and before Master Clayton the Official Receiver did try to get an order for the cross-examination of the appellant on those two contracts. My Lord has described the nature of the contracts, and I need not describe them again.

So far as the relevant proceeding before Slade J. is concerned, it is stated in the affidavit of Mr. King on behalf of the Official Receiver sworn on July 19, 1957, that what was sought before Slade J. when the matter was before him on appeal was, in his words, "an order for cross-examination which was refused at that "stage because the issue before the judge was an adjourned "appeal relating to the form and completeness of the account "rendered or to be rendered by the applicant pursuant to the "orders of the court." In the same affidavit it is said that the learned judge, while saying that the account which was before him could not be said to be a failure to comply with the order under which it was made in point of form, clearly made it plain that he thought that it might well happen that, on investigation of the account and investigation of the materials relied upon in connexion with it, the matter might require to be probed further by the trustee in bankruptcy. So, having regard to those two elements in the hearing before Slade J., it appears to me to be quite impossible to say that the principle of *Greenhalgh's* case [14] applies by reason of the Official Receiver having failed to ask Slade J. for the relief for which he is asking by his present summons.

Then, as to the proceedings before Master Clayton, there appears this uncontradicted paragraph in the same affidavit of

[13] [1947] 2 All E.R. 255. [14] Ibid.

C. A.

1958

A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Romer L.J.

Mr. King: "It was with a view to obtaining directions and an "order for 'surcharging and falsifying' the applicant's account "and to cross-examining him in support thereof that application "was made to Master Clayton, who was eventually of the opinion "that no such order or directions could be made or given under "R.S.C., Ord. 52, r. 25." I can only read that as a categorical statement of fact that the reason why Master Clayton refused to direct this cross-examination which he was asked to do was because he took the view that he could not make such an order under the particular rule under which the application for an account had been made.

Therefore, just as before Slade J., so also before Master Clayton, an application was made for cross-examination and it was rejected in each case, by Slade J. on the ground that he could not deal with it on an adjourned appeal relating to the form of completeness of the account, and before Master Clayton because the order sought could not be made under R.S.C., Ord. 52, r. 25. It appears to me, accordingly, that it cannot be said that the position here is within any reasonably measurable distance of the principle of *Greenhalgh's* case.[15]

That being so, it seems to me that that objection, which was the prime objection urged by Mr. McKinnon on the appellant's behalf, fails. I would only add that the burden of proving that this principle, which is an extended branch of the general principle of res judicata, should apply, lies upon the appellant, and, in my judgment, he has certainly failed to discharge it.

The only other point about which I might say one word is the alleged delay on which the appellant relies. I think that has been quite satisfactorily explained, although, as my Lord has said, at first sight it did seem to call for some explanation. But it has to be remembered that the Official Receiver as trustee in bankruptcy is under no obligation to take any steps until he is in funds sufficient to enable him to do so, and we were told that no such funds became available for some considerable time after the receiving order and adjudication, and as soon as he was in funds the Official Receiver promptly took such steps as were open to him, and he was thwarted from taking proceedings in every possible way Mr. Swirsky could think of. I am satisfied that no legitimate criticism can be advanced on that ground.

It is further to be observed that Mr. Swirsky has from first to last never suggested that he is in any way embarrassed by the length of time that has gone by and that by reason of the passage of time he has now failed to remember what happened and is not in a position to give the information which the Official Receiver is requiring. I have no doubt that if that had been so, he would have said so; but he has not said so, and, indeed, has maintained a marked silence on that part of the case, as he has on every other aspect of the case in the affidavits which he has sworn and the letters which he has written.

[15] [1947] 2 All E.R. 255.

For the rest, I entirely agree with all my Lord has said, and I think that this appeal should be dismissed.

C. A.
1958
A Debtor, No. 472 of 1950, *In re. Ex parte* Swirsky.

Ormerod L.J. I agree, and there is nothing I wish to add to the reasons which have already been fully expressed by my brother Jenkins and my brother Romer. The only thing I wish to say is that I am in full agreement with the remarks that have fallen from them as to the merits of this appeal.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bell & Ackroyd; Tarry, Sherlock & King.*

J. A. G.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* VACCARI.

C. C. A.
1958
Feb. 10.
Cassels, Streatfeild and Slade JJ.

Criminal Law — Gambling — Contribution to insolvency by gambling— Liability for income tax at date of receiving order—Large sums lost by gambling within two previous years—Whether offence committed —Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 157 (1) (*a*) (*b*).

The appellant, a café proprietor, who owed income tax amounting to £7,000, was adjudicated bankrupt and subsequently prosecuted for contributing to his insolvency by gambling contrary to section 157 (1) of the Bankruptcy Act, 1914.[1] At the trial it was not disputed that the appellant had lost some £6,000 by gambling in the two years prior to the date when the receiving order was made:—

Held, that a debt due to Inland Revenue by way of income tax by a trader or a person engaged in business was not a debt "contracted in the course and for the purposes of such trade or "business," and therefore, although the appellant had considerably diminished his estate by gambling, the case did not come within the mischief contemplated by section 157 (1), and the convictions must be quashed.

Appeal against conviction.

The appellant, Amedeo Vaccari, was indicted before the deputy-chairman of County of London Sessions for three offences

[1] Bankruptcy Act, 1914, s. 157 (1): "Any person who has been "adjudged bankrupt, or in respect "of whose estate a receiving order "has been made, shall be guilty of a "misdemeanour, if, having been "engaged in any trade or business, "and having outstanding at the date "of the receiving order any debts "contracted in the course and for the "purposes of such trade or business, "—(*a*) he has, within two years "prior to the presentation of the "bankruptcy petition, materially con- "tributed to or increased the extent "of his insolvency by gambling or "by rash and hazardous speculations, "and such gambling or speculations "are unconnected with his trade or "business; or (*b*) he has, between "the date of the presentation of the "petition and the date of the "receiving order, lost any part of his "estate by such gambling or rash "and hazardous speculations . . . :"

C. C. A.
1958
Regina
v.
Vaccari.

under the Bankruptcy Act, 1914. The first count of the indictment was laid under section 157 (1) (*a*) of the Act and alleged that he, having been adjudged bankrupt, and having been engaged in business as a café proprietor, and having outstanding at the date of a receiving order made against him certain debts contracted in the course and for the purposes of such business had, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling, which was unconnected with his business. The second count was in similar terms but was laid under section 157 (1) (*b*) of the Act and charged him with losing part of his estate by gambling. The third count alleged a failure to keep proper books of account contrary to section 158 (1).

At the trial the evidence for the prosecution was that the appellant had been running a café in the East India Dock Road for many years. In January, 1956, the Inland Revenue obtained a judgment against him for over £5,000 in respect of unpaid income tax over a period of years and, as he failed to pay, they presented a bankruptcy petition against him and a receiving order was made in November, 1957. At the date of the receiving order his indebtedness to the Inland Revenue had increased by £2,000 by reason of a further assessment for 1955. He also owed £23 in respect of goods supplied to his café. It was not disputed that during the two years prior to the making of the receiving order the appellant had lost some £6,000 by gambling.

At the close of the case for the prosecution a submission was made on behalf of the appellant that an income tax liability was not a debt "contracted in the course and for the purpose of such "trade or business" as set out in section 157 (1) of the Act, but the deputy-chairman ruled that it was a debt within the section and directed the jury accordingly. The jury convicted on all three counts of the indictment, and the appellant was sentenced to six months' imprisonment on each of the first two counts, and three months' imprisonment on the third count, to run concurrently. He appealed against his convictions on the first two counts by certificate of the deputy-chairman.

Victor Durand for the appellant.
Alastair Morton and *Patrick Whelon* for the Crown.

The following cases were cited in argument: *Strong & Co. of Romsey Ltd.* v. *Woodifield*[2]; *Inland Revenue Commissioners* v. *Alexander von Glehn & Co. Ltd.*[3]; *Smith's Potato Estates Ltd.* v. *Bolland*[4]; *Allen (H.M. Inspector of Taxes)* v. *Farquharson Bros. & Co.*[5]

Cassels J., delivering the judgment of the court. This case comes to the court by the certificate of the deputy-chairman of

[2] [1906] A.C. 448; 22 T.L.R. 754.
[3] [1920] 2 K.B. 553; 36 T.L.R. 463.
[4] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.
[5] (1932) 17 T.C. 59.

County of London quarter sessions, before whom the appellant was convicted, and raises a question which is probably of some importance. [His Lordship stated the facts, read section 157 (1) of the Bankruptcy Act, 1914, and continued:] The whole case turned on the debt to the Inland Revenue, and it was decided as a question of law by the deputy-chairman that such a debt could be regarded as a debt contracted "in the course and for "the purposes of such trade or business." The deputy-chairman left to the jury the question whether the appellant had increased his insolvency by gambling, and on the first two counts of the indictment the jury did not have much difficulty in arriving at the conclusion that he had undoubtedly done so because he had not paid his tradesmen and he had not paid the Inland Revenue. But is a debt due to the Inland Revenue a debt contracted in the course and for the purposes of such trade or business?

We have listened to the argument of Mr. Durand, for the appellant, who has put everything before us which could possibly be put. He has also found some authorities on the point which were not found at the trial, and counsel for the Crown finds that he is quite unable to support the conviction on the first two counts, or to argue that a debt due to the Inland Revenue by a trader or a man in business is a debt contracted in the course and for the purposes of such trade or business. This court has been concerned to discover what is the nature of the debt due to the Inland Revenue by way of income tax. Income tax is not a debt arising in the course of the trade or business; it is the Crown's share of the profit after that has been ascertained. The authorities which have been cited to the court go to show that which was already well established, that a trader cannot deduct from his profits the cost of having to pay damages to a person who happens to have been injured by a faulty chimney on licensed premises. He cannot deduct the costs of bringing an action against the Inland Revenue on a matter concerned with income tax. He cannot deduct the cost of unsuccessfully defending an action brought against him by the Inland Revenue. In other words, income tax is not a debt arising in the course or out of the trade or business. It is a liability due directly to the Crown and is calculated on the profits or gains in the course of the business but has nothing to do with the actual business in the way of a trade debt. It is not a trade debt, but a statutory liability which has to be paid, and it therefore could not possibly be held to come within the four corners of the words of section 157 (1) (*a*) of the Statute, namely, a debt "contracted in the course and for "the purposes of such trade or business."

In the course of the argument before the deputy-chairman it was argued, so this court understands, that it would be strange if a taxpayer who succeeds in delaying payment of his just dues to the tax collector can enjoy himself as much as he likes by gambling, so that when he is made bankrupt his estate has been considerably diminished by gambling and yet

C. C. A.
1958
Regina
v.
Vaccari.

would not come within the mischief of section 157 (1) (*a*). That is not a matter for this court; it is a matter for Parliament. We have to interpret the law as we find it, and the Bankruptcy Act, 1914, is applicable, and only applicable to a man's trade or business, and a debt which is contracted in the course and for the purposes of such trade or business.

Therefore, the convictions on counts 1 and 2 must be quashed, but the conviction on count 3 for not keeping proper books remains. The appellant does not in fact appeal against that conviction or the sentence of three months' imprisonment. As he has already served it with the exception of a day or two he must remain in prison until he has completed that sentence. To the extent which I have mentioned this appeal is allowed and the convictions on counts 1 and 2 are quashed.

Appeal allowed.

Solicitors: *Hardcastle, Sanders & Armitage; Director of Public Prosecutions.*

E. M. W.

[COURT OF APPEAL.]

C. A.
1958
Jan. 30, 31.

Parker and Sellers L.JJ.

*LES FILS DREYFUS ET CIE SOCIÉTÉ ANONYME *v.* CLARKE.

Practice and Procedure—Summary procedure under Order 14—*Affidavit in support of application — Application to sign judgment under Ord.* 14, *r.* 1 (*a*)—*Plaintiff assignee of debt—Sufficiency of supporting affidavit — Whether defects curable by supplementary affidavits — Failure to verify assignment in affidavit — Whether cured by production of assignment—R.S.C., Ord.* 14, *rr.* 1, 2.

A company, the assignees of a debt due from C., sought leave to sign final judgment against him under R.S.C., Ord. 14,[1] for the

[1] R.S.C., Ord. 14, r. 1: "(*a*) "Where the defendant appears to a "writ of summons specially indorsed "with or accompanied by a statement "of claim under Ord. 3, r. 6, the "plaintiff may on affidavit made by "himself or by any other person who "can swear positively to the facts, "verifying the cause of action and "the amount claimed (if any liqui-"dated sum is claimed), and stating "that in his belief there is no "defence to the action except as to "the amount of damages claimed, if "any, apply to a judge for liberty to "enter judgment for such remedy or "relief as upon the statement of "claim the plaintiff may be entitled "to. The judge thereupon, unless "the defendant shall satisfy him "that he has a good defence to the "action on the merits or shall dis-"close such facts as may be deemed "sufficient to entitle him to defend "the action generally, may make an "order empowering the plaintiff to "enter such judgment as may be just, "having regard to the nature of the "remedy or relief claimed."

R. 2: "The application by the "plaintiff for leave to enter final "judgment under r. 1 shall be made "by summons returnable not less "than four clear days after service "accompanied by a copy of the affi-"davit and exhibits referred to "therein."

debt, together with interest up to the date of payment. The application was supported by an affidavit by one of their directors in which he said that C. was indebted to the plaintiffs in the sum claimed (particulars of which claim appeared by the endorsement on the writ of summons) and that he was so indebted at the commencement of the action. The deponent further stated that it was within his knowledge that the said debt was incurred and was still due and owing.

The master gave leave to enter judgment, but on appeal to the judge, Havers J. held that the court had no jurisdiction to consider the matter because the assignment had not been verified by the plaintiffs' affidavit (or by other affidavits filed subsequently before the master); accordingly, he dismissed the plaintiffs' claim, and they appealed. At the hearing of the appeal it appeared that the original assignment had in fact been put in before the master without objection being taken:—

Held, (1) that the affidavit was a defective support to a summons under Order 14 and did not sufficiently verify the assignment, but that that defect had been cured by the production of the original.

(2) That the court had jurisdiction to allow a plaintiff to seek to cure defects in an affidavit filed in support of an Order 14 summons by supplemental affidavits, and in deciding whether there was jurisdiction to grant him leave to enter final judgment regard was to be had at the end of the day to all the affidavits that had been filed.

Begg v. *Cooper* (1878) 40 L.T. 29 applied.

Lagos v. *Grunwaldt* [1910] 1 K.B. 41; 26 T.L.R. 69 and *Symon & Co.* v. *Palmer's Stores (1903) Ltd.* [1912] 1 K.B. 259 considered.

(3) That, accordingly, in the present case the court had jurisdiction to consider the plaintiffs' claim, and as, on the facts, there did not appear to be a bona fide triable issue which would have entitled the defendant to unconditional leave to defend, the master's order should be restored.

Quaere, whether it is a condition precedent to the issue of a summons under Order 14 that the application should be supported by *an* affidavit, however inadequate.

Decision of Havers J. reversed.

APPEAL from Havers J.

The following statement of the facts is taken substantially from the judgment of Parker L.J.: By a specially indorsed writ dated October 24, 1957, Les Fils Dreyfus et Cie Société Anonyme (hereinafter called "the plaintiffs"), a corporation in Switzerland, alleged, first, that on or about December 5, 1956, Guinness Mahon & Co., a firm of merchant bankers in London lent to the defendant, Thomas Oliver Neville Clarke, the sum of £10,000 at a stated rate of interest, repayable not later than April 30, 1957. Secondly, they alleged that on October 10, 1957, namely, after the sum had become due, Guinness Mahon & Co. assigned the debt to the plaintiffs; and thirdly, that notice of the assignment had been given to the defendant, that he had been called on to pay, but had wrongfully failed and neglected to do so. The plaintiffs claimed in addition to the debt of £10,000, about £195 interest and future interest until payment.

The defendant appeared to the writ. On October 31, a director of the plaintiffs swore an affidavit as follows: "1. The

C. A.
1958
Les Fils Dreyfus et Cie Société Anonyme v. Clarke.

"defendant Thomas Oliver Neville Clarke is justly and truly "indebted to the above-named plaintiffs in the sum of "£10,194 19s. 5d. representing a capital sum of £10,000 owing "by the defendant to the plaintiffs together with the sum of "£194 19s. 5d. interest thereon, and was so indebted at the "commencement of this action. The particulars of the said "claim appear by the indorsement on the writ of summons in "this action. 2. I verily believe that there is no defence to this "action. 3. It is within my knowledge that the said debt was "incurred and is still due and owing. I am duly authorized by "the plaintiffs to make this affidavit."

A summons under R.S.C., Ord. 14, was issued the following day, November 1, and the matter came before Master Jacob for hearing on November 7 on that affidavit. The defendant desired to contest the summons, but had no affidavit in reply. The master gave leave to the plaintiffs to enter judgment, but stayed the drawing up of the order for four days to enable the defendant to file an affidavit and ordered that if he did so there should be liberty to restore. On November 11, the defendant did file an affidavit in reply and the summons was restored. After at least one adjournment, when further affidavits were filed by both sides, the matter was dealt with finally by the master on November 18 on all the affidavits then before him, and he gave leave to the plaintiffs to enter final judgment for the sum claimed.

The defendant appealed to Havers J. in chambers. On December 18, the judge adjourned his judgment into open court and dismissed the plaintiffs' claim, ordering them to pay the defendant's costs forthwith under Ord. 14, r. 9 (*b*). The plaintiffs appealed.

The contentions of the plaintiffs before Havers J. and the conclusions of the judge are summarized in the judgment of Parker L.J.

At the hearing of the appeal it appeared that the original assignment had been produced at the hearing before the master without objection being taken.

L. G. Scarman Q.C. and *C. F. Dehn* for the plaintiffs.

F. W. Beney Q.C., *M. G. Polson* and *Ian Kennedy* for the defendant.

In addition to the cases referred to in the judgment, the following were cited in argument: *May* v. *Chidley*[2]; *Pathé Frères Cinema Ltd.* v. *United Electric Theatres Ltd.*[3]; *Powszechny Bank Zwiazkowy W. Polsce* v. *Paros.*[4]

Parker L.J. This is an appeal from the decision of Havers J. given on December 18, 1957, allowing an appeal from the master, who, on an application under Ord. 14, had given the plaintiffs

[2] [1894] 1 Q.B. 451.
[3] [1914] 3 K.B. 1253; 30 T.L.R. 670.
[4] [1932] 2 K.B. 353.

leave to sign final judgment. In allowing the appeal, the judge did not give the plaintiffs leave to appeal: he merely dismissed the application on the ground that he had no jurisdiction. He thus left it to the plaintiffs, if so advised, to bring further proceedings under Ord. 14. In those circumstances it seems to me that this is a case where the court has jurisdiction to entertain the appeal, and indeed Mr. Beney on behalf of the defendant has not argued to the contrary.

[His Lordship stated the facts set out above and continued:] Mr. Beney for the defendant raised a number of points before Havers J. He submitted, first, that the affidavit of October 31 filed by the plaintiffs was defective in two respects: first, that it did not verify the original debt to Guinness Mahon & Co. or verify that it was still due and owing at the time of the alleged assignment to the plaintiffs; and, secondly, he said it did not verify the assignment itself, either by saying that the deponent had knowledge of it or by exhibiting it. Mr. Beney then went on to submit that in those circumstances the court had no jurisdiction to inquire into the merits at all. Put shortly, he said it was a condition precedent to the issue of the summons that there should be a proper affidavit under the order and that defects in it could not be cured. In the alternative, he submitted that if he was wrong on that point, at any rate the further affidavits which were filed did not cure the defects; and finally he appealed on the merits.

The judge in a long and careful judgment upheld Mr. Beney's first contention that the affidavit was defective in those two respects; but he was against him on the second objection and held that any defect could be cured by further affidavit. He then went on to hold that the first defect complained of, namely, that the original debt to Guinness Mahon & Co. was not verified, or that the money was still due and owing at the date of the assignment, had been cured by subsequent affidavits; but he upheld Mr. Beney in his second criticism in regard to the assignment and held that at the end of the day, looking at all the facts, the assignment had not been verified. Accordingly, following the decision of the Court of Appeal in *Symon & Co.* v. *Palmer's Stores (1903) Ltd.*,[1] he held that he had no jurisdiction to entertain the matter. He, accordingly, dismissed the claim, and under rule 9 (*b*) of Order 14, ordered the plaintiffs to pay the defendant's costs forthwith. It would seem, therefore, that the only point on which the judge was against the plaintiffs was in regard to the failure to verify the assignment.

Before this court Mr. Scarman makes two submissions in regard to that. He says, first, that on a fair and reasonable reading of the first affidavit of October 31, the deponent did sufficiently verify the assignment. Secondly, he says that though the assignment was never formally exhibited to any affidavit, it

[1] [1912] 1 K.B. 259.

C. A.
1958
Les Fils Dreyfus et Cie Société Anonyme v. Clarke.
Parker L.J.

was in fact put in before the master. Finally, in case he is wrong on both points, he has asked and obtained the leave of this court to file and put in a further affidavit exhibiting the original assignment.

As regards his first submission, in my view this is a thoroughly bad affidavit in support of an Order 14 summons. It is the ordinary form used and properly used in the case of a simple debt, but it is wholly inadequate and defective for the purposes of dealing with a case such as this. In the notes to Order 14, r. 1, in the Annual Practice for 1958 there appears quite clearly at p. 246 the proper way to deal with this case. The note says: "Plaintiff assignee of debt.—Where the plaintiff sues as assignee "of a debt, the affidavit should be made by the assignee and "assignor, jointly, proving the assignment; and severally by the "assignor proving that the debt was owing at the time of the "assignment." As the judge held, the affidavit clearly did not define the original debt to Guinness Mahon & Co. That, however, if cure is permissible, has been cured, as Mr. Beney concedes, by the further affidavits. Mr. Scarman nevertheless maintains that, at any rate in regard to the assignment, this is a sufficient affidavit. Put shortly, I think his argument is this, that by paragraph 3 the deponent says that the said debt was incurred and is still due and owing. If one goes back to paragraph 1, one finds that the said debt is the debt owing to the plaintiffs, particulars of which have been given in the statement of claim; and it then goes one step forward and says that that is the debt arising on the assignment referred to in the statement of claim, and, accordingly, that that is a sufficient verification of the assignment.

I agree that there is, as it were, an oblique reference to the assignment in this affidavit; but I am perfectly satisfied that it is not a proper affidavit in these circumstances to verify the assignment. I am not saying that the assignment itself should have been exhibited, but either the assignor or the assignee should specifically have sworn that in his knowledge there was this assignment; and, incidentally, perhaps it is worth mentioning that if and in so far as this affidavit does verify the assignment, it does not verify an absolute assignment.

In those circumstances I cannot accept Mr. Scarman's argument on the first point; but the matter does not rest there. It is always difficult in this court to go into questions as to exactly what happened before the master, but it seems to me reasonably plain that the original of this assignment was in fact put in and handed to the master; and indeed a copy, albeit without signatures, was handed to the defendant's representative. It is also true that there was no express consent given to that course being taken by those representing the defendant. At the same time, no objection was taken and no condition was imposed that the assignment should be exhibited to an affidavit. In those circumstances, I am, for my part, satisfied that the assignment

was put in, and, of course, remained in, and that the production of the original in those circumstances cures the defect in the affidavit. I should add that most unfortunately this contention apparently either was not raised or was not pressed before the judge. It seems to have been rather lost sight of; but, as I have said, I am satisfied it was put in and the omission to refer to that before the judge can be properly dealt with, I think, when it comes to a question of an order for costs.

Mr. Beney—and this is the more difficult part of the case—has sought to uphold the judge's judgment by raising again the second contention that he raised before the judge, namely, that it is a condition precedent to the issue of a summons under Order 14 that there should be a proper affidavit, and that if there is a defect in the affidavit filed, it cannot thereafter be cured. In regard to that, as long ago as 1878, in *Begg* v. *Cooper*,[2] it was held, to quote the headnote, that: "The making of an affidavit "required by r. 1 (*a*) of Order 14 is not a condition precedent "to the issue of the summons for leave to sign final judgment. "So that, where the plaintiff made a defective affidavit, then "obtained his summons, and afterwards swore a fresh and good "affidavit, it was held (affirming the decision of the Queen's "Bench Division, Cockburn C.J., Mellor and Field JJ.) that the "issue of the summons was good, and leave to sign final "judgment must be given."

It is true that the wording of the rule in 1878, at the time of *Begg* v. *Cooper*,[2] was in a slightly different form to that in which it is now; but I agree with the judge, who felt that there was no difference between the rules now and then which would lead to a different interpretation; and, as far as I know, *Begg* v. *Cooper*[2] has never been disapproved in any later case.

Mr. Beney then referred us to a note in the Annual Practice for 1958, at p. 246—the note headed "Plaintiff's affidavit," in which this appears: "The affidavit must be produced before "summons is issued. *Begg* v. *Cooper*,[2] which held otherwise, "has not been acted upon in practice, and was so disregarded "on this point by authority."

Thanks to the industry of junior counsel in the case, it appears —and I do not propose to go into it in detail—that down to 1888, at any rate, in Wilson's Practice, 4th ed., at p. 214, and 7th ed., at p. 167, *Begg* v. *Cooper*[3] is referred to and the statement is made, following *Begg* v. *Cooper*,[3] that the affidavit need not be filed before the issue of the summons. The Annual Practice White Book of 1886–87 took the same line at p. 199; but in the White Book for 1889–90 there is a note at p. 267 to the effect that after the decision in *Begg* v. *Cooper*[3] instructions were given that it was not to be acted upon in so far as it said that the affidavit was not a condition precedent to the issue of the summons, and reference was then made in that note to Archibald's

[2] (1878) 40 L.T. 29. [3] Ibid.

C. A.
1958
Les Fils Dreyfus et Cie Société Anonyme v. Clarke.
Parker L.J.

Practice at Judges' Chambers, 2nd ed. (1886), at p. 62, and reference to Archibald's Practice, 1st ed. (1879), at p. 36, confirms that very shortly after *Begg* v. *Cooper*,[3] and allegedly on the ground of mistake, instructions were given—exactly by whom is not clear—that *Begg* v. *Cooper*[3] was not to be acted on in that respect; and it is from that passage that that note in the White Book is now derived.

If one looks at the Yearly Practice, which is known as the Red Book, again up to 1940, and certainly in the edition of 1918, it is said in the notes at p. 128 that *Begg* v. *Cooper*[3] is not acted on in practice.

Mr. Beney says with some force that if, notwithstanding *Begg* v. *Cooper*,[3] the practice since has been that an affidavit must be produced before the issue of the summons in order to found jurisdiction, that must be a proper affidavit, because it is idle to say that any affidavit can be put in then and the defects cured by further affidavits in the course of the proceedings. It is an attractive argument and may be logically sound, but it does produce a revolutionary idea in regard to practice in chambers. To say now that an affidavit filed by the plaintiff in Order 14 proceedings cannot be, as it were, supplemented by a further affidavit by the plaintiff—of course with the leave of the court—is something which startles one, and, as far as I know, no case has ever heretofore suggested that with the leave of the court the plaintiff's affidavit cannot be supplemented. And indeed, it is to be observed that in the *Symon* case,[4] when the matter came before the court finally, there was one affidavit at least supplementing the original affidavit and seeking to cure, but failing in that case to cure, defects in the original affidavit, and no comment was made before the court that that was wholly improper. *Begg* v. *Cooper*[5] itself, quite apart from what it said with regard to the first point as to a condition precedent, said quite plainly that defects could thereafter be cured; and it is to be observed that in the 1918 edition of the Red Book the note dealing with *Begg* v. *Cooper*[5] says, at p. 128: "That case, however, shows that "any defects or omissions in the affidavit originally filed may be "allowed to be set right or supplied by an affidavit made "subsequently"; and then goes on to say: "See, however, "*Lagos* v. *Grunwaldt*,[6] where the Court of Appeal appears to "have held that the defect in the plaintiff's affidavit was fatal." It is true that in *Lagos* v. *Grunwaldt*[6] at the end of the day it was found that the affidavits, looked at as a whole, were still defective, and that, as in *Symon's* case,[7] led to the result that the court had no jurisdiction; but there—and I think there alone—is a reference in the practice notes to the fact that the affidavit can be cured. I have no reason to doubt—neither had the judge—that there always has been and is jurisdiction in the court to

[3] 40 L.T. 29.
[4] [1912] 1 K.B. 259.
[5] 40 L.T. 29.
[6] [1910] 1 K.B. 41; 26 T.L.R. 69.
[7] [1912] 1 K.B. 259.

allow the affidavit to be supplemented, and that in deciding jurisdiction one looks at the matter at the end of the day on the affidavits that have been filed.

Accordingly, in my judgment, Havers J. was wrong in dismissing the application for want of jurisdiction. The judge in those circumstances did not, of course, deal with the merits. Both parties before us have invited this court to deal with them, and I will do so very shortly. The original loan, as I have said, made in December, 1956, was a loan of £10,000. There was a written agreement providing for repayment on April 30, 1957. The defendant's defence put up in his affidavit is in effect this: True I signed that written agreement, but it does not express the real bargain. The real bargain was that I was to have this £10,000 for two years firm; and I only signed that agreement providing for repayment on April 30, 1957, because I was told, or I understood, that it would be illegal under some regulation to provide for repayment at a later date than six months. That is the defence which he puts up, and Mr. Beney maintains that that raises a triable issue which would entitle him to unconditional leave to defend. He has referred to *Jacobs* v. *Booth's Distillery Co.*,[8] which is always quoted in these cases, and I hope I am mindful that in dealing with a matter of this sort, which is a summary procedure whereby a defendant may be prevented from having his case tried before the court, the matter must be looked at very strictly; but, at the same time, I am satisfied that in the present case there is (if I may put it in this way) no bona fide triable issue. The matter does not rest on that mere statement of the defendant in his affidavit. The court has seen quite a lot of the correspondence. Every single document, as far as I can see, is consistent only with the true bargain having been that set out in the written document; and one cannot put out of one's mind the fact that this defence was put up for the first time on November 11, 1957, at a time when the matter had already been dealt with once by the master. I would allow this appeal and restore the order of the master.

SELLERS L.J. I so entirely agree with the judgment of my Lord and his reasonings that I shall not detract from the clarity of our decision by using any words of my own.

Appeal allowed.

Solicitors: *Rowe & Maw; G. F. Wallace & Co.*

E. D.

[8] (1901) 85 L.T. 262.

1958
Feb. 24.

PRACTICE DIRECTION (COURT FEES AND FIXED COSTS).

Costs — Court fees and fixed costs — Alteration — Supreme Court Fees (Amendment) Order, 1958 (*S.I.* 1958, *No.* 160 (*L.*3).

COURT FEES

Attention is drawn to certain amendments to court fees pursuant to the Supreme Court Fees (Amendment) Order, 1958 (S.I. 1958, No. 160 (L.3)). This Order comes into operation on March 1, 1958, and applies only to proceedings commenced on or after that date.

Included in these amendments are the following:—

(1) The fee on issuing a writ of summons is increased from £2 to £3 where the claim is solely for a liquidated sum not exceeding £100 and to £4 in all other cases.

(2) The fee on signing a judgment in default of appearance or of defence, or pursuant to an order under Order XIV is abolished.

(3) The fee on issuing an originating summons to which no appearance is required is increased from 10s. to £2 (with an exception in certain matrimonial causes).

FIXED COSTS

As an interim measure until such time as Appendix P is amended, the following alterations will be made in proceedings to which the above Order applies, in the amounts indicated in the Scale of Fixed Costs issued by the Senior Master dated September 1, 1956, as amended on February 18, 1957:—

Four Day Costs

Where the amount claimed is £40 and over but less than £75 (one defendant):—

	£	s.	d.		£	s.	d.
Town Cases increased from	4	8	0	to	5	8	0
Country Cases increased from ...	4	18	0	to	5	18	0

Where the amount claimed is £75 and over but less than £300 (one defendant):—

	£	s.	d.		£	s.	d.
Town Cases increased from	6	10	0	to	7	10	0
Country Cases increased from ...	7	0	0	to	8	0	0

Where the amount claimed is £300 and over (one defendant):—

	£	s.	d.		£	s.	d.
Town Cases increased from	6	10	0	to	8	10	0
Country Cases increased from ...	7	0	0	to	9	0	0

JUDGMENT IN DEFAULT OF APPEARANCE OR OF DEFENCE

Where £300 or over is recovered:—

	£ s. d.		£ s. d.
Town Cases increased from	9 0 0	to	10 0 0
Country Cases increased from ...	10 0 0	to	11 0 0

JUDGMENT UNDER ORDER XIV

Where £300 or over is recovered:—

	£ s. d.		£ s. d.
Town Cases increased from	12 15 0	to	14 5 0
Country Cases increased from ...	13 10 0	to	15 5 0

JUDGMENT ON DISCONTINUANCE OR ON ACCEPTANCE OF MONEY PAID INTO COURT

	£ s. d.		£ s. d.
Costs on signing Judgment decreased from	1 7 0	to	0 17 0

All other amounts in the Scale of Fixed Costs remain unaltered.

R. F. BURNAND,
Senior Master of the Supreme Court.

February 24, 1958.

[NORWICH CONSISTORY COURT.]

* *In re* PARISH OF CAISTER-ON-SEA. NORFOLK COUNTY COUNCIL *v.* KNIGHTS AND OTHERS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE.

1957
Aug. 20; *Sep.* 27, 28; *Oct.* 21; *Nov.* 15.

Ellison Ch.

Ecclesiastical Law—Faculty—Burial ground—Disinterment followed by reinterment in communal grave—Road widening scheme. Cemetery.

A county council, as highway authority, sought a faculty to enable them to use certain consecrated land for the purposes of a road widening scheme, involving interference with a large number of graves in that land. Proposals were put forward for the exhumation and subsequent reinterment of some 400 human remains, most of which were identifiable. Such remains as could not be identified would be reinterred together in a communal grave:—

Held, that while there was no general rule or doctrine of the Church of England against exhumation and subsequent reinterment in another place, the grant of a faculty for this purpose was a

---

[Reported by M. B. KELLY, ESQ., Barrister-at-Law.]

1957

Parish of Caister-on-Sea, *In re.*

matter of discretion, and on the facts of this case the faculty as prayed would be refused.

Petition for faculty.

By their petition dated February 4, 1957, the Norfolk County Council, as highway authority, sought a faculty to take a strip of land along the length of Caister-on-Sea cemetery, which was under the management and control of the Caister-on-Sea Joint Burial Committee, adjacent to Ormesby Road, in order to widen that road by about 4 feet 6 inches, and to make a footpath between the widened road and the new boundary of the cemetery. The scheme involved interference with a large number of graves and the exhumation and subsequent reinterment of some 400 human remains, about 80 of which were unidentifiable. Those that could be identified would be reinterred in separate graves and those that could not, would be reinterred in a communal grave.

The petition was opposed by 27 individual parties who, by order of the court, were formed into seven groups, each group being ordered to be represented by a "representative party "opponent."

The objections of the representative parties opponents raised (inter alia) the following issues: (i) that the number of accidents which were alleged by the petitioners, who had based their case on alleged traffic danger, was excessive; (ii) that exhumation on such a large scale was an unsuitable and unbecoming procedure; (iii) on the question of pedestrians, if certain limited improvements were made to it, many more people would use a footpath through the cemetery, and (iv) on the question of the widening of the roadway, that a proposed alternative scheme was preferable to that put forward by the petitioners. The Caister-on-Sea joint burial committee in their objections confined themselves to the third and fourth points and proposed an alternative scheme.

D. E. H. James (solicitor) for the petitioners.

R. C. Killin (solicitor) for the representative parties opponent.

The joint burial committee were represented by one of their members appointed to act on their behalf.

Cur. adv. vult.

Ellison Ch. stated the facts and referred to the pleadings, and continued: I think that this would be a convenient stage for me to make one or two general observations. The contention of the parties opponent that exhumation and reinterment is an unsuitable or unseemly procedure was developed during the evidence of some of them into the much wider contention that once land was consecrated it should never be interfered with under any circumstances, and that reinterment of unidentifiable remains in a communal grave should not be permitted. I think

that this proposition needs some qualification. Consecration has, of course, a spiritual significance but the act of consecration, essentially judicial and becomes manifest when pursuant to a petition to consecrate, and after due consideration, the Ordinary pronounces a sentence dedicating and setting apart the lands from all common and profane uses. Once consecrated the land falls within the jurisdiction of the Ordinary exercised through the medium of the consistory court. Subsequently, consecration can only be rendered nugatory or its effect taken away by legislative means such as an Act of Parliament.

Although the consistory court is an ecclesiastical court it is nevertheless a court of the realm and one of the Queen's courts, and not infrequently it is called upon to do justice between the church authorities and others of the Queen's subjects. The court has long assumed a jurisdiction to permit within its discretion the user of consecrated land for purposes such as road-widening schemes, where it has been satisfied that it is necessary for public good that such user should be allowed, and many are the examples in the textbooks and reports. In my judgment, there is no doctrinal or other rule which says in effect that the dead once buried in consecrated land shall for ever after take absolute priority over the compelling needs of the living: and if I was satisfied in any case that there was a substantial need based on danger to the living, or other cogent reasons why a road should be widened at the expense of using consecrated land, it would be my duty to grant a faculty to enable that to be done. Under powers granted by the Faculty Jurisdiction Rules, 1939, this court of its own motion summoned the Archdeacon of Norwich, the Venerable Robert Meiklejohn, to assist on these and other aspects. In his evidence the Archdeacon expressed the opinion that there was no general rule or doctrine of the Church of England against exhumation and subsequent reinterment of human remains elsewhere. But he emphasized that, in his opinion, this course should only be taken when it was proved to be necessary and in other cases it should be avoided. On the question of interment in a communal grave he again knew of no doctrinal objection, and he was unable to see any other practical way of interring large numbers of unidentified remains. I accept those views entirely. In my judgment, they are sound. Although communal burial may seem distasteful to some, yet that practice has long been adopted, particularly in cases of national disaster: it followed often as a consequence after heavy bombing raids during the war, and in cases of serious aircraft accidents, and where, for one reason or another, the remains have not been identifiable, communal interment has taken place. I think that it is most unfortunate that this question of communal reinterment should ever have arisen, and it is certainly no fault of the Norfolk County Council that they have been obliged to put it forward in their proposals.

1957

PARISH OF CAISTER-ON-SEA, *In re.*

[The Chancellor then considered the facts, and in the exercise of his discretion concluded that the petitioners had not made out a sufficient case to warrant the grant of a faculty.]

Faculty refused.

Solicitors: *D. E. H. James, Norwich; Ruddock, Middleton & Killin, Norwich.*

[CENTRAL CRIMINAL COURT.]

C. C. C.

1957
Nov. 25.

Glyn-Jones J.

* REGINA *v.* SMITH AND OTHERS.

Criminal Law—Indictment—Separate indictments—One charging manslaughter, the other stealing or receiving — Common evidence — Joinder of charges in one indictment—Purpose of joinder—Voluntary bill.

Criminal Law—Evidence—Depositions—Reading at trial—Substituted voluntary bill of indictment—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 13 (3).

A and B were jointly indicted for manslaughter. In a separate indictment A, B, C, D and E were charged with stealing or receiving. The prosecution intended to rely in one case on almost all the evidence on which it relied in the other:—

Held, (1) that it was in the interests both of justice and of the public that all matters alleged by the prosecution should be heard and disposed of in one trial.

(2) That, since neither indictment could properly be amended, the judge should grant a voluntary bill of indictment.

(3) That the evidence of the witnesses conditionally bound over by the examining justices could properly be read at the trial proceeding upon the voluntary bill.

TRIAL ON INDICTMENT.

Henry Thomas Smith and Robert Semaine were jointly charged, in one indictment, with manslaughter. In a second indictment Smith and Semaine were charged with larceny and with receiving stolen property, Eugene Charles Edward Candler as an accessory after the fact to the charge of larceny and receiving stolen property, and Edward George Richardson and Charles William Richardson with receiving stolen property.

The witnesses to be called by the prosecution numbered about 30 in all. They were each (with the exception of certain medical witnesses) to be called on the trial of each indictment to give the same evidence on each occasion.

R. E. Seaton and *E. J. P. Cussen* for the Crown.
R. A. Kaye for Smith and Semaine.
Peter Rawlinson for Candler.
James Burge for Edward George Richardson.
Victor Durand for Charles William Richardson.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

No case was cited in argument.*

GLYN-JONES J. At the close of the hearing before the examining justices Smith and Semaine were committed to stand their trial on a charge of manslaughter. All the defendants, including Smith and Semaine, were also committed to stand their trial on charges of stealing or receiving. Separate indictments were preferred in this court, one against Smith and Semaine charging manslaughter, another against all the defendants, including Smith and Semaine, charging stealing or receiving.

If these two indictments were to be tried separately, as, being separate indictments, they would have to be, it would be necessary for the prosecution to call in one trial almost all the evidence which would have to be called in the other. It seemed to me that it would be a great waste of time and money that all that evidence should be called twice over; and I have formed the opinion that it would be desirable in the interests of justice and in the public interest that all the matters alleged against these defendants should be heard and disposed of in one trial.

A technical difficulty, however, arises. It was not, as I saw it, possible to amend the indictment for manslaughter by including the other defendants in that indictment which charges the stealing and receiving; nor had I thought it right to amend the indictment for stealing and receiving by adding the charge of manslaughter. It therefore seemed to me that the proper course was to grant a voluntary bill of indictment against all these defendants, in which there shall be included a charge of manslaughter against Smith and Semaine. That has been done, and this trial proceeds upon the voluntary bill.

A further question arises as to whether or not the provisions of section 13 (3) of the Criminal Justice Act, 1925,[1] apply so as to enable the depositions of those witnesses who were conditionally bound over to be read upon this trial. I have come to the conclusion that this is a trial of persons who have been committed for trial for the offences, in the case of Smith and Semaine

* EDITOR'S NOTE: In *Rex* v. *Large* (1939) 27 Cr.App.R. 65, Humphreys J., delivering the judgment of the Court of Criminal Appeal, said (ibid. 68): "In future we think that it "would be better that no other count "should be added to an indictment "for manslaughter. That has always "been the practice in murder cases. "It was formerly the practice in "manslaughter cases, and this court "repeats that it should be the prac-"tice in the future."

[1] Criminal Justice Act, 1925, s. 13 (3): "Where any person has "been committed for trial for any "offence, the deposition of any per-"son taken before the examining "justices may, if the conditions "hereinafter set out are satisfied, "without further proof be read as "evidence on the trial of that "person, whether for that offence or "for any other offence arising out "of the same transaction, or set of "circumstances, as that offence. The "conditions hereinbefore referred to "are . . . (*a*) The deposition must be "the deposition . . . of a witness "whose attendance at the trial is "stated to be unnecessary . . . "(*b*) It must be proved at the "trial . . . that the deposition was "taken in the presence of the "accused and that the accused or his "counsel or solicitor had full oppor-"tunity of cross-examining the wit-"ness. . . ."

C. C. C.
1957
REGINA v. SMITH.
Glyn-Jones J.

of manslaughter and of stealing or receiving, as the case may be, and in the case of the others of receiving. The trial takes place, therefore, upon the charges on which these defendants have all been committed. Each defendant has heard the evidence given by the witnesses conditionally bound over, each has had his opportunity to cross-examine, and I rule that in this case, all the defendants having been committed for trial for the offences with which they are now charged, the depositions of the witnesses conditionally bound over may be read. Any other decision, in my opinion, would cause a wholly unjustified waste of public time and money.

Solicitors: *Director of Public Prosecutions; Freeman (R. G.) & Co.; Prothero & Prothero; Brian Rees & Co.*

[COURT OF APPEAL.]

C. A.
1958
Feb. 17.
Parker and Sellers L.JJ.

* GORFIN *v.* ODHAMS PRESS LTD.

[1956 G. No. 822.]

Barrister—Fees—Leading counsel—Issue of quantum of damages only —Disallowance of costs of leading counsel—Objection to taxation—Taxing master's discretion—R.S.C., Ord. 65, *r.* 27 (41).

The plaintiff brought an action for personal injuries against the defendants, who admitted the claim, put the damages in issue and paid £350 into court. At the trial the plaintiff was represented by leading and junior counsel and the damages were assessed at £650. On the taxation of the plaintiff's costs, the taxing master disallowed the fee of leading counsel and, on appeal, Donovan J. upheld the taxing master:—

Held (1) that notwithstanding the terms of R.S.C., Ord. 65, r. 27 (41),[1] in practice the court will only interfere with the exercise of the taxing master's discretion if it is clear that he has gone wrong in principle, and for that reason matters of quantum only, where no principle is involved, are rarely interfered with; but where a question of principle is involved as, for example, whether two counsel should be allowed, if it can be shown that the master has erred in principle the court would exercise its own discretion.

Ginn v. *Robey* [1911] W.N. 28 and *In re W. T. Potts* [1935] Ch. 334 considered.

(2) That while it was, in general, proper that two counsel should be employed, the fact that the costs of leading counsel were disallowed in any case did not mean that the master must have erred in principle and that, it not having been shown that the master had so erred, the court could not interfere with his decision.

Decision of Donovan J. affirmed.

[1] R.S.C., Ord. 65, r. 27 (41): "Any party who may be dissatisfied "with the certificate . . . of the "taxing officer, as to any item . . . "which may have been objected to ". . . may . . . apply to a Judge at "Chambers for an order to review "the taxation as to the same item ". . . and the Judge may thereupon "make such order as the Judge may "think just. . . ."

APPEAL from Donovan J. sitting in chambers.

The plaintiff, John Gorfin, claimed against Odhams Press Ltd. damages for personal injuries sustained by him by reason of the defendants' negligence or breach of statutory duty. The defendants, admitting that they were guilty of a breach of section 25 (1) of the Factories Act, 1937, disputed the quantum of damages, and they paid £350 into court. The plaintiff was represented before Byrne J., who tried the action, by leading and junior counsel. The defendants were represented by junior counsel only. The judge directed that judgment should be entered for the plaintiff for £650 and costs to be taxed. The taxing master disallowed the plaintiff's costs of leading counsel. In his answer to the plaintiff's objections he stated: "Having "heard long argument on this objection on the original taxation "and on the hearing of this objection, I am of the opinion that "the circumstances of this case did not justify the briefing of "two counsel. No question of principle is involved as to the "allowance or disallowance of two counsel. It is a matter "entirely in the master's discretion (*Payne* v. *Schmidt* [2]). I "therefore overrule this objection."

Donovan J. having affirmed the taxing master's decision, the plaintiff appealed.

The plaintiff's main ground of appeal was that the judge had misdirected himself in holding that the taxing master was not wrong in principle in disallowing the costs of two counsel. The plaintiff contended that the number of counsel was a matter of principle and that in a case such as this there was an established principle that two counsel should be allowed.

John Thompson Q.C. and *J. G. Sheldon* for the plaintiff.
Peter Pain for the defendants.

The following cases were referred to in argument which are not mentioned in the judgments: *Wilson* v. *Wilson, Bobbin & Co. Ltd.*[3]; *Llanover* v. *Homfray*[4]; *Payne* v. *Schmidt*[5]; *Eaves* v. *Eaves & Powell*[6]; *Francis* v. *Francis and Dickerson*[7]; *Frost* v. *London, Brighton & South Coast Railway Co.*[8]; *Jacobs* v. *London, Brighton & South Coast Railway Co.*[9]; *Peel* v. *London & North Western Railway Co.* (*No.* 2)[10]; *Wheeler* v. *Fradd*[11]; *Friend* v. *Solley.*[12] Reference was also made to King's Costs on The High Court Scale (1910), p. 102, Butterworth's Costs (1951), Vol. II, p. 134.

PARKER L.J. stated the facts and continued: Before the judge the plaintiff on appeal argued, as I understand it, and

[2] [1949] 2 All E.R. 741, 743.
[3] (1911) 28 R.P.C. 741.
[4] [1884] W.N. 134, 206.
[5] [1949] 2 All E.R. 741.
[6] [1956] P. 154; [1955] 3 W.L.R. 984; [1955] 3 All E.R. 849.
[7] [1956] P. 87; [1955] 3 W.L.R. 973; [1955] 3 All E.R. 836.
[8] (1870) 39 L.J.(N.S.)Ex. 54.
[9] (1870) 22 L.T. 651.
[10] [1907] 1 Ch. 611.
[11] (1898) 14 T.L.R. 440.
[12] (1847) 10 B. 329.

C. A.
1958
Gorfin v. Odhams Press Ltd.
Parker L.J.

he has argued in this court, that the master had gone wrong in principle; and it was at one time suggested that Donovan J. took the view that the question whether there should be two counsel or one counsel was not a matter of principle at all, but only of quantum, and that therefore he had no jurisdiction to go into the matter. I think it is quite clear from what Mr. Pain has said and also from the note which was made by junior counsel for the plaintiff, that all Donovan J. said was something which judges often say, namely: "If I had "been judging this matter on my own I might well have come "to a different conclusion"; the judge, however, held that this was a matter which was, prima facie, for the discretion of the master and he could not see that the master had erred in principle.

I entirely agree with the judge. Mr. Thompson, who has said everything possible for the plaintiff, admits that he has to show that the master went wrong in principle. Although the terms of R.S.C., Ord. 65, r. 27 (41) are very wide, and in effect treat the matter before the judge in chambers as a re-hearing, I think it is now clear in practice and on authority that the court will only interfere with the exercise of the master's discretion if it is clear that the master has gone wrong in principle. It is for this reason that matters of quantum only, where no principle is involved, are rarely, if ever, interfered with. In other matters, as indeed the question of whether there should be two counsel allowed or one counsel, it is impossible to say that there is no principle involved; and accordingly, if it can be shown that the master has erred in principle, then the court will exercise its own discretion in the matter.

It is sufficient to refer to two cases on that; the first is *Ginn* v. *Robey*,[1] a decision in this court, in which the court (Fletcher Moulton and Buckley L.JJ.) said: "Although the "court had jurisdiction to interfere with the discretion of the "taxing master it was the rarest thing for the court to interfere "except where the taxing master had gone wrong on a matter "of principle. The question whether the fees of two counsel "should be allowed was not purely a question of quantum, but "it was a question which the taxing master was much better "qualified than a judge to decide, and prima facie the court "would not interfere in such a case."

In *In re W. T. Potts*,[2] Farwell J. said: "A matter of this "kind [fee of leading counsel] is prima facie one for the dis-"cretion of the taxing master, and this court is very slow indeed "to interfere with the exercise of that discretion, and, indeed, "in my judgment this court ought not to interfere, unless it "has reason to think that the taxing master, in exercising his "discretion, has acted upon some wrong principle or upon some "misunderstanding of the true position."

[1] [1911] W.N. 28.

[2] [1935] Ch. 334, 339.

What Mr. Thompson says is that now, if it has not become the rule, it is at any rate prevailing practice, that two counsel will be allowed on taxation, except in very special circumstances, and he elevates it, if I may so put it, into a principle and says that the master must therefore have gone against principle in this case, there being no special circumstances involved.

It is perfectly true, and I hope it may continue, that it is in general proper that two counsel should be employed. There are a number of dicta in the cases to that effect, and as has been pointed out, the note in the White Book to Ord. 65, r. 27 (47), says: "Two counsel usually allowed." But to say that, because counsel is disallowed in any case, the master must therefore have erred in principle is a very different matter, and I cannot say in the present case, any more than could the judge, that the master has erred in principle.

Finally, Mr. Thompson drew attention to the last paragraph of the master's answer, which is not very happily worded. That paragraph says: "No question of principle is involved as "to the allowance or disallowance of two counsel."

As a general proposition, I think that is wrong, although it may well be that, as applied to the facts of this particular case, there was no principle involved. Then the master goes on: "It is a matter entirely in the master's discretion," quoting *Payne* v. *Schmidt*.[3] There again it is perhaps not very happily worded; it is a matter which is in the master's discretion, but of course it is not entirely in his discretion, because if he errs in principle then his discretion can be set aside.

However, as I have said, I cannot see that the master erred in principle, and, accordingly, I agree with the judge that whatever one might have decided oneself, hearing the case de novo, this court cannot interfere. I would dismiss the appeal.

SELLERS L.J. I agree with my Lord. Mr. Thompson's forceful argument has indicated and perhaps established that this is a hard case and it might be described as a borderline case. The sum of £650 was recovered in the action and that is a sum which very often would justify the employment of leading counsel. The case was perhaps made more difficult for the plaintiff when it was realised that the sum of £350 had been paid into court in respect of the damages claimed. But it is clear from the answer to the objection given by the master that he had these matters present in his mind and the question for him was whether it was reasonable and prudent to have two counsel, leading counsel and a junior.

Looking at the nature of the injuries in the claim, they were of the most modest type that one finds in pleadings in this type of action. When the medical terms are interpreted, the

[3] [1949] 2 All E.R. 743.

C. A.
1958
Gorfin v. Odhams Press Ltd.
Sellers L.J.

injuries consisted of no more than cuts and bruises. Apparently there must have been some more serious consequences; something else must have developed which would justify the amount of damages.

But having regard to the issue which the master had to decide, I cannot take any different view from that of my Lord, namely, that it was within the master's discretion. If he had said, as he did not say, that in every case where damages only were in dispute two counsel would not be justified, then this court might well have interfered. That would, I think, have been erring in principle, but the master applied his mind to the problem which was for him to decide: should a second counsel be allowed in the circumstances of the particular case.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.; C. A. Rutland.*

B. A. B.

[COURT OF APPEAL.]

C. A.
1958
Feb. 13.
Lord Evershed M.R., Parker and Sellers L.JJ.

* HARDIE *v.* FREDIANI.

Landlord and Tenant — Rent restriction — Possession application — Greater hardship—Dwelling-house reasonably required for occupation by landlord's daughter—Whether reasonable to make order—Movability of other tenants of landlord — Whether relevant consideration—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I, para.* (*h*).

A landlord of a dwelling-house within the scope of the Rent Acts sought to recover possession on the ground that he required it for occupation as a residence by his married daughter, within paragraph (*h*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.[1] The daughter was living with her father and the county court judge was satisfied that the

[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s 3: "(1) No order or judgment for "the recovery of possession of any "dwelling-house to which the prin-"cipal Acts apply or for the eject-"ment of a tenant therefrom shall "be made or given unless the court "considers it reasonable to make "such an order or give such a judg-"ment, and . . . (*a*) the court has "power so to do under the provisions "set out in the First Schedule to this "Act; . . ."

Sched. I, para. (*h*): "the dwel-"ling-house is reasonably required by "the landlord . . . for occupation as "a residence for . . . (ii) any . . . "daughter of his over 18 years of "age . . . Provided that an order or "judgment shall not be made or "given on any ground specified in "paragraph (*h*) of the foregoing pro-"visions of this Schedule if the court "is satisfied that having regard to all "the circumstances of the case, in-"cluding the question whether other "accommodation is available for the "landlord or the tenant, greater "hardship would be caused by grant-"ing the order or judgment than by "refusing to grant it."

landlord reasonably required possession of the house, but decided that, in all the circumstances, it was not reasonable to make the order. The judge took account of the fact that part of the landlord's house was occupied by a married couple and, as it was conceded that if they left there would be sufficient accommodation for the daughter, the judge concluded that it would be more reasonable to move them than the tenant against whom possession had been sought. The landlord appealed, contending that this was not a relevant factor in considering, as required by section 3 (1) of the Act of 1933,[1] whether it was reasonable to make the order:—

Held, that the fact that if the occupants of part of the landlord's house were turned out there would be sufficient room for his daughter, was relevant in considering whether it was reasonable to make the order, and that it could not be said that there was no evidence to support the judge's conclusion that it was not reasonable.

APPEAL from Judge Fraser Harrison, sitting at Liverpool County Court.

The plaintiff, Edmund Wallace Hardie, appealed against the refusal of the county court judge to make an order for the recovery of possession of a dwelling-house known as No. 15 Selwyn Street, Liverpool.

The dwelling-house was within the protection of the Rent Acts and was occupied by the defendant, Francis Frediani, as a statutory tenant, his contractual tenancy having been determined by a notice to quit which expired on September 2, 1957.

The house in which the landlord lived, No. 23 Church Road, Liverpool, had four bedrooms, but there were living in it, in addition to the landlord and his wife (both aged 52), his daughter, a Mrs. Garrod, aged 22, and recently married, her husband, and the landlord's son. A Mr. and Mrs. Sedgewick were also living there, occupying a living-room and a bedroom and having the exclusive use of the butler's pantry for their cooking. In addition the landlord's daughter was expecting a baby in March, 1958. The landlord submitted to the county court judge that they would be uncomfortably crowded when the baby arrived and that it was not generally for the welfare and happiness of his daughter, her husband and their baby that the present occupants, the daughter, her mother, the father and the husband, should all be in the same house. The judge took a favourable view of the landlord and his daughter and agreed with them that it was entirely reasonable for him to seek to recover possession of No. 15 Selwyn Street as a home for his daughter.

In considering the defendant tenant's position, the judge took the view that as a result of the Rent Act, 1957, the proviso to paragraph (*h*) of the Act of 1933 was no longer operative. But he concluded that it was not reasonable to make the order and that if anyone was going to have to move it should not be the tenant of No. 15 Selwyn Street (who had three children aged 16, 11 and 10, and an orphan aged 20 living with him and his wife),

[1] See footnote, p. 318.

C. A.
1958
Hardie
v.
Frediani.

but the Sedgewicks. The landlord's daughter had conceded that if they went there would be sufficient room for her and her family.

The landlord appealed.

Andrew Rankin for the landlord.
Gerson Newman for the tenant.

The following cases were cited in argument: *Cumming* v. *Danson*[2]; *Darnell* v. *Millward*.[3]

Lord Evershed M.R. This was an action for possession of a house, 15 Selwyn Street, in the occupation of the defendant, a wife, and three children aged 16 and under. There is no doubt that the landlord most favourably impressed the judge, who spoke of him as an excellent witness, and the encomium was also extended to his daughter, on whose behalf the landlord had brought the proceeding; for it was one based upon paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Apart for the moment from the point of the proviso following that paragraph, it is, I think, clear enough that by the joint effect of section 3 (1) of the Act of 1933, and this paragraph, a landlord seeking possession for the purpose of the house being occupied as a residence by his daughter (as was the case here) has first to establish that he reasonably so requires it, in order to give the court jurisdiction, and second, he must succeed on the broader issue enshrined in the well-known phrase: "No order . . . shall be made . . . unless the court "considers it reasonable to make [it]." In a case, however, based on paragraph (*h*) there is also the question which was debated before the judge whether the proviso which follows the paragraph also applies, and that proviso states, as again is well known, that an order shall not be made under paragraph (*h*) if the court is satisfied that in all the circumstances, including, as there stated, greater hardship would be caused by making the order than by refusing it.

The tenant sought to rely before Judge Fraser Harrison upon the proviso. I assume that he was well aware of the established proposition that under the proviso the onus is on the tenant to show that greater hardship would be caused by granting the order than by refusing it. But the judge took the view that the proviso had ceased to be operative in these cases by virtue of the Rent Act, 1957. It has now been decided by this court,[1] in the division presided over at the time by Lord Denning, sitting with Hodson and Pearce L.JJ., that that view is not well founded, and that the provisions of the Act of 1957 have not rendered the proviso ineffective in appropriate cases.

[2] [1942] 2 All E.R. 653; 59 T.L.R. 70.

[3] [1950] W.N. 567; 66 T.L.R. (Pt. 2) 1100; sub nom. *Darnell* v. *Millwood* [1951] 1 All E.R. 88.

[1] *Piper* v. *Harvey* [1958] 2 W.L.R. 408; [1958] 1 All E.R. 454.

Mr. Newman, for the tenant, has served a notice to the effect that if the landlord succeeded he would desire to say that this question of greater hardship was wrongly excluded, and that we should give whatever directions were appropriate in those circumstances. The problem has not in fact arisen, because I have come myself to the clear view that we cannot disturb the conclusion at which the judge arrived. I need, therefore, say no more about the greater hardship point.

I return to the language of section 3 of the Act of 1933, which I have already read so far as relevant, and the two points which have to be established in a case such as this, namely, first, that it is reasonable for the landlord to want the accommodation, as he said, for his daughter, and, second, that even so, still it is reasonable for the judge to make the order.

[His Lordship stated the facts and continued:] The judge had no difficulty (particularly since he took a most favourable view of the landlord and his daughter as witnesses) in concluding that it was entirely reasonable for the landlord to seek the order in order to provide No. 15 Selwyn Street as a home for her.

But that is not, as it seems to me, the end of the matter. It was still for the judge to ask whether it was reasonable for him to make the order. That question, in the end of all, he decided adversely to the landlord, and in deciding it he certainly took into account that the defendant, after all, had three children aged 16, 11 and 10, two only of them going to school; and that if anybody had got to move, the right and proper course was for Mr. and Mrs. Sedgewick to move. On the evidence that he had before him the judge was able to conclude—and I do not see how anyone could cavil at the conclusion—that the Sedgewicks were reasonably decent people who might well, in the circumstances, go at once without any difficulty. It was suggested with force by Mr. Rankin that presumably the Sedgewicks themselves had the benefit of a controlled tenancy under the Rent Acts, and that it was not simply a question of waving a hand and saying to the Sedgewicks "Go," and their going. It might involve further proceedings. Indeed, that being so, Mr. Rankin's contention was twofold: first, that even if (contrary to his submission) the position of the Sedgewicks could properly be taken into account, when one asked and answered the question "Was it reasonable "for the landlord to seek the order he sought against tenants of "No. 15 Selwyn Street?" one had then certainly exhausted the admissibility, for all purposes of this case, of the presence of the Sedgewicks; and it was not legitimate to take their presence into consideration in determining the further question whether it was reasonable to make the order. Second, and alternatively, Mr. Rankin says that in any case there was no evidence that they were, in any sensible use of the term, movable. And where was this matter going to end? said he. The landlord appeared to own a certain number of houses, and he might go from place to place

C. A.
1958
Hardie
v.
Frediani.
Lord Evershed M.R.

seeking unsuccessfully to get orders for possession and be constantly told that it was far better to get the other man to go. And so he might eventually, after a long, expensive, and litigious journey, arrive at the position from which he started.

I cannot take quite so gloomy a view of his prospects. But in any case I am unable to agree that the question of the Sedgewicks and their movability is something not to be taken into account on this question of the reasonableness of making the order. This question is one to be determined as a matter of fact upon a consideration of all relevant circumstances. So much has clearly been established, and I see no ground upon which this particular matter could fairly and properly be excluded. It is a question of the weight one would attach to the circumstances that here are two people, Mr. and Mrs. Sedgewick, no part of the family, occupying an appreciable proportion of 23 Church Road, as to which the daughter conceded in evidence that, if they did go, then there would be room enough. How much weight is one going to give to that fact, knowing that the Sedgewicks may try to remain, may seek to raise the defences of the Acts, and so forth?

Turning to the second alternative argument, I can see no ground for supposing that the judge here acted without any basis of evidence. I think he was entitled to say: "The Sedgewicks "are decent people. It may well be that they will not make "difficulties. But, in any case, I bear in mind that they may "raise the defences of the Act, and I also consider what the "chances are likely to be. In all the circumstances, I do not "think it is reasonable to evict the Fredianis, the tenants, and "their three children, even though I do not like Mrs. Frediani "very much." On such a matter of fact, I think on well-established principles, it would not be right for us to interfere, and I see, indeed, no basis which would justify interference.

On the whole, therefore, though I do indeed share the sympathy which the judge obviously felt for the landlord and his daughter, I do not think we can or should interfere with the order made. I would, therefore, dismiss the appeal.

Parker L.J. I agree.

Sellers L.J. I also agree.

Appeal dismissed.

Solicitors: *Purchase Clark & Treadwell for Rollo & Mills-Roberts, Liverpool; T. L. Hurst, Liverpool.*

E. D.

[COURT OF APPEAL.]

*W. COLLIER LTD. *v.* FIELDING (VALUATION OFFICER).

C. A.

1958
Feb. 21.

Lord Evershed M.R., Parker and Sellers L.JJ.

Rates and Rating — Plant and machinery — Baker's oven — Provers movable parts—Whether rateable—"To such extent as any such "part is, or is in the nature of, a building or structure"—Meaning —Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24—*Plant and Machinery (Valuation for Rating) Order,* 1927 (*S.R. & O.,* 1927, *No.* 480), *Sch., Class* 4.

A company carrying on a bakery business had two ovens over 60 feet long called "60 tray Uniflow ovens." By a conveyor belt to which 60 trays were attached, dough was passed through the ovens at such a rate that it emerged as cooked bread. They also had provers for conditioning which were also operated in similar fashion. This mechanical apparatus for moving the bread weighed some 9 tons. Both the ovens and the provers could be operated without the moving parts in an emergency, but it would not have been commercially practicable to do so. It was not disputed that the ovens and provers themselves fell within Class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927,[1] being structures or in the nature of structures, and were accordingly rateable. It was also not disputed that the motors, which operated the moving parts, were not in the nature of structures and were not rateable. The Lands Tribunal held that the moving parts also were not rateable:—

Held, that, as the ovens and provers appeared in Class 4 of the Schedule to the Order of 1927, they were rateable "to such extent "as any such part" of the ovens and provers were or were in the nature of a building or structure; and that the moving parts were sufficiently severable and distinct to make it reasonable to conclude that if and so far as they were part of any oven or prover, or an essential part of an oven or prover as a working piece of apparatus, nevertheless they were not part of the oven or provers as a structure, and, accordingly, they were not rateable.

APPEAL from the Lands Tribunal.

The respondents, W. Collier Ltd., owned a bakery business and had at their bakery at Duva Leigh ovens and provers. The ovens, known as "60 tray Uniflow ovens," were 60 feet long, the bread being carried into and through the ovens on the 60 trays, which were attached to a conveyor belt. The dough was similarly taken in and out of the provers. The evidence established that while it would not be practicable to operate the ovens and provers without the movable apparatus, in an emergency both the ovens and provers could be operated by hand.

The local valuation court for South Lancashire held that

[1] Plant and Machinery (Valuation for Rating) Order, 1927, Sch.: "*Classes of machinery and plant* "*deemed to be part of the here-* "*ditament.* . . . Class 4. The following parts of a plant or a combination of plant and machinery "whenever and only to such extent "as any such part is, or is in the "nature of, a building or structure:—. . . Burners . . . Ovens "and Stoves; Chambers for:— . . . "Conditioning or Treatment; . . ."

C. A.
1958
W. Collier Ltd. v. Fielding (Valuation Officer).

the movable parts of the ovens and provers, which were described as "(a) trays, chains, sprocket wheels and shafts, driving wheels "and shaft, gears, motors, fans, etc., used in connexion with "baking ovens; (b) provers, including trays, chains, sprocket "wheels and shafts, driving wheels and shaft, gears and motors, "etc.," were rateable plant and machinery.

The company appealed from that decision to the Lands Tribunal, who found that: "the moving parts do not form an "essential feature of the oven as an oven or the prover as a "chamber for conditioning," and reversed the decision of the local valuation court.

The valuation officer appealed.

The facts found by the Lands Tribunal are sufficiently stated in the judgment of Lord Evershed M.R.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

Michael Rowe Q.C. and *R. W. Leach* for the respondent company.

The following cases referred to in argument are not mentioned in the judgments: *Edwards (Inspector of Taxes)* v. *Bairstow* [2]; *Burton* v. *Ogdens (Brighton) Ltd.* [3]

Lord Evershed M.R. This case is concerned with certain apparatus, known respectively as provers and ovens, in the bakery business of the respondents.

It will suffice for the purposes of this judgment if I confine myself in what follows to the ovens. The ovens in question are made by the well-known firm of Baker Perkins Ltd. Their nature is set out carefully and fully in the decision of the Lands Tribunal, from which I cite this much: "The two ovens are "identical and are marketed as '60 tray Uniflow ovens.'" I pause there to say that the name "60 tray Uniflow ovens" may perhaps give some clue to the mechanical nature of the contrivance in that, by a system of an endless belt to which trays are attached numbering 60, loaves can pass through the oven, emerging at the end and having remained subjected to the oven's heat for a sufficient time to convert them into bread of the required consistency and other qualities. The decision goes on to give the dimensions and weight of these contrivances. The latter is 45 tons, of which about 9 tons is attributable to the moving parts. The contest before us relates to what is there described as "the moving parts."

The decision states that the ovens are put together on the site, and that they consist of steel sections which are bolted together on concrete platforms. Then occurs this paragraph: "The mechanical equipment of each oven comprises five electric

[2] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

[3] (1952) 23 D.R.A. 246, 255.

"motors," which are then described: "a working shaft with two "sprocket wheels, an idle shaft with two sprocket wheels, four "blocks and bearings carry sprocket shafts, two lengths of chain "with slot guides connecting the working sprocket wheel to the "idle one, a main drive chain from the driving motor to the "working shaft, a tension sprocket to adjust the tension main "chain drive, 60 metal trays 8 feet long fastened to the chains, "two oil heaters which pre-heat the oil supply, a time clock and "a hand-operated winding handle."

I have to confess that I am myself not mechanically minded, so that the description does not imprint in my mind any particularly clear picture of how this contrivance works or of what its moving parts consist; but the tribunal had the one immense advantage which we have not had of visiting the premises of the respondents, inspecting these ovens and seeing them in operation.

The decision continues: "All the parts of this mechanical "equipment are removable without removing the outer covering. "The motors are easily removable and are all taken out for "cleaning about every three months. The other parts are only "removed when repairs or cleaning become necessary.

"The purpose of the moving parts of each oven is to carry "the dough in tins placed on the moving trays at such a speed "as will ensure that the time elapsing from the placing of the "tins on the trays at the feeding entrance to their removal at "the discharge exit is sufficient to ensure the correct cooking of "the dough into loaves of bread.

"The ovens apart from their moving parts could not be "removed without dismantling and they"—I understand that to mean the ovens apart from their moving parts—"are intended "to remain in their present situation until the time comes for "them to be scrapped."

The question which presented itself to the Lands Tribunal arises upon Class 4 in the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927. That order was formulated as a result of the deliberations of the committee envisaged in section 24 of the Rating and Valuation Act, 1925. Class 4 consists, after an opening sentence which is of vital significance, of a long list or catalogue of apparatus or plant, beginning with acid concentrators and ending with windmills and wireless masts.

Without referring to the actual terms of the statute, it is well to remind oneself that the general scope of the legislation quo ad industrial plant was that plant in general should not be rateable; but that general statement was made subject to the qualification that certain plant or parts of plant specified in (among other places) Class 4 of this Schedule was to be rateable, but only to the extent (and I am anticipating the language itself) that the Schedule so made it rateable.

The opening words of Class 4 are these: "The following parts "of a plant or a combination of plant and machinery whenever "and only to such extent as any such part is, or is in the nature

C. A.
1958
W. Collier Ltd. v. Fielding (Valuation Officer).
Lord Evershed M.R.

"of, a building or structure." If the eye passes down the catalogue, it will observe in the appropriate alphabetical place the word "Ovens" and it will also notice "Chambers for Condition-"ing or Treatment," a phrase which admittedly covers the provers in the present case.

The problem is found to resolve itself into one of a dual character. First, it is necessary to see whether the subject-matter sought to be rated can be identified with some item in the list. Second, one then asks the question: to what extent is the item with which we are concerned in the nature of a building or structure? It has been conceded by Mr. Lyell that those are the vital questions.

There is no doubt as regards the first part of the problem. I have already indicated that ovens appear in the list. It is the fifth item of the collection: "Burners, Forges, Furnaces, Kilns, "Ovens and Stoves." Equally, among the list of chambers is found one appropriate to provers. Therefore, the real point in the case below, and equally in the case as put to us, is represented by the question: to what extent are the ovens (and provers) with which we are concerned in the nature of a building or structure?

In order to dispose of the matter, it has been conceded by Mr. Lyell for the Crown that the motors, of which it will be recalled there are five in these ovens, are not in truth parts of the ovens at all: they are, therefore, excluded from further consideration. It is not now disputed that the motors, as such, are not possibly in the nature of structures, and it is therefore no part of the case before us that they ought to be a subject-matter of rating.

The question has been as to the moving parts, the nature and function of which has been described. On the one side it is said, and said with very great force by Mr. Lyell, that one cannot sensibly sever for any relevant purpose these moving parts from the oven as a whole. After all, the oven is described as a 60 tray Uniflow oven. Its purpose is to bake bread, and that is achieved by passing the dough in these trays through the ovens for that purpose. The mere fact that one can physically detach the trays and the apparatus to which the trays are clipped, Mr. Lyell says, is quite irrelevant. They are an essential part of the oven and therefore the oven as a whole must be regarded as one item, all of it in the nature of a structure, as it is conceded that the framework bolted to the site is a structure.

But the conclusion of the Lands Tribunal was adverse to the Crown upon this matter. I confess at once that I have felt considerable doubt and difficulty in this case and have done so largely for the reason that it is not to me entirely clear what were the points which the tribunal put to himself upon this question. It will be a fitting introduction, perhaps, to what follows if I now read the three vital paragraphs from the decision. "Upon Mr. Browne's main contention"—that is a reference to the argument presented for the Crown by Mr. Browne—"Mr.

"Rowe"—for the subject—"emphasised that under Class 4 of "the Schedule the material words were 'only to such extent as' "and contended that the moving parts of both oven and prover "were in effect nothing but conveyor belts within an oven and "were not in themselves structures or in the nature of a "structure."

I can indicate by reference to that paragraph at once the kind of difficulty which has presented itself. I think nobody will quarrel (certainly nobody in this case has quarrelled) with the validity of the first reference to Mr. Rowe's argument: "Mr. "Rowe emphasised that under Class 4 of the Schedule the "material words were 'only to such extent as.'" With that counsel before us on both sides have been firmly agreed throughout this appeal. But there is then attributed to Mr. Rowe the contention that the moving parts here were not merely nothing but conveyor belts, but were not in themselves structures, as though the view for which Mr. Rowe contended was that the test to apply to these moving parts is to ask whether they, in isolation and being detached, were themselves structures or in the nature of structures. I am quite sure that that was not Mr. Rowe's contention in the court below, as it most clearly has not been his contention here.

The question I will attempt now to restate: is it true to say that this 60 tray Uniflow oven is, as to all the mechanism of which it is comprehended, in the nature of a structure; or is it true only to say that it is as to part of it structural by nature, but as to some part of the mechanism not structural? That, as I conceive, is a different question from that attributed to Mr. Rowe in the paragraph which I have read from the decision.

The decision then goes on to make a reference to *Cardiff Rating Authority* v. *Guest Keen Baldwin's Iron & Steel Co. Ltd.*[1] and proceeds: "but it seems to me that there is a "distinction between a movable structure," which is what was subject to consideration in the *Cardiff* case,[1] "and movable plant "which is used in conjunction with a structure. In the present "case I am satisfied by the evidence that the oven could be "used as an oven and the prover as a prover without the moving "parts although it would not be economical so to use them since "the dough would have to be stacked in and unstacked by hand "and the whole benefit of the continuous process would be lost." There follows this pregnant sentence: "But the moving parts do "not form an essential feature of the oven as an oven or the "prover as a chamber for conditioning, they are provided merely "to ensure a continuous flow." I will pause there again to observe, with the utmost respect to the Lands Tribunal, that he appears to me to have misstated the essential point. The question is not so much whether the moving parts form an essential feature of the oven as an oven, but whether they form

[1] [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27.

C. A.
1958
W. Collier Ltd. v. Fielding (Valuation Officer).
Lord Evershed M.R.

an essential feature of the oven as a structure. If the matter had rested where I have stopped in my reading, I should feel, to say the least, very doubtful whether the tribunal had posed to himself the proper question for his answering, but the tribunal continues as follows: "and are, as Mr. Rowe put it, the furni-"ture, and not integrated in the structure and become part "of it."

Those last words seem to me essentially to be saying what I venture to suggest should have been said before. They appear to be a finding that these moving parts, being but furniture, are not part of the oven as a structure. I so interpret, and feel bound to interpret, the phrase "and not integrated in the structure." By that route, therefore, the conclusion is reached by the tribunal which is stated in these terms: "I have, therefore, come to the "decision that the moving parts of both ovens and provers are "not rateable under the order, since the moving parts do not "themselves appear to me to form part of the structure of either "oven or prover." Again, in that last sentence I sought to emphasize the vital words "form part of the structure."

If I have earlier correctly posed the problem which in these cases the Order of 1927 presents, it will, I apprehend, be, prima facie at any rate, a question of degree and of fact whether in any given case one can properly say that the identified item of plant or part of plant is, as to the whole of it or as to some part less than the whole, in the nature of a structure. If it be a question of fact and if, in determining it, the tribunal has in no way misdirected itself, then the finding of fact will not be capable of challenge in this court.

In the end of all in this case, though I have felt the doubts which the language already read has put into my mind, and the force of Mr. Lyell's argument, I have come to the conclusion that the tribunal did find as a fact that these moving parts, though parts of the oven and for any practicable commercial purposes an essential part, were none the less not part of the structure of the oven and that, in so far as he so found, he did not misdirect himself, nor did he apply his mind to the wrong question.

In concluding, as I do on the whole, that we could not disturb this finding, I have been somewhat influenced by considering what else this court ought to do or might do. I stated earlier that the tribunal had the great advantage of seeing this oven in operation. Perhaps I might be allowed to say here that I hope what I have said about the oven can fairly be applied to the case of the prover. My citations from the decision have been those relating to the oven or substantially such, but I think that no distinction for present purposes arises between the two apparatus, nor indeed has Mr. Lyell sought to say that as to one apparatus rather than the other the decision should be impeached.

I repeat that the tribunal saw the apparatus. The description of the moving parts of it I have already read and the reading

of it will perhaps at least indicate this to a mechanically untutored mind. There might be a distinction between the moving trays 8 ft. long which are clipped in some way to the conveyor, on the one hand, and some of these shafts, which no doubt are part of the working attachment, on the other. It might well be that a tribunal of fact in this case, or in another similar case, considering what I have tried to emphasize as being the essential question, might come to a conclusion of fact different from that which the tribunal reached on this occasion. But I should myself feel the very gravest difficulty, if I had been persuaded by Mr. Lyell that this decision was based on erroneous premises implicit in the language which I have read and on which I have commented, in concluding in a contrary sense that these moving parts or some of them were in truth part of the oven regarded as a structure.

It would therefore seem that, if we were persuaded of the vice in this decision which Mr. Lyell has sought to demonstrate, we should have then to refer it back to the tribunal, directing him to reconsider the matter in the light of the questions which we think are the right questions and which I have attempted to formulate. I think that would perhaps make a great pother of this particular case. In future cases it may be (and I hope I am not in this respect assuming more to myself than I ought) that the formulation of the proper questions to be asked which we now make will assist in answering similar problems.

Reading this decision, and being well aware of the great care the tribunal takes in deciding these cases, I cannot believe that, if we sent the matter back, the tribunal would, when applying his mind to the questions formulated by us, be likely to come to a different or substantially different conclusion in the end from that which he has reached and expressed in this case. I hope that I am justified in that supposition. If I am, it comforts me in the conclusion which I have reached.

Before I leave the case, there is one other point which was taken on which I think it right that I should say a word or two. It was said that there was really no evidence to support the view that the moving parts could be regarded as something in any commercial or sensible use of the term distinct from the oven as a whole. I will confine myself to reading one or two questions and answers from the cross-examination of Mr. John Ackland Hinks. In cross-examination Mr. Browne said: "(Q.) Do you "seriously suggest you could use these sixty tray Uniflow ovens "in any way which is practical, if they had not these moving "parts in them? (A.) One would not just do it, but it could be "done; that is the answer."

A little later there is this passage: "(Q.) Speaking as a "practical commercial matter dealing with these machines, would "these provers work if they did not have the moving parts in "them? (A.) They would not work except that the conveyor "belt . . . (Q.) If you took the conveyor belt away, it would

C. A.
1958
W. Collier Ltd. v. Fielding (Valuation Officer).
Lord Evershed M.R.

"cease to be a prover? (A.) You would put the things in by "hand, leave them there a period and take them out. (Q.) You "said that the oven as a matter of practical politics would not "do it commercially? (A.) I do not think so. (Q.) With the "prover you equally would not work it except with the moving "parts in it? (A.) I think so, except in an emergency."

I agree that the evidence shows that, as a practical commercial matter, these moving parts were essentially a part of the mechanism of the oven and you would not find an oven described as a 60 tray Uniflow oven without having this belt and these trays attached to it, to justify that description and make it work in the way it was intended to work.

Although one may criticize certain sentences in the decision on the basis that it may have done less than justice to what Mr. Hinks said, I think the true view, none the less, is not whether these things formed part of the oven as an oven, but whether they formed part of the oven as a structure. I find nothing in this evidence which is sufficient to disable the conclusion which I think was in the end the deliberate conclusion of the tribunal that these moving parts were sufficiently severable and distinct to make it sensible to conclude as a fact that, if and so far as they were part of the oven and, if you will, an essential part of the oven as a working piece of apparatus, nevertheless they were not part of it as a structure. On the whole, therefore, and for the reasons which I have tried to state, I would dismiss this appeal.

Parker L.J. I have not found this at all an easy case, involving as it does the interpretation and application of the words "only to such extent as," which appear in Class 4 of the Order.

I think it is clear that it is not sufficient, in order to make the whole of a piece of plant set out in that class rateable, that a part of it should be, or be in the nature of, a building or structure. It is clear from the words "only to such extent as" that it is possible that there will be cases where part of the plant in question will not be rateable, though the rest of the plant will.

Accordingly, it seems to me that the approach in any case must be along these lines. First, is the entity in question one of the specified pieces of plant and machinery in the order? If the answer is yes, looked at generally can it be said that it is, or is in the nature of, a building or structure? Finally, on a second look, is it clear that the whole of it is of that nature? Put in another way, is there any extent to which it is not?

Quite clearly, that does not involve looking at each component part of the plant in question in isolation. If one, as it were, dismembered the plant into its components and looked at each component, no part of it would be a structure at all. It clearly does not mean that. It seems to me, however, that, if you find an accessory, a piece of equipment, a component, which is not itself a structure and which is not built into that part of the

plant which is undoubtedly a structure, then there would be grounds for excluding it under these words and that part would not be rateable.

Looked at in that way, it seems clear from the findings of the tribunal that the moving parts in this structure would not be rateable. In one paragraph the tribunal said that the moving parts are "the furniture, and not integrated in the structure "and become part of it," and in another paragraph that they do not appear to form part of the structure. On the face of it, therefore, that finding, which is clearly a finding of fact, is one with which we could not interfere.

Mr. Lyell has stressed very forcibly that that conclusion is arrived at following a finding that these moving parts were not an essential part of the oven, and he points out that, on the evidence, that is clearly wrong: in any commercial sense they are essentially part of the oven.

Nevertheless, for the reasons given by my Lord, I do not think that any useful purpose would be served in this case by remitting the case back to the tribunal. I think that there is a clear finding that no part of these moving parts formed part of the structure, and accordingly I would dismiss the appeal.

SELLERS L.J. I have come to the same conclusion, and I do not think that I can add anything affirmatively to assist in the reasoning given by both my Lords.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Godden, Holme & Co.*

B. A. B.

[COURT OF APPEAL.]

* SHELL-MEX AND B.P. LTD. *v.* HOLYOAK (VALUATION OFFICER).

C. A.
1958
Feb. 19, 20, 21.
Lord Evershed M.R., Parker and Sellers L.JJ.

Rating — Plant and machinery — Petrol station — Underground petrol storage tank — Whether "a building or structure" — Whether a "tank"—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24—*Plant and Machinery* (*Valuation for Rating*) *Order,* 1927 (*S.R. & O.,* 1927, *No.* 480), *Sch., Class* 4.

In accordance with licences issued by the local authority pursuant to the Petroleum (Consolidation) Act, 1928, a company constructed an underground petrol container beneath the pumps of a petrol station. The container consisted of a concrete base with brick walls 9 inches thick having a cement rendering. Concrete cradles rested on the base on which was placed a metal cylinder 13 feet 6 inches long by 7 feet in diameter capable of containing 3,000 gallons of petrol. The space round the outside of the cylinder was packed

C. A.

1958

Shell-Mex and B.P. Ltd. v. Holyoak (Valuation Officer).

with dry sand and the whole was covered with slabs of reinforced concrete except for the manhole through which the cylinder was filled. The Lands Tribunal held that the brick and concrete structure was liable to be rated, but that the metal cylinder was not in the nature of "a building or structure," within Class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927,[1] being a movable piece of apparatus and, accordingly, was not liable to be rated as a "tank":—

Held, that the installation on the hereditament was in its entirety, including the metal cylinder, a "tank" for the purposes of the Order of 1927, and, since the whole of it was in the nature of a structure, it was rateable as to its entirety.

Cardiff Rating Authority v. *Guest, Keen Baldwins Iron & Steel Co. Ltd.* [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27 considered.

Appeal from the Lands Tribunal.

The Local Valuation Court for Warwickshire included in the assessment of Shell-Mex and B.P. Ltd. in respect of their Oakland Filling Station at Birmingham Road Budbrooke certain underground storage tanks. The company appealed against that assessment to the Lands Tribunal, on the ground that the storage tanks were plant or machinery which were not liable to rating by virtue of the provisions of the Rating and Valuation Act, 1925, s. 24 (1).

The metal petrol storage tanks in question were contained in a brick underground chamber or compartment the construction of which is fully described in the judgment of Lord Evershed M.R. The Lands Tribunal allowed the company's appeal stating his conclusion as follows: "But it seems to me that the compartment in which the tank is housed does not form a functional entity with the tank any more than any other building in which a piece of plant or machinery is housed. That compartment appears to me to form an integral part of the hereditament like any other building thereon, but the metal tank which is admittedly not a building or structure or in the nature of a building or structure looked at by itself should not under section 24 and the order be deemed to be a part of the hereditament."

The valuation officer appealed.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

Michael Rowe Q.C. and *William Roots* for Shell-Mex and B.P. Ltd.

The cases cited in argument are referred to in the judgments.

[1] Plant and Machinery (Valuation for Rating) Order, 1927, Sch.: "*Classes of machinery and plant deemed to be part of the hereditament . . . Class 4.* The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure:— . . . Tanks."

LORD EVERSHED M.R. The question raised in this appeal relates to the liability for rating of an underground petrol container (to use for the moment a neutral phrase) which underlies the petrol pumps of a petrol station.

Parliament, by the Petroleum (Consolidation) Act, 1928, has in some degree sought to regulate the keeping in bulk of petroleum spirit. The requirements applicable to the respondents to the appeal are those provided in licences issued by the relevant local authority. The conditions at the back of the licence are numerous and involve the construction of elaborate means designed to protect persons and property in the immediate neighbourhood from the risks of leakage and explosion. Thus, to take one or two illustrations. No. 1 in the schedule of conditions reads: "The "petroleum spirit tank together with the connections, pipes and "fittings shall be so constructed and maintained as to prevent "any leakage of petroleum spirit." No. 4 provides: "The filling "and dipping pipes shall be carried down to within two inches of "the bottom of the tank."

It is more helpful in the present case to consider the actual construction with which we are concerned; for the question is whether that which now exists underground at the respondents' petrol station is or is not, as to the whole or any part, liable to be rated. That construction is well illustrated by a plan which is described as "Details of petrol storage tanks," the details so illustrated being those in fact required by the local authority at or near Birmingham.

There is first made in the ground at the required depth a concrete base of an indicated thickness. There are side walls of 9-inch brickwork from the base to the surface, the brickwork has a three-quarter inch cement rendering to line it. On the base are concrete rests or cradles, and on those rests is placed the actual metal cylinder which contains 3,000 gallons, or is capable of containing 3,000 gallons, of petroleum spirit. The dimensions of that container are 13 ft. 6 ins. in length by 7 ft. in diameter.

The space round the outside of the cylinder and between it and the walls is filled, again in accordance with requirements, by what is described as being "well consolidated sweet dry sand." In the plan the space which has been created by the base and walls is called a chamber. The cylinder has at its top a means whereby it is filled with petroleum and from which, on the other hand, petroleum can be extracted for supply to customers. This is provided on the surface of the earth by a manhole, but save for that manhole there is placed above the cylinder and between it and the surface of the earth slabs of reinforced concrete to a considerable thickness.

From the description I have given it will be appreciated that the 3,000 gallon cylinder, is in the end of all, encased in a construction of concrete, brick and sand, etc., tightly encased and embedded in the ground, the whole thing being designed for the protection of persons and property, so that, if there should be

C. A.
1958
Shell-Mex and B.P. Ltd. v. Holyoak (Valuation Officer).
Lord Evershed M.R.

leaks or explosions, the effect will be taken by the earth and the surround and will not do damage outside.

That being the construction in accordance with the local authority requirements, the question then is: How much of it, if any, should be rated? Mr. Rowe, for the respondents, conceded, as I understand, that the cradle, the walls and the base would be buildings on or in the hereditament and liable as such to be rated without any reference to the Plant and Machinery (Valuation for Rating) Order, 1927, which we discussed in *W. Collier Ltd.* v. *Fielding.*[1]

But that is not the end of the matter; for it has been the claim of the Crown to rate the whole of the structure as a single unit and as constituting a "tank," a word which hitherto I have been careful to avoid.

The opening words of Class 4 of the Schedule, which is the relevant part of the Order of 1927 provide: "The following parts "of a plant or a combination of plant and machinery whenever "and only to such extent as any such part is, or is in the nature "of, a building or structure." In the catalogue which follows appears the word "tanks," and it has not been in doubt that that is the only item in the catalogue with which, on any view, this construction or the cylinder inside it can be identified. There has been no attempt to say that the construction as a whole can be identified with some other item in the list, for example, as one of the chambers for any of the purposes there described. We are concerned with the item tank in the list and with the question accordingly: what constitutes for present purposes "the tank"? And, when that question has been answered, is it as to the whole, or to the extent of any part of it, in the nature of a structure?

It was the view of the Lands Tribunal that the tank was limited to the cylindrical object which is inside the concrete, brick and sand structure which I have described. Further, it was said that that tank was not in itself in the nature of a structure: it was a movable piece of apparatus, large no doubt, but not so large as to be other than an ordinary piece of movable plant.

On the other side, for the Crown it was said that that is not a correct way to look at this contrivance. The real truth of the matter, Mr. Lyell said, is that the respondents are storing petrol in a tank which consists of base, walls and side packing, and of which the metal cylinder is merely the containing lining or skin. The Crown submit that, on such a view of the matter, the whole thing, cylinder and all, is not only a tank, but is in the nature of a structure.

To simply the matter, I may say at once that, if that view is right, then, as I have understood the argument, it is not in doubt that the whole thing is rateable. It has not been suggested that, treating the whole construction as a tank, it is a structure or in the nature of a structure as to less than 100 per cent. of it.

[1] Ante, p. 323.

It is not suggested, for example, that the metal cylinder could be treated as a detachable part and therefore not itself part of the tank as a structure. That is perhaps natural enough, because when the whole job is done, it is perfectly plain that it would be quite impossible to extract the tank by any means whatever other than by demolition of the whole thing, walls, sand, concrete and everything.

In the course of my judgment in the *Collier* case [1] I made the point that, when the question arises, as to some identifiable piece of apparatus, is it and to what extent is it in the nature of a structure, then that question is prima facie a matter of degree and of fact. So also, prima facie, it will be, I apprehend, a matter of fact to say what in any given case constitutes the thing you identify with the item in the catalogue.

If, therefore, the matter was simply that the tribunal had said, after examining the material and perhaps examining the site, "I conclude that the tank here is no more than the "cylinder," that might well have been the end of it. But the tribunal has not so confined himself. Finding this case difficult, as I found the last, I have come to the conclusion that the tribunal here materially misdirected himself and therefore, I think on the whole, that the decision ought not to stand.

The tribunal, having described the way in which this underground containing apparatus is put together, referred to *Cardiff Rating Authority* v. *Guest, Keen Baldwins Iron & Steel Co. Ltd.*,[2] and to the formula which there was used by Jenkins J., a "functional entity." The tribunal then went on as follows: "I have come to the conclusion that the only part of the "installation which can properly be described as a 'tank' for the "purposes of the order is the metal cylinder."

As I have just indicated, if the tribunal had stopped there, it might well have been the end of the matter. But he went on as follows: "It seems to be clear that the licence deals solely "with this cylinder as a 'tank' in which the petroleum spirit is "to be stored."

I must pause again to explain what I understand that to mean. I read two of the conditions, and it might well be that those two conditions and others like them when they spoke of the tank were referring to the metal cylinder or the lining; for example, when condition No. 4 spoke of the dipping pipes going to within two inches of the bottom, that must have referred to the bottom of the cylinder, the lining. Further, the drawings mark and show the tank by that name, as distinct from the walls, elsewhere called a chamber; though I do also observe that the whole thing (lining, base, cradle and everything) is described in the title to the drawing as "Details of petrol storage tanks."

Returning to the decision: "The licence requires this tank to "be below ground and requires a plan of the layout of the

[1] Ante, p. 323.

[2] [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27.

C. A.
1958
Shell-Mex and B.P. Ltd. v. Holyoak (Valuation Officer).
Lord Evershed M.R.

"premises to be deposited and adhered to in order to ensure "that the tank is so placed as to reduce to a minimum the risk of "fire or explosion. But it seems to me that the compartment in "which the tank is housed does not form a functional entity with "the tank any more than any other building in which a piece of "plant or machinery is housed. That compartment appears to "me to form an integral part of the hereditament like any other "building thereon, but the metal tank which is admittedly not a "building or structure or in the nature of a building or structure "looked at by itself should not under section 24 and the order be "deemed to be a part of the hereditament."

I emphasized in reading the two words "functional entity," which are no doubt extracted from the judgment of Jenkins J. in the *Cardiff* case.[2] I cannot help thinking, with all respect, that the tribunal may have been somewhat diverted by that phrase. It depends on what function you have in mind; but I should, for my part, very much doubt whether you could say that, in this case, the compartment with the concrete and the sand filling was not "a functional entity with the container," since the whole object of the apparatus and of the installation was that the petrol should be so contained as to minimize to the greatest possible extent the risks and consequences of fire and explosion.

It seems to me with all respect that the fallacy lies in this sentence: "But it seems to me that the compartment in which "the tank is housed does not form a functional entity with the "tank any more than any other building in which a piece of "plant or machinery is housed." I have been unable to escape from the conclusion that the tribunal came in the end to the view that what he called "the compartment," the installation other than the cylinder, was no more relevant to the question of the rating of the cylinder in this case than would be an ordinary above-ground edifice in which there happened to be found, resting on a cradle, a cylinder, a tank. In my judgment, quite manifestly that is not so.

If you wished to translate this installation to an above-ground equivalent, you would not simply place the metal cylinder on a cradle in a building. You would have to create, as I follow it, a structure with outer walls, concrete, sand filling, and all the rest of it, of which the cylinder in truth would be nothing more than the convenient lining. The thing which you would require to produce would be a much more solid piece of apparatus, designed and required to protect the outside world in the form of human beings and material from the risk of leakage and explosion.

The conclusion, therefore, that the tank for the purposes of the order is confined to the metal cylinder rests on the ground stated; namely, that in the view of the tribunal the housing, what the tribunal calls "the compartment," is no more relevant to the cylinder than would be the surrounding building in the ordinary case of a cylinder found upon cradles in such a building above

[2] [1949] 1 K.B. 385.

ground. I think that that reasoning disables the conclusion, and I would, therefore, in this case allow the appeal, and say that the tank, which you find in the hereditament of the respondents, is the installation in its entirety. If that view is right, there is no question that it is not as to the whole of it of the nature of a structure.

PARKER L.J. I agree, and I would only add this. The question, as it seems to me, is what in relation to the hereditament is the nature of the underground structure, using that word in a neutral sense. It is perfectly true that, in relation to the licence and the local authority plans, the only part which is called, and described as, a tank is the metal container and that the surrounding walls are treated as a chamber.

The question is what, not in relation to the licence but in relation to the hereditament, is properly described as "the "tank." It seems to me that, looking at the primary facts found in this case by the Lands Tribunal, the only reasonable conclusion is that the whole structure, walls and metal lining, itself forms the tank. After all, the purpose is the storage of petrol. The brick and concrete structure without the lining performs no function at all. Equally, the lining without the walls and concrete performs no sensible function, quite apart from any question of legality. I say "no sensible function," because it seems to me that this is not merely a case of some added safety precaution, but a question of storing a highly dangerous and inflammable liquid which cannot in any sensible sense, quite apart from legality, be stored without very careful precautions. In other words, it seems to me that this is a long way away from a piece of machinery or plant put into a building for convenience. It is a case where the so-called chamber is a housing which forms part of the plant itself.

For these reasons and those given by my Lord I would allow this appeal.

SELLERS L.J. I think the significant matter is that these tanks are for the storage of petrol, as my Lord has just indicated. The matter has to be so viewed. The mere cylinder would be quite insufficient for that purpose having regard to the liabilities of the occupiers, who are the respondents. It would not be sufficient to have the petrol simply in the cylinder. It has to be dealt with in some manner similar to that in which it is dealt with here for the purposes of safety and proper user. The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up. What has been called the structure or building and the cylinder form one tank for the purpose of storage of petrol, and it should be so regarded. There is, in my view, an

C. A.
1958
SHELL-MEX AND B.P. LTD. v. HOLYOAK (VALUATION OFFICER).

error of law in the conclusion at which the Lands Tribunal arrived. (See *Edwards* v. *Bairstow and Harrison.*[3])

I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Sydney Morse & Co.*

B. A. B.

[3] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

[COURT OF APPEAL.]

C. A.
1958
March 3.
Hodson, Morris and Pearce L.JJ.

* MEDCALF *v.* MEDCALF.

Husband and Wife — Practice (in matrimonial causes) — Appeal — Time bar—Refusal of decree—Notice of appeal served within six weeks of order—Appeal not set down within six weeks of order—Appeal against refusal of decree not governed by rule applicable to appeals against a decree nisi—Proper practice—R.S.C., Ord. 58, *rr.* 4, 5, 15.

An appeal from the refusal to grant a decree nisi of divorce is not an appeal "against a decree nisi" within rule 15 of R.S.C., Ord. 58 [1] (which requires that the notice of appeal and the setting down of the appeal must be effected within six weeks of the making of the order), but is an appeal within rule 5 [1] of the same Order, such that if the notice of appeal is served within the six-week period provided by rule 4 of Order 58, the appeal may be set down within seven days after service or within such further time as may be allowed by the proper officer.

Where, therefore, a petitioner served notice of appeal against the refusal of a decree within six weeks of the commissioner's order, but did not set down the appeal within that period:—

Held, that the proper course was to apply to the registrar as the "proper officer" under rule 5 of Order 58 for leave to extend the time for setting down the appeal, since an appeal against the refusal of a decree nisi was not governed by rule 15.

[1] R.S.C., Ord. 58, r. 4: "Time for appealing.—(1) Subject to the provisions of this Rule, every notice of appeal shall be served . . . within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say:—. . . (c) in any other case, six weeks."

R. 5: "Setting Down.—(1) The appellant shall, within seven days after service of the notice of appeal or within such further time as may be allowed by the proper officer, apply in accordance with this Rule to set down the appeal. . . ."

R. 15: "Appeal against decree nisi.—(1) The following provisions of this Rule shall apply to any appeal to the Court of Appeal in a matrimonial cause against a decree nisi of divorce or nullity of marriage. (2) The period of six weeks specified in Rule 4 of this Order shall be calculated from the date on which the decree was pronounced, and Rule 14 of this Order shall not apply in relation to that period. . . . (6) In this Rule 'the appropriate Registrar' means, in relation to a cause . . . proceeding in a District Registry the Registrar of that Registry."

MOTION for leave to extend time for appeal.

A wife petitioner for divorce on the ground of her husband's adultery asked the court to exercise its discretion in her favour in respect of her own adultery. The suit was undefended. On December 16, 1957, Judge Rawlins, sitting as special commissioner in divorce at Reading, gave his considered judgment, finding the alleged adultery proved, but refusing to exercise his discretion in the petitioner's favour; and he refused to grant her a decree nisi.

The wife sought to appeal from that refusal. Her notice of appeal was served in time, on January 27, 1958, that is, on the last day of the six-week period from the date of the judgment. Her solicitors sought to set down the appeal on the same day, but the documents were not in order. On the following day, that is, one day after the six-week period had elapsed, the petitioner's solicitors were informed by the district registrar (1) that the documents were not in order, and (2) that in any event the petitioner was out of time for setting down the appeal, since this was not an ordinary appeal to which the provisions of R.S.C., Ord. 58, r. 5 (1) [1] as to setting down applied, but was an appeal within rule 15 of Order 58 [1] which applies to "any appeal to the "Court of Appeal in a matrimonial cause against a decree nisi "of divorce or nullity of marriage," and requires that both service of notice of appeal and setting down of appeal must be effected within six weeks.

Having received that information from the registrar, the solicitors did not put the documents in order and did not apply to the registrar as the "proper officer" for extension of time to set down the appeal under Order 58, rule 5, but moved in the Court of Appeal for leave to extend time for setting down the appeal.

Frank J. White for the petitioner. The notice of appeal was served in time under either rule 5 or rule 15 of R.S.C., Ord. 58. If, as the registrar stated, this appeal falls within rule 15 as an appeal "against a decree nisi" not only must service be effected within six weeks, but the appeal must also be set down within that period. It is submitted that on the strict reading of rule 15 this is not such an appeal, but is an appeal which is governed by the provisions of rules 4 and 5 of Order 58, and therefore the petitioner could have applied to set down her appeal within seven days of service of the notice, or within such further time as might be allowed by the proper officer. There is some confusion on the scope of the application of rule 15: see Latey on Divorce, 14th ed., pp. 364, 949–950, which cites that rule as applying to appeals from "the grant *or refusal* of decrees nisi."

The respondent husband was not represented and did not appear.

[1] For footnote 1 see p. 338.

C. A.
1958
Medcalf v. Medcalf.

Hodson L.J. The notice in this case was given in time, and this is not an appeal which is governed by R.S.C., Ord. 58, r. 15. It is not an appeal against a decree nisi. Accordingly, the right course to take in future cases is for the matter to be dealt with in the ordinary way through the proper officer. The court ought not to issue a direction to the proper officer on how he is to act, but if this rule is drawn to his attention, and if he has no special reason for refusing to extend the time, he will do so, because Order 58, rule 5 provides that the proper officer can extend the time for setting down "within such further time" of the service of the notice "as may be allowed" by him. We are of opinion that the matter should be dealt with in that way.

Motion referred to registrar.

Solicitors: *Lovegrove & Durant.*

M. M. H.

[PROBATE, ETC., DIVISION.]

1958
Jan. 15, 16, 31.
Lord Merriman P. and Collingwood J.

* COX *v.* COX.

Husband and Wife—Desertion—Just cause—Adultery, reasonable belief in—Evidence—Whether evidence of opportunity necessary.

A husband separated himself from a wife for whom he admittedly had no love, on the ground of his alleged reasonable belief in her adultery. His belief was founded solely upon two conversations between the wife and a third party, as to incidents at her place of work, which he had overheard, and a further conversation in which the husband taxed the wife with regard to the incidents.

The justices dismissed the wife's complaint of desertion and wilful neglect to provide reasonable maintenance. On the hearing of her appeal the Divisional Court found that, assuming the conversations to provide evidence of inclination, the circumstances surrounding the incidents precluded the commission of adultery then and there and there was no other evidence of opportunity:—

Held, that the test of reasonableness of belief was objective, and since the necessary element of opportunity could not be left to be inferred in the absence of any evidence to support it, the husband's belief was not reasonable but had arisen from his tendency to put the worst construction on anything she said or did, and the husband was, therefore, in desertion.

Glenister v. *Glenister* [1945] P. 30; [1945] 1 All E.R. 513 considered.

Haswell v. *Haswell and Sanderson* (1859) 1 Sw. & Tr. 502 distinguished.

Appeal by a wife from the dismissal by the Tisbury justice of her complaints on the grounds of desertion and wilful neglect to provide reasonable maintenance.

The parties were married on February 27, 1954. There was one child, Stephen, born on June 6, 1956. After the marriage

the parties lived with the husband's parents for a few weeks, after which they obtained a house at Zeals in Wiltshire. The wife was in employment at the time of the marriage, and continued to work after it. The husband was employed as a lorry driver.

It was common ground according to the evidence given before the justice that the marriage was an unhappy one from shortly after its beginning. The wife complained that her husband consistently neglected her, adopted a domineering attitude towards her, continually complained of her deficiencies as a housewife, though giving her little or no assistance, frequently abused and threatened her, and on occasions assaulted her.

The husband agreed that he did complain, and said that he had good cause for so doing, alleging that she did not look after the house, but allowed it to get into a filthy condition; did not look after him, as regards his meals or mending; and neglected the child in regard to his feeding, care and general supervision. He said in evidence that she was no good as a wife or a mother, and admitted having struck her twice, and further that he had told her many times that he had no love for her, and that she got on his nerves.

Shortly after the birth of the child, in June, 1956, the husband's sister, Mrs. Oliver, came to live with the parties, bringing with her two children of her own, and a coloured boy to whom she was acting as foster-parent with a view to adopting him. Mrs. Oliver remained with them until July 19, 1957, and while she was there she did the bulk of the housework, and looked after the child Stephen while the wife was away at work, which was from about 6.30 a.m. to 6.30 p.m., during the week.

In May, 1957, the husband ceased to have intercourse with his wife, moving into a separate room. He did so, he said, because of certain statements which he overheard his wife make to Mrs. Oliver.

There were two conversations involved, the first taking place in December, 1956, when he said he heard his wife speak of a fellow-employee, one Hall, saying that he was very handsome, and that he had said that he wished that he and she (the wife) could spend more time alone, and that he was in love with her. The wife added that she thought he really meant it. The husband said he did not think much about this conversation, though later, in cross-examination, he said he was "suspicious." But he said it was the second conversation which made him cease to sleep with his wife. This occurred in May, 1957, when he heard her tell his sister that her workmates, waiting in the queue for the truck, used to convey them from the works where she and Hall were employed, had said to her: "Come on Joyce, "we've got homes to go to, even if you haven't." She added that she had been kissing and cuddling Hall in the adjoining canteen, and had made Hall "conscious of himself," and that

1958

Cox
v.
Cox.

the other drivers had said to Hall "put a coat over it, Stan," a remark which she had subsequently repeated (she said) as a joke.

Mrs. Oliver did not discriminate between the two conversations: her version was that the wife told her that she and Stan Hall had got to the stage of kissing and cuddling in the canteen or shed; that Hall loved her; that he used to hang back (that is, delay his departure) so that she could kiss him; and that she had made him conscious that he was a man, and that his mates had told him to put a coat over himself.

The wife in cross-examination agreed that she had mentioned Hall to Mrs. Oliver, but denied having said that Hall loved her, or that she had been kissing and cuddling in the canteen.

Some two days after hearing this conversation the husband spoke to the wife about it, and he said that her reply was that Hall was just a driver at the works—there was nothing in it—they were all as bad as one another, and it was not true. He stated that she then added "a slice off a cut loaf is never "missed," a remark which the wife agreed she had made, but said it was made at another time, and not in connexion with Hall.

The husband then said to his wife "You have been having "dealings with this man Hall," to which she replied that Hall was a decent man and devoted to his wife and daughter.

The husband consulted a solicitor, and thereafter he acted upon the solicitor's advice. He moved, as already stated, into a separate room, ceasing to have sexual intercourse with the wife, and shortly thereafter withdrew from any form of common matrimonial life.

On October 7, 1957, the justices for the Petty Sessional Division of Tisbury and Mere sitting at Tisbury dismissed the wife's complaints that the husband had deserted her, had wilfully neglected to provide reasonable maintenance for her and had been guilty of persistent cruelty. They found that the husband had a reasonable and bona fide belief that the wife had committed adultery and had withdrawn from cohabitation because of that belief. From the dismissal of the first two charges the wife appealed on the ground that the findings were against the weight of the evidence.

J. F. E. Stephenson for the wife.

Dimitry Tolstoy for the husband.

The following cases were cited in argument in addition to those referred to in the judgment: *Marjoram* v. *Marjoram* [1]; *Fisk* v. *Fisk* [2]; *Beer* v. *Beer* (*Neilson cited*) [3]; *Jones* v. *Jones* [4];

[1] [1955] 1 W.L.R. 520; [1955] 2 All E.R. 1.

[2] (1920) 36 T.L.R. 248.

[3] [1948] P. 10; 63 T.L.R. 606; [1947] 2 All E.R. 711.

[4] [1953] 1 W.L.R. 867; [1953] 2 All E.R. 345.

Williams v. *Williams*[5]; *Greene* v. *Greene*[6]; *Lewis* v. *Lewis*[7]; *Price* v. *Price*[8]; *Chilton* v. *Chilton*[9]; *Jones* v. *Jones*[10]; *Ousey* v. *Ousey and Atkinson.*[11]

Cur. adv. vult.

Jan. 31. COLLINGWOOD J., reading the judgment of the court, referred to the facts substantially as set out above and continued: As to the desertion, the wife alleged that the husband had withdrawn from cohabitation, though the parties remained under the same roof, and the case was conducted before the justices, and before this court, upon the assumption that the circumstances in which the parties were living as from June 22, 1957, amounted to desertion by the husband, unless he could satisfy the court that he had a bona fide and reasonable belief, induced by her conduct, that his wife had committed adultery.

It is unfortunate that no notice of the nature of the case against the wife was given prior to the hearing before the justices. That such notice should be given has been pointed out in a number of cases, including *Sullivan* v. *Sullivan.*[1] The first intimation of the line of defence appeared in the cross-examination of the wife, and while it is true that the case was not completed on the first day (October 3, 1957), but adjourned part-heard until October 7, 1957, so that the element of surprise was to that extent diminished, nevertheless the case was not opened or presented on the wife's behalf as it would have been had such notice been given, and one of the grounds of appeal as originally drawn arose out of this, though the matter was not pressed before this court.

The principle invoked by the husband in this case is that laid down in *Glenister* v. *Glenister*,[2] in which Lord Merriman P. said[3]: "... if the wife has so conducted herself as to lead "any reasonable person to believe, until she gives some ex-"planation, that she has committed adultery, the husband, "becoming aware of the facts, and honestly drawing that "inference, and leaving his wife on that ground, ought not "to be held to have left her without reasonable cause."

That decision has been followed frequently in this court and has been approved by the Court of Appeal in *Allen* v. *Allen*[4] and *West* v. *West.*[5]

The first question which arises is: Does the evidence support the justices' finding of fact that the husband withdrew from

[5] [1943] 2 All E.R. 746.
[6] [1916] P. 188; 32 T.L.R. 520.
[7] [1956] P. 205n.; [1955] 3 W.L.R. 862n.; [1955] 3 All E.R. 598.
[8] [1951] P. 413; [1951] 2 All E.R. 580n.
[9] [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322.
[10] [1954] 1 W.L.R. 1474; [1954] 3 All E.R. 476n.
[11] (1874) L.R. 3 P. & D. 223.
[1] [1956] 1 W.L.R. 277n.; [1956] 1 All E.R. 611n.
[2] [1945] P. 30; [1945] 1 All E.R. 513.
[3] [1945] P. 30, 38.
[4] [1951] 1 All E.R. 724.
[5] [1954] P. 444; [1954] 3 W.L.R. 163; [1954] 2 All E.R. 505.

1958

Cox
v.
Cox.

cohabitation because he honestly believed his wife had committed adultery?

The husband said in evidence "I thought she was having "intercourse with Hall," and that he ceased to have intercourse with his wife because of the conversation which he overheard in May, 1957, and the justices accepted his evidence. It was urged on behalf of the appellant wife that, on his own admission, the husband had lost all interest in and affection for his wife long before May, 1957; that he regarded her as no good as a wife or a mother, and that what he did was to seize with avidity on an excuse to be rid of her. Be that as it may, we do not think we can say there was no evidence to justify the finding of the justices upon this point. The circumstances referred to, however, as to the husband's state of mind, are not without relevance to the second question, viz.: Was his belief that of a reasonable man, and was it based upon reasonable grounds?

His belief was founded, and founded solely, upon what he had heard his wife say to his sister, together with his wife's subsequent conversation with him.

The wife's statement to her sister-in-law amounts to the fact that the man Hall had evinced an affection for her; that she was gratified by his attentions, and had indulged in kissing and embracing with him, to an extent which had avowedly produced sexual excitement. This had taken place in the daytime, in the canteen at the works where both were employed, at a time when, with others, they were waiting for the truck, and in circumstances in which their conduct was obvious to a number of fellow-employees, who had been moved to ribald jests. There was no evidence of any association between the two at any other time or place. In our opinion the circumstances above described preclude the commission of adultery there and then. But we were invited to hold that the wife's behaviour, as disclosed in her conversation with her sister-in-law, showed that she had an inclination to commit adultery, and that her hours of absence from home of necessity afforded an opportunity of indulging that inclination. But assuming, as we are prepared to assume, that what the wife said did amount to evidence of inclination to commit adultery, as distinct from a mere willingness to indulge in amorous dalliance falling short of adultery, we do not think that the necessary element of opportunity to indulge the inclination can be left to be inferred in the absence of any evidence to support it.

In our opinion the evidence in the husband's possession as to his wife's conduct was not such as to afford reasonable grounds for believing that she had committed adultery. He was disposed to put the worst construction on anything she said or did—but the test of reasonableness is an objective one.

We were invited by counsel for the respondent husband to say that if the evidence did not disclose reasonable grounds for

believing that the wife had committed adultery then nevertheless her conduct was, in itself, such a grave and weighty matter as to justify the husband in leaving her, and in support of this contention we were referred to *Haswell* v. *Haswell and Sanderson*.[6]

That was a petition by a husband by reason of his wife's adultery. The marriage had taken place without the knowledge of the parents of either party, and the wife continued to live with her mother, where the husband visited her from time to time. On one such visit he discovered his wife in a room upstairs with a man who had his arm round her and his hand on her breast. After consideration he decided to have nothing more to do with his wife and never again visited her mother's house.

Subsequently the wife cohabited with another man, and there was no doubt as to her adultery with him. But the decision turned on the construction of the proviso to section 31 of the Matrimonial Causes Act, 1857.[7] The court held[8] that the petitioner, having found his wife submitting to indecent liberties, had, on that ground, never returned to her mother's house where she resided. The Judge Ordinary continued[9]: "It is not "necessary for the court to say whether this would have justi- "fied him in turning her out of his house; that it would have "enabled him to resist an action of debt for necessaries supplied "her, or would have been a sufficient answer in a suit for "restitution of conjugal rights. But the question is, whether "we are in a position to exercise a discretionary power. The "adultery has been fully proved, and we cannot say that the "petitioner comes within the description of a person 'wilfully "'separating himself without reasonable excuse.' The discre- "tionary power therefore does not exist. The petitioner is "entitled to a decree."

With regard to that decision it is to be noted that the Judge Ordinary expressly refrained from deciding whether the wife's conduct was such as to justify the husband in turning her out, or would have afforded an answer to a suit for restitution. Further, the circumstances differ considerably from those in the present case. In *Haswell* v. *Haswell and Sanderson*[10] the wife was found in the home indulging in an act of sexual familiarity.

However that may be, we are not considering whether the facts in *Haswell's* case[11] would, or would not, bring the case within the principle laid down in *Glenister* v. *Glenister*.[12] But

[6] (1859) 1 Sw. & Tr. 502.

[7] Matrimonial Causes Act, 1857, s. 31: ". . . Provided always, that "the Court shall not be bound to "pronounce such decree . . . if the "petitioner shall, in the opinion of "the Court, have been guilty of . . . "having deserted or wilfully sepa- "rated himself or herself from the "other party before the adultery "complained of, and without any "reasonable excuse, . . ."

[8] 1 Sw. & Tr. 502, 504.

[9] Ibid. 505.

[10] 1 Sw. & Tr. 502.

[11] Ibid.

[12] [1945] P. 30.

1958

Cox
v.
Cox.

we think that, because of the nature of the offence of adultery, the principle of that case should not be extended beyond its proper scope. For example, it would be going further than is warranted by the reasoning upon which the decision in *Glenister* v. *Glenister* [13] is based to hold that a husband would be justified in leaving his wife upon the belief that she had been cruel to him; or that she had given him some other ground for complaint which he reasonably believed would afford him the right to leave her. It is sufficient to say that we do not think it would be right in this case, despite the wide terms of Matrimonial Causes Rules, 1957, r. 73 (7), to decide the case upon an entirely new issue which was never adumbrated in the court below, and which involves a finding of fact as to which no evidence was given. The husband's case from first to last was that he left his wife because he believed she had committed adultery. In our opinion that was not a reasonable belief, and we do not think we ought now to enter into a consideration of the further question whether he would have been justified in leaving her, without his having drawn the unjustifiable inference to which he himself ascribes the separation.

Appeal allowed.

Solicitors: *Butt & Bowyer for Rutter & Rutter, Wincanton; Markham Thorp & Co. for Farnfield & Nicholls, Gillingham (Dorset).*

E. J.

[13] [1945] P. 30.

[COURT OF APPEAL.]

C. A.

1958
Jan. 16, 17;
Feb. 13.

Lord Evershed M.R., Sellers L.J. and Harman J.

* O'CONNOR *v.* BRITISH TRANSPORT COMMISSION.

[Plaint No. 458 A.]

Railway—Negligence—Child—Killed by falling from corridor guard's van in express train — Internal handle to door — Duty of care to three-year-old child—Whether danger reasonably foreseeable—Whether commission entitled to assume supervision of young child by responsible person—Whether insurers of safety.

Negligence—Child—Injury to—Railway—Child killed by fall from corridor guard's van—Internal handle to door—Whether danger reasonably foreseeable.

A child aged three years and ten months, travelling with his mother on the Irish mail train from Holyhead to London, fell out of a corridor-type guard's van and was killed. The guard's van was between the passenger coaches and the restaurant car and the child had been waiting there with his mother until tea was ready to be served in the restaurant car. In proceedings brought by the child's father against the commission the mother said that she had told the child not to go near the door because she realized that it was a danger. The judge found that her attention had been

diverted and that, despite her injunction, the child had wandered to the door and had opened it. The door handle was on the inside and was not defective, but the evidence showed that it could be opened by a small child:—

Held, that the standard of care owed by the defendants as carriers for reward, though high, fell short of insuring the safety of their passengers, and that although they were under a duty to take due care, they were entitled to assume that a child of this age would be accompanied by a responsible person who would look after it.

Dicta of Montague Smith J. in *Readhead* v. *Midland Railway Co.* (1868–69) L.R. 4 Q.B. 379, 393, and of Lord Shaw in *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, 61; 38 T.L.R. 102 applied.

(2) That it was not reasonably foreseeable that a mother who was, admittedly, aware of the danger would have let her child wander across the carriage.

Appeal from Judge Bensley Wells, sitting at Marylebone County Court.

On July 24, 1953, at about 4 p.m., John Gerald O'Connor, aged three years ten months, fell out of a door on the Irish mail train whilst it was travelling from Holyhead to London and was killed.

The following statement of the facts is taken from the judgment of Sellers L.J. The child was travelling with its mother, and at Holyhead they had taken their seats in the second coach from the front of the train. During the journey they had left their seats and gone down the train (in a rearwards direction) to have tea in the restaurant car. The train was full and people were obstructing the corridors. As she was required to wait some ten minutes or so for tea the mother, with the child, came up the train again to a guard's van through which she had just passed on her way to the car. Another mother with a baby 18 months old was travelling in the van, and Mrs. O'Connor decided to wait there rather than push her way back along the corridors to her compartment. Mrs. O'Connor's account of what happened after she entered the guard's van was accepted by the judge, and was this: "I was not holding the child by the hand when we came "into the guard's van. The child walked away from me towards "the guard's door. I called him back, and he came. I told him "not to go near the door. I then asked a lady passenger for a "light for my cigarette. She was standing in front of the letter "rack on the left-hand side of the van. While she was standing "there with her lighter I had my back to the door in question. "At that moment I looked round and saw the child with his "right hand on the window strap of the door behind me, and he "seemed to be going out of the door. He went out head first. "The last I saw of him was his feet." Then she was cross-examined, and she stated: "I agree that you always have to "keep an eye on a child of that age. It was the first time he had "ever been in a train. I called him back from the door, because "I realized that the door was a danger. He came back. I was

C. A.
1958
O'Connor v. British Transport Commission.

"standing just in front of the letter rack on the left of the com-"municating door when I called the boy back. The whole thing "happened in a flash." The judge found as follows: "On the "evidence before me I have no doubt at all that this little boy "unfortunately opened that door himself; that is why this door "opened, because the child interfered with it." There was evidence that a child of this age might be able to pull down the handle sufficiently to open the door. The judge rejected other suggestions as to the possible cause of the accident, as, for example, that the door might have been flung open accidentally by someone, presumably the child, being thrust against it.

On these findings by the judge it was submitted on behalf of the plaintiff, the child's father, that the commission were at fault and were responsible for the accident in having on the lock of the door of the guard's compartment the particular type of handle, that is, a metal vertical handle, two feet from the ground to the bottom of the handle, or in having an internal handle at all. The lock was of the safety type which, if opened slightly, or if not properly pulled to, rested securely on a latch and would not be released so as to open fully until the handle was lowered to the right between 95 degrees and 100 degrees.

The judge dismissed the plaintiff's claim and he appealed. At the hearing of the appeal attention was drawn to evidence given before the judge and notes by him. First, the guard of the train gave evidence to the effect that the coach from which the child fell was a passenger-carrying coach and that the guard's compartment was serving as a luggage van. He himself was in a similar van towards the end of the train with two other passenger-carrying coaches behind it. Secondly, evidence was given before the judge by a Mr. Roe who, as carriage and wagon inspector at Crewe when the accident occurred, had inspected the train from which the child fell when it arrived at Crewe. Mr. Roe said that the coach in question was built in 1938 and had been overhauled and returned to service only a month before the accident happened. Internal handles, he said, other than the "squeeze" type, were not used in passenger-carrying coaches for safety reasons, and brake vans with this type of handle were not normally used in passenger trains or at any rate not in such a position that passengers might have to pass through them. He added, however, that that might have to be done if the train was going to be split in the course of its journey, for then a brake van of this type would be put in the middle of the train and when the train was split it would be split before that coach. Until the split occurred the middle brake van would be used as a corridor. Normally speaking a luggage van through which passengers might have to pass had no internal handle. The witness further said that the type of handle had been introduced in guard's vans in 1930 for the avowed purpose of assisting the guard in the performance of his duties because the handle was easier to open from the inside than the "squeeze" type. Since 1946 the rolling

stock was of a different design, but there were still more than 20 vans of the old type in use in main line trains at the time when the accident occurred. This evidence was not relied upon in argument, apparently, and the judge made no finding on it.

H. I. Nelson Q.C. and *P. J. H. Benenson* for the plaintiff.

A. P. Marshall Q.C. and *C. W. R. Pickthorn* for the commission.

In addition to the cases referred to in the judgments, the following were cited in argument: *Easson* v. *London and North Eastern Railway Co.*[1]; *Haseldine* v. *C. A. Daw & Son Ltd.*[2]; *Wilkinson* v. *Rea Ltd.*[3]; *Paris* v. *Stepney Borough Council*[4]; *R. Addie & Sons (Collieries)* v. *Dumbreck*[5]; *Woods* v. *Duncan*[6]; *Christie* v. *Griggs.*[7]

Cur. adv. vult.

February 13. Lord Evershed M.R. I will ask Sellers L.J. to deliver the first judgment.

Sellers L.J. [having stated the facts as set out above and referred to the evidence given by Roe on behalf of the commission:] I do not feel it would be right to hold that the commission knew or had any suspicion that the type of handle in the guard's van was in any way unsafe or that the van in question was old and unsuitable for use on a main line train where it would be used as a thoroughfare by persons who had occasion to move along the corridors to the restaurant car and to a lavatory. The type of handle had been brought into use to assist the guard in his duties, but as passengers were entitled, and expected, to pass through this compartment it was necessary that the construction of the handle should have regard to their safety. If it was of such a nature that accidental pressure against it might open it, then it was to be condemned, but after careful inquiry the judge rejected this, and rightly so. There was nothing defective in the handle or the lock and there was no evidence or even suggestion that any such accident had occurred or had been contemplated as possible by anyone before.

In these somewhat formidable circumstances Mr. Nelson submitted that the judge had misdirected himself in law in failing to impose a sufficiently high standard of duty on the commission as carriers for reward and had, in effect at least, associated or identified the child with the mother. The judge said: "If a mother is taking her child along the corridor of a "train she must exercise such control over it that she does not

[1] [1944] K.B. 421; 60 T.L.R. 280; [1944] 2 All E.R. 425.
[2] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.
[3] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.
[4] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[5] [1929] A.C. 358; 45 T.L.R. 267.
[6] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420n., H.L.
[7] (1809) 2 Camp. 79.

C. A.
1958
O'CONNOR v. BRITISH TRANSPORT COMMISSION.
Sellers L.J.

"allow it to open doors." I do not read that as identifying the child with its mother's want of care in the sense of treating her negligence as its negligence, but it is an important factor in considering the duty and the alleged breach of duty of the defendants.

Mr. Nelson, in the course of his argument, took this passage from Erle C.J.'s summing-up in *Ford* v. *London and South Western Railway Co.*[1]: "The railway company is bound to take "*reasonable care*; to use the *best precautions in known practical* "*use*, for securing the safety and convenience of their passengers." Applying that to this case, counsel urged that as modern passenger-carrying coaches had no internal handles at all the commission failed to comply with modern standards and were, therefore, in breach of their duty. He also referred to *Barkway* v. *South Wales Transport Co. Ltd.*,[2] a case of a passenger in an omnibus which overturned, and submitted that even if the commission had complied with the recognized and general practice, that was not necessarily sufficient. It may often prove unreliable or misleading to extract a sentence from a judgment, still more perhaps from a summing-up to a jury, and to treat it as a complete statement of the law. Erle C.J. was addressing a jury in 1862, and in the course of the summing-up he added[3]: "You "are to consider what *is* reasonable care, and whether they have "used the proper precautions. They are entrusted with most "important interests, with human *lives*, and a jury may reason- "ably require an amount of care proportioned to those interests. "At the same time a jury would not be entitled to expect the "*utmost* care that could *possibly* be conceived, or the highest "possible degree of skill. It is to be borne in mind that railways "themselves are of recent introduction, and that their manage- "ment is a matter of experience and of practical knowledge "which increases day by day. It is not to be expected that the "directors shall at once have in use every invention or discovery "of science. It is sufficient if they use every precaution in "*known practical use*, for the *safety* and *convenience* of the "passengers." The allegations against the defendants in that case, which concerned a train which had run off the line, were, amongst others, that the tyre of one of the wheels of the tender was in an improper state and that the gauge between the two lines varied somewhat in places.

In *Barkway's* case[4] the complaint was that the omnibus ran off the road because of a defective tyre. In vehicles of either nature, on rail or on road, it is obvious that defective or unsuitable wheels are potentially dangerous and may lead to accidents, likewise, in the case of railways, a defective or inadequate railroad. These are plainly matters for those in charge of vehicles or railways to guard against and demand high standards of care, and

[1] (1862) 2 F. & F. 730, 732.
[2] [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597; [1950] 1 All E.R. 392.
[3] 2 F. & F. 730, 733.
[4] [1950] A.C. 185.

established practices are cogent evidence. Erle C.J. pointed out that railways were then in their infancy and one can comment that they had not perhaps reached a very high standard of reliability. His words must be read, I think, in relation to the circumstances then existing, for I do not understand it to be universal law that every railway or omnibus or taxicab or passenger aircraft undertaking which trades for reward must have the latest standard of design in the way submitted by counsel. Economically and practically it would be impossible and would involve carriers who were on one day apparently fulfilling their obligations, becoming, by some improvement, automatically in breach of duty to their customers on the next or at least within such reasonable time as the improvement could have been known and adopted. If the passage relied on by counsel is to be examined more closely, it puts passengers' convenience in the same category as that of their safety, and read literally would seem to require all passenger compartments to have the same facilities. I think the emphasis in the address to the jury was in regard to precautions against dangers, and the real questions in such cases are whether there was a danger and whether reasonable care and foresight should have foreseen it and avoided it.

The duty imposed on railway companies is, I think, correctly and conveniently summarized from the cases cited in support of the summary in Halsbury's Laws of England, 3rd ed., vol. 4, pp. 174, 175: "Carriers of passengers are not insurers of the "safety of the persons whom they carry, neither do they warrant "the soundness or sufficiency of their vehicles. Their under-"taking is to take all due care, and to carry safety as far as "reasonable care and forethought can attain that end. . . . "Carriers of passengers are answerable for the soundness and "sufficiency of their vehicles, and are liable for any defect which "careful and reasonable examination would reveal." Soundness and sufficiency of vehicles includes suitability of design in relation to safety.

To those statements I would add some observations from the judgment of Montague Smith J. in *Readhead* v. *Midland Railway Co.*[5] This is a leading case on this topic. He delivered the judgment of the six judges sitting in the Exchequer Chamber. He said[6]: "We do not attempt to define, nor is it necessary to "do so, all the liabilities which the obligation to take due care "imposes on the carriers of passengers. Nor is it necessary, "inasmuch as the case negatives any fault on the part of the "manufacturer, to determine to what extent and under what "circumstances they may be liable for the want of care on the "part of those they employ to construct works, or to make or "furnish the carriages and other things they use. See on this "point *Grote* v. *Chester and Holyhead Railway Co.*[7] 'Due

[5] (1868–69) L.R. 4 Q.B. 379.
[6] Ibid. 393.
[7] (1848) 2 Ex. 251.

C. A.
1958
O'Connor v. British Transport Commission.
Sellers L.J.

"'care' however undoubtedly means, having reference to the "nature of the contract to carry, a high degree of care, and casts "on carriers the duty of exercising all vigilance to see that "whatever is required for the safe conveyance of their passengers "is in fit and proper order." This is familiar law with regard to the duty of those carrying passengers for reward, and I can see no indication that the county court judge applied any lower or different standard in arriving at the conclusion that the defendants were not in breach of duty.

The defendants as carriers of passengers could not in my view be held (apart from special agreement) to expect to carry a child under four years of age (or even considerably older) unaccompanied by a responsible person to look after it. If that were within their contemplation and experience, it seems that the commission's junior counsel used the right term when he said they would have to make the coaches and the journeys "baby-"proof." A train normally swerves, rocks or jolts at some stage of its journey, and a young child could, if unattended, be knocked over or against the framework of the train with considerable risk of injury. In this case the mother said that the child was frightened as they crossed to get between the coaches and clung to her for safety. A train stops at stations, doors are opened, and perhaps not closed until the train is due to leave. An unattended child would be confronted with many dangers, and indeed would not know when it had reached its intended destination.

I think the commission were required to make provision for the safety of children of tender years on the basis that they would be accompanied by someone capable of looking after them. Ought, then, the commission to have foreseen that an accident of this kind might occur to a young child accompanied by its mother, that in the course of the journey this handle might be opened by a very young child? The trial judge thought not, and I agree with him. It is, of course, dangerous to open a carriage door when a train is in motion and highly dangerous to do so when it is travelling at any speed. It is so surprising and shocking to find that a child under four had ever got into the position that it was able to do so that it makes one wonder whether the true cause of the accident has been established. But no other explanation is forthcoming. The door could have been locked, no doubt, and that would have shut passengers in, but an emergency might have arisen when passengers might wish to get out quickly and a locked door would have prevented it and might well have been the subject of complaint. The absence of an internal handle may have its difficulties if an urgent exit is necessary on train or omnibus.

The case reveals a most regrettable accident, but I agree with the judge in holding that it would be putting too high a duty on the commission to find them responsible here. It would in

substance be making them insurers of the child's safety and they are not so in law.

I would, therefore, dismiss the appeal.

Harman J. Mr. Nelson, in opening this appeal, was content to rest his case upon one point, a point of law. His submission was that the county court judge had misdirected himself on the degree of liability of a common carrier. He would have us hold that his duty is in a category higher than that of an invitor towards his invitee, and that it lay in a territory between that and the duty of an insurer—lower than the latter admittedly, but higher, he submitted, than the former. The judge based himself upon *Phipps* v. *Rochester Corporation*,[8] a case of an invitee or licensee, and therefore rejected the submission that the fact that there was a contract of carriage for reward sufficed to heighten the degree of obligation. He himself observed, after giving judgment, that he based himself on the law, the facts being, as he thought, "so obvious."

There were then in the county court no disputed facts. The real bone of contention was whether in putting a coach of this sort in a position between dining car and passenger coaches the commission had fallen below the standard required of them, and what that standard was.

In this court there emerged a point which so far as appears was never agitated in the county court at all, and which, therefore, could not have been an element operating on the judge's mind. The point is this. The evidence showed that it is unusual to put a coach of this type in this position. [His Lordship referred to the evidence of Mr. Roe summarized above, and continued:] Further, the evidence shows that in passenger corridors internal handles have been altogether abolished, and that for safety reasons. If then it could be established that the commission do not ordinarily put this type of coach anywhere except at the end of a train because it was realized that this handle constitutes a danger to passengers, there would, I think, be a strong case to be made against them. This was the point which caused the court some anxiety, but it was, as I have said, never canvassed in the court below. The commission's witnesses were never questioned on the point. Their evidence is consistent with the view that these coaches are not usually in the middle of a train, not because they are considered unsafe, or because of the unsuitability of this particular form of door handle, but because this is a generally unsuitable form of coach in a position where it must be used as a corridor. In my judgment there is nothing to justify this court in taking, in effect, a different view of the facts from that taken below: we should be inventing a point never considered and on which neither the plaintiff nor the judge relied.

[8] [1955] 1 Q.B. 450; [1955] 2 W.L.R. 23; [1955] 1 All E.R. 129.

C. A.
1958
O'Connor v. British Transport Commission.
Harman J.

The true question for us is that presented by Mr. Nelson: did the judge take too lenient a view of the commission's obligations and thus misdirect himself? On that I am content to say that I agree with the observations of Sellers L.J. This was not, after all, a part of the train where passengers were invited or even authorized to linger.

The type of door handle was well suited to the proper use of the coach—that is to say, as a guard's or luggage van—and it is not suggested that it was in any way defective, nor was it proved that the door could be opened by pressure or by anything short of turning the handle through an angle of more than 90 degrees. It seems to me that the concluding words of the passage cited by the judge from *Phipps* v. *Rochester Corporation*[9] may properly be used to decide the present case. Both the parent and the commission must act reasonably. "'That duty,'" said Devlin J. [citing from Lord Shaw's speech in *Glasgow Corporation* v. *Taylor*[10]], "'rests upon both and each: but each is entitled to "'assume it of the other.'" This was a tragic case, but, in my judgment, it was not reasonable to leave a child of under four, who had never been in a train before, the liberty to wander across the carriage when the mother was aware of the temptation and the danger of the door. This is what she did: the commission, in my judgment, were entitled to assume that she would not act in this way, and, therefore, are not liable for the lamentable result.

Lord Evershed M.R. I am in full agreement with the judgments which my brethren have delivered upon the question of the principle of law to be applied. I agree with them that there is no special formula which imposes upon the commission as a common carrier of passengers a standard of liability towards them falling somewhere between that of an insurer and that of an invitor. The standards of reasonableness and foreseeability are, I think, applicable here as they are applicable to the invitor. But the practical result is to be judged in the light of the circumstances attendant upon the carriage of passengers by rail. The commission offer to carry large numbers of persons of both sexes and of all ages and dispositions in trains which are frequently crowded and which are apt to be travelling at high speeds. To fall from a fast travelling train means, almost certainly, death. So it is truly said that there is required a high standard of care to see that the trains and their component parts are free from defects. Doors in the compartments or corridors which are liable to fly open upon a touch, or during the jolting of the train, would inevitably and properly involve the commission in liability for the consequences of their doing so.

But there is here, upon the judge's finding, no question of any defect; nor was the door handle in question of such a kind

[9] [1955] 1 Q.B. 450.

[10] [1922] 1 A.C. 44, 61; 38 T.L.R. 102, 107.

that it could be accidentally opened by some impact from a passenger. It was the first point preferred by Mr. Nelson in this court, and appears to have been the main argument in the court below, that the commission were liable on the ground that it must be a breach of their duty of care to have in any part of the train, to which passengers had access in the ordinary course, doors capable of being opened (though in all other respects of proper design and construction) by a small child of three or four years of age. I agree with the county court judge and my brethren that this proposition ought not to be sustained; for I agree with them that the commission is entitled to assume that a child of three or four years old, travelling with its mother, will be properly looked after by her.

If, therefore, there were no more in the case, I should be content to express my agreement with my brethren. But what has troubled me so much—and more, I think, than it has troubled them—is a certain passage in the evidence given on the commission's behalf.

[His Lordship referred to the evidence of Mr. Roe summarized above, and continued:] If the judge's note correctly records the witness's evidence, and if I am free to draw such deductions from that evidence as its language in its context seems fairly to justify, then it would appear to me that Mr. Roe could be taken as stating: (1) that the use of internal handles (other, at any rate, than "squeeze" handles) in any compartments used in the ordinary course by travelling passengers had, at the relevant date, come to be regarded by the commission as involving avoidable risk—that is, through being opened by careless or mischievous persons: and had for that reason been, at the relevant date, wholly discontinued in such compartments; (2) that such handles continued, however, to be used in guards' vans because they could be quickly and easily opened by the guards; and (3) that guards' vans were normally at the rear end of trains, and, therefore, not liable to be used by passengers in moving up and down the trains (for example, for going to and from the restaurant cars); though sometimes where a single train had later to be split, a guard's van would be placed at the appropriate place in the middle of the train. Ought Mr. Roe further to be taken as having said: (4) that the use of a coach having an internal handle of the kind in question—a coach which, be it observed, was not a guard's van properly so-called, but consisted of a number of ordinary passenger compartments with a corridor having the brake van at its end so that it constituted or contained part of the corridor—was not in accordance with normal practice?

If all this is what Mr. Roe said, and (more particularly) if (4) above is justified, then it seems to me that it further could be fairly inferred that the placing of the coach here in question in the position in which it was constituted a departure from the practice which for safety purposes was commonly adopted. In other words, the use of this coach (with an internal handle

C. A.
1958
O'Connor v. British Transport Commission.
Lord Evershed M.R.

designed specially for easy opening by a guard) as part of the corridor accommodation of the passengers was a use which was abnormal because it was regarded as involving exposure of the passengers to a foreseeable (and avoidable) risk: and no explanation or justification was given for the departure from normally accepted practice.

Mr. Nelson much relied upon the passage from the direction given to the jury by Erle C.J. in *Ford* v. *London and South Western Railway Co.*,[11] which has been cited by my brother Sellers but which, because of its importance, I also cite here: "The railway company is bound to take *reasonable* care; to use "the *best precautions in known practical use*, for securing the "safety and convenience of their passengers . . . They are "entrusted with most important interests, with human lives, and "a jury may reasonably require an amount of care proportionated "to those interests . . . not . . . the highest possible degree of "skill . . . their management is a matter of experience and of "practical knowledge which increases day by day. It is not to "be expected that the directors shall at once have in use every "invention or discovery of science. It is sufficient if they use "every precaution in *known practical use* for the *safety* and "*convenience* of passengers."

The case cited was one concerning a defect in the railway apparatus. The language is, however, of general authority. On the other hand, it is, in my judgment, clear (and implicit indeed in Erle C.J.'s language) that a decision to abandon a particular design of coach in favour of a newer model by reason of a risk of danger in the former appreciated or apprehended does not of itself demand the immediate and total withdrawal of the first class of vehicle. The actual operation of the railway services must, to some extent, be subject to the exigencies of ordinary and prudent management. But here, as I have said, no explanation or justification was given in evidence of what (if Mr. Roe's evidence may fairly be interpreted in the full sense set out above) was regarded at the time as normal (and safe) practice.

If, therefore, the matter rested with me, and if it were permissible to give to Mr. Roe's evidence the full significance above suggested with all the inferences to be drawn therefrom, I think I should be disposed to come to a conclusion in the plaintiff's favour. But it is pointed out by my brethren that this view of the facts does not appear to have been put to the judge. There is no hint of it in his judgment and no findings of fact comparable to those which I have adumbrated; nor was this aspect of the case put to us by Mr. Nelson in his opening. It is, therefore, the view of my brethren that to draw the conclusions which, I have suggested, might be derived from Mr. Roe's evidence is to invent a case; to assume, without any warrant in the judgment of the judge who heard the witnesses,

[11] 2 F. & F. 720.

what the evidence really was. In all the circumstances, though I have thought it right to express the serious doubts which I have felt and the reasons for them, I do not on the whole desire to dissent from my brothers' conclusion in favour of dismissing the appeal.

Appeal dismissed.

C. A.
1958
O'Connor v. British Transport Commission.

Solicitors: *Claude Barker & Partners; M. H. B. Gilmour.*

E. D.

[COURT OF APPEAL.]

*FATSTOCK MARKETING CORPORATION LTD. *v.* MORGAN (VALUATION OFFICER).

C. A.
1958
Feb. 17, 18, 19.
Lord Evershed M.R., Parker and Sellers L.JJ.

Rates and Rating—Industrial hereditament—Slaughterhouse—"Adapting for sale of any article"—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.
Factory—Definition.

The appellants owned a slaughterhouse where, after the initial operation of killing, the normal good slaughterhouse procedure was followed and the offals, intestines and so forth were separated from the main carcase, which was then cooled to get it into a fit state for human consumption and divided for ease of handling. The intestines were further processed. The Lands Tribunal held that the slaughterhouse was not a factory or workshop within the Factory and Workshop Act, 1901,[1] and, accordingly, was not entitled to be entered on the valuation list as an "industrial "hereditament" within section 3 of the Rating and Valuation (Apportionment) Act, 1928[2]:—

Held, (1) that the code of legislation controlling slaughterhouses was directed to a distinct and quite different purpose from that contemplated by the Factory Acts, the slaughterhouse legislation being directed to the securing of cleanliness for the benefit of the public and to the elimination, so far as practicable, of cruelty to animals when slaughtered; the Factory Acts, on the other hand, were designed to give protection to persons working in factories; the purposes of the two, however, were not mutually exclusive and the Factory Acts were capable of applying to slaughterhouses.

[1] Factory and Workshop Act, 1901, s. 149 (1): ". . . the following expressions have in this Act the meanings hereby assigned to them; that is to say: . . . The expression 'non-textile factory' means—. . . (*c*) any premises wherein . . . any manual labour is exercised by way of trade . . . in or incidental to any of the following purposes, namely— . . . (iii) the adapting for sale of any article, . . . The expression 'workshop' means— . . . (*b*) any premises, . . . not being a factory, in which . . . any manual labour is exercised by way of trade . . . in . . . (iii) the adapting for sale of any article."

[2] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In this Act the expression 'industrial 'hereditament' means a hereditament . . . occupied and used as a . . . factory or workshop. (2) . . . the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

C. A.

1958

Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).

(2) That whether the whole series of operations which went on in a slaughterhouse, including the killing, amounted to an adaptation of an article for sale, was a matter of degree and of fact and the Lands Tribunal having come to the conclusion that the primary use of the premises was to produce meat for human consumption and that the killing was subsidiary to that main purpose, the operations of the slaughterhouse did amount, within the meaning of the Factory Act legislation, to an adapting of an article for sale and, accordingly, the slaughterhouse was a factory or workshop within the provisions of the Factory and Workshop Act, 1901, and an industrial hereditament within section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

Surrey Revenue Officer v. *Clarkson; Rotherham Revenue Officer* v. *Rotherham Co-operative Society* [1931] 2 English Derating Appeals 53; *Woolwich Revenue Officer* v. *Royal Arsenal Co-operative Society Ltd.* [1931] 2 English Derating Appeals 282 and *Inland Revenue Officer* v. *Assessor for Edinburgh,* 1930 S.C. 429 applied.

Appeal from the Lands Tribunal.

The appellants, the Fatstock Marketing Corporation Ltd., appealed from a decision of the Local Valuation Court for North Glamorgan rejecting the appellant's proposal that hereditaments described as a slaughterhouse at Ynys Road, Aberdare, owned and occupied by the appellants, should be transferred to Part II of the valuation list for the Aberdare Urban District Rating Area as an industrial hereditament within section 3 of the Rating and Valuation (Apportionment) Act, 1928.

The following statement of facts is taken from the decision of the Lands Tribunal:—

"The premises comprise a stock yard for the reception of "livestock, lairages for cattle, sheep and pigs where the live-"stock is pined before killing, three slaughter bays, one for "cattle, one for sheep and calves, and one for pigs, two hanging "rooms adjoining these bays, a condemned meat room, a gut "room, a skin room, mess room, offices and stores.

"Upon the premises the appellants employ a manager, two "salesmen, a cashier and clerk, all engaged upon administrative "work, a checkweigher, a stockman and caretaker, a lorry driver "and six slaughtermen all of whom are licensed slaughterers "under the Slaughter of Animals Act, 1933, and who work "together as a team. In the case of cattle, the animals, after "pining, are taken to the appropriate slaughter bay where they "are stunned with a humane killer and a cane is inserted "through the hole made by the captive bolt to ensure complete "unconsciousness, the neck veins are then severed and the blood "drains away. This bleeding serves the double purpose of "killing the animal and preventing putrefaction of the tissues. "While the carcase is still warm and before rigor mortis sets "in, the horns, if any, head and feet are removed, the hide or "skin is removed, the body cavity opened and the loose fat "surrounding the stomach, the white offal, i.e., stomach and "intestines, the glands, the red offal, i.e., lungs, liver, heart

"and windpipe, are removed and a certain amount of trimming "of the carcase takes place. All those operations, together "with frequent washing, wiping and cleaning take place in the "slaughter bay, the body being slung on a hoist by the hind "legs at appropriate heights for the carrying out of the different "operations. The carcase is then suspended from an overhead "rail and pushed into the hanging room. In the case of cattle, "the carcase is here split into two sides by a mechanically "operated saw, but no such division of the carcase takes place "in the case of sheep or calves. The carcases are then finally "cleaned and washed and together with the red offal and the "white offal after further treatment would remain in the hanging "room till sale, and while there are inspected by the food "inspector of the local authority and graded by an authorized "officer of the Ministry of Agriculture under the Fatstock "Guarantee Scheme. Any meat condemned by the inspector is "removed to the condemned meat room where it is further "examined, unfit meat removed and sound meat brought out for "sale. While in the hanging room the meat cools to atmos-"pheric temperature and sets due to rigor mortis, and this "cooling and setting is necessary to get the meat into proper "condition for human consumption. Prior to sale, which usually "takes place the day following slaughter, the sides of beef are "weighed and further subdivided into quarters for ease of "handling.

"The red offal is normally sold to the butcher buying the "side of beef, together with the head and tongue. If there is no "demand for heads, they are boned out on the hereditament, "the meat being sold to butchers or sausage makers and the "bones to a bone crusher.

"The edible fats are sold, after cooling in the hanging room, "to a fat melter, who converts them into dripping.

"The stomach, which is full of undigested and partially "digested food, is taken outside the building, emptied and swilled "out, and after the fat and trimmings have been removed is then "hung up in the hanging room until sold to a tripe dresser.

"The intestines while still warm are taken to the gut room "where the fat is separated from the intestines which are "then stripped of their contents and prepared for further "processing either on or off the premises for beef casings.

"The horns, hoof and inedible fats are then placed in the "yard for sale to technical fat processors for glues, fertilizers "and tallow, while the hides are similarly placed and sold to hide "merchants.

"Certain of the glands are placed in a freezing cabinet in the "hanging room and are subsequently sold for medical purposes.

"The processes in the case of sheep and calves are generally "the same save that the carcases are not divided.

"The procedure in the case of pigs is very similar save that "after killing the carcases are put into scalding tubs and then

C. A.
1958
Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).

"scraped by hand to remove hair. The intestines are further "cleaned and scraped in the skin room so as to convert them "into sausage skins, which are sold to butchers or sausage "makers.

"A certain amount of pig blood is collected for sale for the "manufacture of black puddings, etc.

"It was agreed by the expert witnesses called on behalf of "both appellants and respondents that the whole of the pro-"cesses carried out on the premises constituted the normal good "slaughterhouse procedure.

"It was further agreed by these witnesses that if a beast was "merely killed and the further processes carried out on the "premises did not immediately follow, the flesh would be unfit "for human consumption. The carcase of a cattle beast would "only realize from £5 to £6 as the price of a dead beast to a "knacker, whereas an estimated total of £67 10s. would be "obtained for the carcase, meat, hide, red offal and white offals "after the processes had been carried out on the hereditaments "by sales to the various purchasers already enumerated."

The Lands Tribunal stated its conclusion thus: "We have "come to the decision upon the evidence before us that the "primary purpose of the occupation and use of the premises is "to produce meat for human consumption and by-products for "sale, and that the actual killing is subsidiary to this main "purpose. It is clear that if nothing was done but killing, the "resultant carcases would be of little value; it is only because "the carcases are dressed in the way we have described that "they satisfy the requirements of the Fatstock Guarantee "Scheme and are saleable as meat for human consumption, and "that the by-products are rendered fit for sale."

The tribunal further stated that: "In the present case it is "also clear that we cannot hold that the whole process carried "on is an adaptation of an article for sale since the live beast "which goes in is not an 'article,' and it is, we think, only by "some straining of the language that we can describe the opera-"tion as an adaptation of the dead beast or the dead beast as an "'article' . . . In these circumstances we do not think that "it is possible to hold that the legislature contemplated such "premises as these in the definition of a 'factory or workshop' "in the Act of 1901."

The company appealed.

Michael Rowe Q.C. and *W. L. Roots* for the appellants.

G. D. Squibb Q.C. and *C. E. Scholefield* for the valuation officer.

The following case referred to in argument was not mentioned in the judgments: *Thomas* v. *British Thomson-Houston Co. Ltd.*[3]

[3] [1953] 1 W.L.R. 67; [1953] 1 All E.R. 29.

LORD EVERSHED M.R. The question in this appeal is thus presented by the case stated: Whether upon the findings of fact we came to a correct decision in law in holding that the hereditament (that is the appellants' slaughterhouse) is not a factory or workshop within the provisions of the Factory and Workshop Act, 1901.

That is a correct posing of the true problem in the case. But this is a rating appeal and the question in the first instance is strictly whether under the Rating and Valuation (Apportionment) Act, 1928, the hereditament is an "industrial hereditament," an expression which by section 3 (1) of that Act is defined to mean a hereditament occupied and used as a factory or workshop. Certain exceptions follow in the subsection, including, in paragraph (*f*), that where the hereditament is primarily occupied and used for "any other purposes, whether or not similar to any of the "foregoing, which are not those of a factory or workshop." By subsection (2) of section 3 it is provided, putting it shortly, that, subject as there stated, the words "factory" and "workshop" have respectively the same meanings as they have in the Factory and Workshop Acts, 1901 to 1920. So the matter comes back to the application of the Factory and Workshop Act, 1901, and it is a proper formulation, in the end of all, of the problem before us to ask whether this hereditament is a factory or workshop within the provisions of the Act of 1901.

By section 149 of that Act elaborate definitions are provided. So far as relevant, it suffices to say that the expressions "factory" and "workshop" mean premises wherein any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, including "the adapting for sale of any article." It was pointed out to us in argument that in the case of a factory there has to be the added condition stated in paragraph (*c*), relating to the use of power, but that condition does not apply in the case of a workshop. In the end the question is whether it can be said that the operations in the appellants' slaughterhouse are conducted for the purpose of adapting articles for sale.

Before leaving the Act of 1901 it will be convenient to point out that earlier in section 149 reference is made to a list of factories and workshops contained in Parts I and II of the Sixth Schedule. The list enumerates many familiar instances, such as print works and earthenware works and such like, but it is clear, and would not be disputed, that that list is by no means exhaustive. It is pointed out by way of example that there is included no instance of chemical works in the list, well known though those must have been at the time; nor is there comprehended any reference to a brewery or a distillery.

I return to the problem whether the operations of the slaughterhouse can be described as those of adapting for sale any article. At first sight, to an ordinary reader of our language, it would not easily appear so; it might not be natural to regard the

C. A.
1958
FATSTOCK MARKETING CORPORATION LTD. v. MORGAN (VALUATION OFFICER).
Lord Evershed M.R.

live animal or the dead carcase as an "article." Against that, however, it has to be remembered that the slaughtering of beasts, like many other things, is no doubt much more mechanized in the second half of the twentieth century than it was 100 years ago, and, in so far as that is so, it may fairly be said that the purposes for which the Factory Acts were passed, namely, the safety and protection of workers, would not be unnaturally extended to cover the operations in a slaughterhouse. In any event, there have been certain cases before the courts which, though not binding upon us, seem to show plainly enough that this first impression (if I may so describe it) of the language is not one which has been adopted during the last generation.

I will make short reference only to the cases. Three of them were decided in 1931. They are *Surrey Revenue Officer* v. *Clarkson; Rotherham Revenue Officer* v. *Rotherham Co-operative Society Ltd.*[1] and *Woolwich Revenue Officer* v. *Royal Arsenal Co-operative Society Ltd.*[2] In the first two of those cases the Divisional Court held that there was no case made out for disturbing the conclusion of fact of the quarter sessions or recorder to the effect that the slaughterhouses there concerned were within the comprehension of the Factory Act legislation. I will read a short passage from the judgment of Lord Hewart C.J. in both cases.[3] "In the second case the learned recorder has come to "the conclusion that the hereditament should remain in the "Special List, and he has said: 'I am not satisfied that the "'slaughtering business is more important than the food factory "'business carried on in the said hereditament in that mere "'proof of floor space does not determine the primary purpose.' "Again, I think upon the facts of that case he was entitled to "arrive at the conclusion which we know." The Lord Chief Justice then referred to a Scottish case, and he concludes: "No "doubt these two cases are not quite the same, no two cases are, "but I think they are the same in this vital respect: That the "question was really a question of fact, and there were materials "to support the conclusion at which in each case the Court of "Quarter Sessions arrived."

The third case serves at least to emphasize the significance of the sentence which I have last read, for there the court of quarter sessions had arrived at an opposite conclusion. I refer to *Woolwich Revenue Officer* v. *Royal Arsenal Co-operative Society Ltd.*[4] The judgment in that case of Avory J. (who had participated in the earlier cases) indicated his own doubt as to the soundness of the conclusion of fact, but he none the less felt no hesitation in agreeing that it was a conclusion of fact based on some evidence which the Divisional Court ought not to disturb. The not entirely satisfactory impression is left that cases which

[1] [1931] 2 English Derating Appeals 53.
[2] Ibid. 282.
[3] Ibid. 61.
[4] Ibid. 282.

were apparently very alike resulted in opposite conclusions; but, treating these cases as matters of fact, that may perhaps be an inevitable result.

One passage from the judgment of MacKinnon J. in this last case was used in the course of argument and may illustrate some of that argument. The judge said [5]: "Premises in which sheep "and oxen become mutton and beef, in other words, premises in "which they are killed, are not an industrial hereditament. "Premises in which beef and mutton are turned into joints, "chops, and cutlets are an industrial hereditament. Premises "where both those processes go on may or may not be an "industrial hereditament. It depends whether the first or second "is the primary purpose for which the whole premises are "occupied and used." It has been part of a strenuous argument put forward by the valuation officer that, on the facts in the present case, it is clear enough that these are not premises in which beef and mutton are turned into joints, chops and cutlets, but rather is a hereditament in which sheep and oxen become mutton and beef.

I come now to the Scottish case which was decided in the Inner House of the Court of Session on appeal from the Lands Valuation Court. The case is *Inland Revenue Officer* v. *Assessor for Edinburgh*,[6] in which the question before the court was whether the slaughterhouse, conducted by the Corporation of the City of Edinburgh, was or was not within the ambit of the factory legislation. The court had found in favour of the City of Edinburgh, and that view was sustained in the Inner House. Lord Hunter said [7]: "The main argument presented by the appellant "was that the primary use and occupation of the premises was "to provide statutory facilities for slaughtering animals, and that "they were therefore not entitled to be treated as industrial "subjects. . . . I think this argument was fallacious, and that, "as the subjects were being mainly, if not entirely, used for "purposes which were admittedly"—I emphasize the word "admittedly" in deference to Mr. Squibb's argument—"proper "factory purposes, the committee were right in treating the "subjects as industrial."

Lord Sands was of the same opinion, although he concluded by expressing some doubt [8] "as to whether the relief here given "in any way subserves the economic purpose of the legislation."

Lord Fleming, at the end of his judgment, used language which has been much quoted [9]: "The slaughter of animals, the "dividing up of the carcases, and the treatment of the by-products "and residuals appear to me to be a process of altering or "adapting for sale, and I therefore think that the committee "were right in holding that the subjects were industrial lands "and heritages."

[5] [1931] 2 English Derating Appeals 282, 286.
[6] 1930 S.C. 429.
[7] Ibid. 432.
[8] Ibid. 433.
[9] Ibid.

C. A.
1958
Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).
Lord Evershed M.R.

I have referred to the admission mentioned by Lord Hunter because Mr. Squibb made the point that in the Scottish case, as in the Divisional Court cases, there were special features which he relied on as showing that they could none of them be taken as in all respects in pari materia with the present case. I also draw attention to the fact that none of the cases are in strictness binding on this court. But they have stood apparently unchallenged for more than a quarter of a century. It seems, therefore, to me that two conclusions may be drawn from the cases for our guidance: first, that it is now too late to be shocked, so to speak, by the application to the processes with which we are here concerned of the phrase "adapting an article for sale"; and, second, that these questions should be treated, as they have been treated, prima facie at any rate as questions of degree and therefore of fact.

I turn now to the decision of the tribunal which sets out very fully the facts in the present case. I content myself with one or two references. Thus, after describing the initial operations, including the killing and the separation from the main carcase of the offal, intestines and so forth, the tribunal states: "While in "the hanging room the meat"—and that refers to the main carcase—"cools to atmospheric temperature and sets due to rigor "mortis and this cooling and setting is necessary to get the meat "into proper condition for human consumption. Prior to sale, "which usually takes place the day following slaughter, the sides "of beef are weighed and further sub-divided into quarters for "ease of handling." The decision then passes to a discussion of what happens to the component parts. This again I quote by way only of illustration: "The intestines, while still warm, are "taken to the gut room where the fat is separated from the "intestines which are then stripped of their contents and prepared "for further processing, either on or off the premises, for beef "casings." Finally, the tribunal says: "It was agreed by the "expert witnesses called on behalf of both appellants and the "respondent that the whole of the processes carried out on the "premises constituted the normal good slaughterhouse procedure. "It was further agreed by these witnesses that if a beast was "merely killed and the further processes carried out on the "premises did not immediately follow, the flesh would be unfit "for human consumption." That no doubt may be so; but I add that it does not seem to me to follow that the other operations are not processes nevertheless.

If I may venture to say so, I think that Mr. Scholefield's attractive presentation of the case is perhaps an over-simplification of it; for he says, founding himself on certain of the passages which I have read, that all that occurs at this slaughterhouse is a particular kind of killing. You may have the killing of the knacker's yard, where the result is not intended for human consumption, or you may have the killing in a slaughterhouse, which is a killing for butcher's meat; and in either case all you

are really doing is a particular kind of killing; and, he says, killing of any kind is not an adaptation of an article for sale.

I am not satisfied that that is a sufficient or adequate analysis. Killing is, after all, an incident, albeit one essential to the whole process which follows and which indeed initiates all that does follow; but it is an incident none the less, a part only of all that goes on in the slaughterhouse. In other words, the question whether the whole series of operations, including the killing, amounts to an adaptation of an article for sale is (as I have said, guided by the cases that I have quoted) a matter of degree and of fact. So, as I think, the tribunal treated it, and rightly treated it; they said: "We have come to the decision upon "the evidence before us that the primary purpose of the occupa-"tion and use of the premises is to produce meat for human "consumption and by-products for sale and that the actual killing "is subsidiary to this main purpose."

At this point I should like to say (not with any desire to be critical) a word about the use in the sentence I have read of the word "primary." Immediately before that sentence, the question had been posed thus: "The question therefore which "we have to consider is what is the primary purpose of this "hereditament?" Now the word "primary" does not occur at all in section 149 of the Factory and Workshop Act, 1901. There the language poses the question: Is the hereditament used for any of the following purposes, including the adaptation for sale of any article? The first question, in strictness, therefore, is for the tribunal to ask and answer the question: Looking at the whole of the process carried on, can it fairly and properly be said that the hereditament is being used for the purpose of adapting for sale an article?

The word "primary" owes its significance and presence in these cases to the terms of section 3 of the Rating and Valuation Act, 1928. It is there provided that, notwithstanding that the hereditament may at first have qualified as an industrial hereditament by being a factory within section 149 of the Act of 1901, nevertheless, for the purposes of the Rating Act, it may after all be excluded if its "primary purpose" was a purpose which was not that of a factory or workshop. Other examples of exclusion include that where the primary purpose is that of a retail shop; and in that case no apparent conflict arises. Where the only question as to user is that of adaptation or not, it may no doubt come to much the same thing; but the real point here is not, as I think, the question of what the primary purpose was (which would be directly appropriate to the question of exclusion under the Act of 1928) but rather the more general question whether the purposes for which this hereditament was used were within the terms of the Act of 1901 and particularly the phrase "the "adapting for sale of any article."

But that possible criticism of the way in which the decision

C. A.

1958

Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).

Lord Evershed M.R.

has been formulated does not affect what I take to be the conclusion, so far, of the tribunal, namely, that on the facts the operations conducted in this slaughterhouse, set out earlier in the decision, did qualify the hereditament as a factory or workshop within the meaning of section 149 of the Act of 1901. So far, then, the tribunal's decision was not adverse to the contention of the appellants. But the tribunal went on to say that, although you might properly hold that the purpose for which the hereditament was used was an adaptation for sale of an article (strained though the use of the language might thereby be), still, the truth was that this slaughterhouse, and, indeed, any slaughterhouse, was an entity not comprehended in Parliamentary intention within the Factory Act code at all, but rather that slaughterhouses should be treated as governed, and for this purpose exclusively governed, by what might be called the slaughterhouse special code of legislation. I have already referred to the point that slaughterhouses are not mentioned in the Sixth Schedule, though it is conceded on all hands that that of itself is not by any means conclusive.

The point is stated by the tribunal as follows: "Twenty "years before the first Factory Act of 1867"—I think that perhaps the word "first" might be omitted—"slaughterhouses "had been the subject of legislation in the Towns Improvement "Clauses Act, 1847, and it is clear from the provisions of the "Markets and Fairs Act of the same year that a slaughterhouse "was the only place in which not only might cattle be "slaughtered but also the carcase dressed for sale for human "food. The legislation in regard to slaughterhouses deals "specifically with them in a manner similar to that in which "factories are regulated by the Factories Act, and it seems "to us that Parliament, in passing the Factories Act, 1901, "deliberately omitted slaughterhouses from the list of non-textile "factories as being already regulated by other legislation."

It is no doubt true that the circumstance that the process being conducted on a particular hereditament may be fairly and properly described (whether the language be strained or not) as an adaptation of an article for sale is not necessarily conclusive of the question whether the hereditament is a factory or workshop, particularly if it appears that the general provisions of the Factories Act, 1901, as a whole clearly are inapplicable to the circumstances under consideration. That was the effect of both *Nash* v. *Hollinshead*[10] and *Wood* v. *London County Council*,[11] referred to earlier in the decision. In the former case an agricultural operation, carried on as part of normal farm work, and in the second case a kitchen, providing for meals of operatives, were held to be outside the scope of the Factories Act legislation, because neither a farm nor the kitchen could be fitted at all into the general compass and expressed purpose of the Factories Act.

[10] [1901] 1 K.B. 700; 17 T.L.R. 352.

[11] [1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 2 All E.R. 230.

But I am not satisfied that the same can by any means be said of this case. Even if 90 years ago—that is to say, in 1867—slaughterhouses did not so easily fit into the general scope and application of the Factories Act legislation of that year, it does not follow, as Mr. Rowe pointed out in his reply, that the same is true of a much more mechanized age, or that the workers in a modern slaughterhouse may not naturally be the subject of Factory Act protection. Indeed, during the course of the argument my brother Sellers referred to *Gledhill* v. *Liverpool Abattoir Utility Co. Ltd.*,[12] which showed that in Liverpool, when that case was decided, it was readily admitted that an abattoir was within the Factories Act, so as to give to the workers therein the protection of that legislation.

I would therefore answer this point in this way: I would say that the slaughterhouse legislation, the code which I have mentioned, is really directed to a distinct and quite different purpose from that contemplated by the Factories Acts. It is directed to the securing of cleanliness for the benefit of the public, who will eat the meat eventually produced, and also to the diminution or elimination, so far as it is practicable, of cruelty to the animals which are slaughtered. The Factory Acts, on the other hand, are designed for a quite different purpose, namely, to give protection in cases where protection is properly required to persons working in what are called factories or workshops. Once that difference in aim is stated, it follows that there is no logical ground for saying that the purposes of one are exclusive of the purposes of the others.

As regards factory legislation, we were referred to the first of the Acts, 3 & 4 Will. 4, c. 103, known as the Shaftesbury Act, and the Acts which followed in 1840, 1850, 1853 and 1856. It is quite true that the legislation which comprehends the factory legislation prior to 1867 might be said to be largely concerned with the employment in factories of women and children, and it was said by Mr. Squibb that really it could have no sensible application to slaughterhouses in those days. I am unable to accept that. There is no material in fact before us, but it would not appear to me to be self-evident that provisions against the employment of women and young children were necessarily wholly inapposite in the case of slaughterhouses in the first half of the nineteenth century. The significance, I should state, of the date 1867 and the Factory Act of that year, is that it was in the legislation of that year that the phrase "adapting for sale "of any article" first came into the legislative code.

Thereafter the two streams of legislation go on. Prior to 1867 there had been, under the head of slaughterhouse legislation, the Markets and Fairs Act, 1847, and the Towns Improvement Clauses Act, 1847, mentioned in the decision and directed, as I have said, to cleanliness and the absence of cruelty. Thereafter, equally, in 1933, 1938 and 1954 there were Acts for similar

[12] [1957] 1 W.L.R. 1028; [1957] 3 All E.R. 117.

C. A.
1958
Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).
Lord Evershed M.R.

purposes relating to slaughterhouses. On the other side, as regards the other stream, so to speak, there came the Factory and Workship Act, 1901, followed by the Act of 1920.

For the reasons I have stated, I am therefore unable to agree with the conclusion of the Lands Tribunal that the continuing stream of slaughterhouse legislation from 1847 to 1954, forming, if you please, something of a code in itself, has the effect of excluding from the scope of the Factory Act legislation slaughterhouses. I do not find any good reason for saying that slaughterhouses were thereby not intended by Parliament to be covered by the latter legislation. I think that the Factory Act is clearly capable of applying to slaughterhouses, certainly where the use of modern machinery makes it sensible that those working in them should have the protection of those Acts. If that is so, then the case is thrown back upon the first question, namely, the question of fact whether the operations of this slaughterhouse did amount, within the meaning of the Factory Act legislation, to an adapting of an article for sale. On that matter of fact the tribunal found in favour of the appellants and I see no ground for disturbing their conclusion.

The result must be, in my view, that this appeal must be allowed, and that the tribunal should have found the appellants' hereditament entitled to the derating privilege which they sought.

Parker L.J. I have come to the same conclusion. The first question is whether manual labour was employed in the appellants' premises for a factory purpose within section 149 (1) of the Factory Act, 1901, the relevant purpose being the adapting for sale of an article.

The whole process carried out in the premises is undoubtedly the preparation of food for human consumption, but the question is whether any part of that process amounts to the adapting for sale of an article. Clearly, the actual killing is not, since a live animal is not, I think, an article. At the other end of the scale, there may be premises (not these premises) where the meat is in the end made, for instance, into sausages or pies, in which case there is clearly an adapting for sale of an article, if not the manufacture of an article. In between there are, as in the present case, a number of steps taken in the preparation of the food, some to preserve the food, some to carve up the carcase, and some to separate the products for sale to different purchasers.

I confess that, on a first consideration of the matter, it seemed to me a strain of language to say that any of these steps amounted to an adapting for sale, but, having regard to the opinions expressed in the cases to which we have been referred—decisions which have stood for a long time—I am not prepared to differ. Indeed, I think it can be put in this way. Most, if not all, of the steps taken after the actual killing amount to the dressing of the carcase for sale, a matter which, on the facts of

any particular case, may be said to amount to an adapting for sale. The tribunal have clearly so found, and there was evidence on which they could arrive at that conclusion.

The next question is whether, there being an activity here, namely, the actual killing, which was not a factory purpose, it can be said that these premises were primarily used for a factory purpose. As regards that, it must in every case be a matter of degree and, accordingly, a question of fact. The tribunal, as I read their decision, have clearly found that the primary purpose here was a factory purpose. That being so, prima facie the premises in question amounted to an industrial hereditament within section 3 of the Rating and Valuation (Apportionment) Act, 1928.

The tribunal, nevertheless, held that a consideration of the activities carried on in the premises led to the conclusion that the Factory Act legislation was not applicable and reference was made to *Nash* v. *Hollinshead*[13] and *Wood* v. *London County Council*,[14] to which my Lord has referred. This contention was supported before us by Mr. Squibb by reference to the legislation dealing with factories and that dealing with slaughterhouses. He contended that at the time when the words "adapting for "sale" were first introduced into the Factory Acts, namely, in 1867, those Acts contained no provisions apt to apply to slaughterhouses, other than provisions dealing with what one may call sanitary arrangements which already appeared in the slaughterhouse legislation: for example, section 128 of the Towns Improvement Clauses Act, 1847.

I am unable to accept this contention. It may well be, for instance, that boys under 18 or women were being employed at that time in slaughterhouses, in which case the Factory Acts then were certainly apt to cover slaughterhouses. But, at any rate, looked at today, when mechanical saws, hoists and other machinery are used in slaughterhouses, I cannot think that the factory legislation is in any way inapplicable.

The tribunal also referred to the fact that these premises were not registered under the Factory Act, and that slaughterhouses were omitted from the list of non-textile factories in the Act of 1901. Those considerations certainly are not conclusive and, to my mind, carry little weight.

For those reasons, and the reasons given by my Lord, I would allow this appeal.

SELLERS L.J. I take the same view. This case takes one back to the legal battlefields of over a quarter of a century ago when, after the Act of 1928, known as the Derating Act (although the actual benefit of derating was not, I think, given until a year later, 1929), there were many contests giving rise to questions such as those which have been brought before us in this case, and in 1930 a large number of cases were assembled for

[13] [1901] 1 K.B. 700.
[14] [1941] 2 K.B. 232.

C. A.
1958
Fatstock Marketing Corporation Ltd. v. Morgan (Valuation Officer).
Sellers L.J.

the consideration of this court. I quote from *Bailey R. O.* v. *Potteries Electrical Traction Co.*[15]

I propose to read two brief extracts from the judgment of Scrutton L.J.[16]: "It must be borne in mind that if you exclude "a hereditament from derating because there is no manufac- "turing process carried on in it, you are depriving the workmen "of the protection of the Factory Acts, as well as the employer "of the benefit of derating. It must also be borne in mind that "in construing the Factory Acts, the courts have given a wide "meaning to the words. When in *Law* v. *Graham*[17] the courts "thought that mechanical bottle washing did not make a place "a factory, the legislature the same year put bottle washing into "Part II of the Sixth Schedule, making it a factory, if power "were used. Putting chocolates into a decorated box, in "*Fullers'* case,[18] and arranging flowers on a metal cross or circle "to make a wreath, in *Hoare* v. *Robert Green Ltd.*,[19] have been "treated as 'adapting for sale' to protect the workpeople "employed in that occupation."

I quote that passage, because, as my Lord has pointed out, in *Gledhill* v. *Liverpool Abattoir Utility Co. Ltd.*,[20] the Liverpool Corporation, who are the occupiers of an abattoir in Liverpool, had accepted the obligations of the Factory Acts, accepting that those premises were within the Acts. The Court of Appeal, as appears from the judgment of Morris L.J., were informed that the application of the Factory Acts to the premises was not in dispute and the court proceeded to apply the regulations applicable to a factory. That, of course, is not conclusive, because the issue was not fought out and decided whether the premises were or were not within the Factory Acts. That case is not, I think, the first occasion when that very abattoir has been accepted in the courts as a factory, and it is unlikely that an admission that the premises were subject to the onerous obligations of the Factory Acts would have been made unless a well-informed local authority had been satisfied that that was the case. It may be that the facts and circumstances existing at that abattoir are not precisely the same as those in the case before us, but I think the probabilities are that there, also, they carry out what has been referred to in this case as normal good slaughterhouse procedure but on a very much larger scale.

The only other passage to which I would refer in the judgment of Scrutton L.J. deals with this question of adaptation for sale. I do not propose to read it all, although it is all applicable to the issues we have had to try in the present case. The Lord Justice said[21]: "But in view of the fact that 'adapting for sale' "is a separate head from altering, I see no reason for requiring "alteration of substance to make 'adapting for sale.' If this

[15] [1931] 1 K.B. 385; 46 T.L.R. 601.
[16] [1931] 1 K.B. 385, 493.
[17] [1901] 2 K.B. 327; 17 T.L.R. 474.
[18] [1901] 2 K.B. 209.
[19] [1907] 2 K.B. 315; 23 T.L.R. 483.
[20] [1957] 1 W.L.R. 1028.
[21] [1931] 1 K.B. 385, 495.

"were necessary, there would be no need to insert 'adapting for "'sale.' Where the process of separation or sorting is com- "plicated and substantial, again I think there is adapting for "sale. In many cases, it is a question of degree, which is, in "my view fact and not law, and not properly the subject of a "Special Case."

On the facts which have been revealed here and, as I understand it, on the finding of the Lands Tribunal, the processes carried on in this slaughterhouse amount to an adapting for sale and would, prima facie, make these premises a factory and subject to the Factory Acts. But Mr. Scholefield in particular, developing an argument advanced by his leader, stressed that that was a wrong view to take of the facts. He said that what happened after the killing was normal good slaughterhouse procedure and was to be treated as part of the slaughtering. That argument does not appeal to me. Once the killing is done that is final. The dead animal could, of course, be taken away; it could be burned or buried or, I suppose, it could be placed in a deep-freeze container and in that way preserved without decomposition setting in. So far, I would agree that that would be slaughtering and handling incidental thereto. But what takes place on the premises here, after the killing, is done for the purposes of preservation and adaptation for food of the carcase of the beast which has just been killed. The acts done are in no way to complete the slaughter, but to make use of the beast after slaughter, and if what is done amounts to an adaptation for sale that particular requirement within the definition of "factory" is, as I see it, fulfilled. I think it has been so found.

The only remaining question is one on which I entirely agree with my Lords for the reasons they have given. I can see no reason why the special legislation dealing with slaughterhouses cannot run concurrently with the legislation with regard to factories. I do not think that the slaughterhouses legislation is or has been in any way exclusive of the other. They deal with different matters. The slaughterhouse legislation deals with the animals and the products, and the factory legislation deals with the workmen carrying out the work and the processes involved in such an occupation. From another aspect, the slaughterhouse legislation deals with cleanliness and the prevention of cruelty, and in the case of the Factory Act legislation it deals with the safety and health of the workpeople. There may be matters in which there is some overlapping, such as ventilation, because good ventilation serves the purposes of both types of legislation. I think the appeal should succeed.

Appeal allowed.

Solicitors: *Richards, Butler & Co.; Solicitor of Inland Revenue.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

1958
Mar. 7.

Lord Goddard C.J., Streatfeild and Slade JJ.

* *In re* HASTINGS.

Criminal Law—Sentence—Concurrent sentences—Form—Indictment containing several counts—Sentence of "four years' corrective "training"—Conviction on first count quashed—Whether concurrent sentences—Whether particular form of words necessary—Clear intention to pass concurrent sentences—Whether sentence on other counts in existence.

The applicant was tried on an indictment containing five counts, the first of which charged him with larceny as a bailee, the next three with false pretences, and the last with fraudulent conversion. He was convicted on each count. The trial judge passing sentence, said: ". . . you have been convicted . . . of deliberate, calculated "and systematic frauds. Those frauds have not only affected "companies . . . but have . . . brought . . . financial burdens on "little men. . . . You will go to prison for four years' corrective "training." The only sentence endorsed on the indictment, entered in the court calendar, and stated in the prison governor's commital warrant, was "four years' corrective training." On an appeal against conviction, the Court of Criminal Appeal quashed the conviction on the first count and dismissed the appeal in relation to the other counts. On an application for a writ of habeas corpus on the ground that as the conviction on the first count had been quashed there was no lawful sentence in existence on the applicant:—

Held, that where an indictment contained a number of counts a court passing concurrent sentences should make it clear that it was in fact passing sentence on each count on which there was a finding of guilt, but that, provided that the meaning was made clear in the passing of the sentence, no particular form of words was necessary; that the words used by the judge showed a clear intention to impose concurrent sentences of four years' corrective training in respect of each of the offences; and that, therefore, the sentence of four years' corrective training was applicable to each of the counts and the applicant was lawfully detained.

Rex v. *Grubb* (1945) 30 Cr.App.R. 148; 61 T.L.R. 288 and *O'Connell* v. *The Queen* (1844) 11 Cl. & Fin. 155 considered.

Per Lord Goddard C.J. When passing concurrent sentences it is desirable that some such words as "on each count" or "concurrent" should be used.

Application for writ of habeas corpus.

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the four remaining counts were in respect of misdemeanours; counts two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, passing sentence, said: ". . . you have been "convicted on the plainest evidence of deliberate, calculated and "systematic frauds. Those frauds have not only affected com-"panies well able to sustain loss, but have cruelly brought grave

"financial burdens on little men which it will be difficult for "them to bear. This is by no means the first time you have "been convicted of dishonesty. You are a menace to the "integrity and health of the commercial community. You will "go to prison for four years' corrective training." There was endorsed on the indictment "four years' corrective training," and that was the sentence entered on the calendar for the session of the court; the warrant of commitment sent to the Governor of Walton Prison, Liverpool, where the applicant was detained, stated: "Whereas . . . Edward Thomas Hastings is "and stands convicted of larceny, false pretences and fraudulent "conversion. It is therefore ordered and adjudged by this court "that [he] be sent for corrective training for four years."

The applicant applied for leave to appeal against the convictions and leave was given in respect of the first and two of the other counts. On December 18, 1957, his appeal was heard by the Court of Criminal Appeal, when the conviction on the first count was quashed and the appeal in relation to the two other counts was dismissed. Pearson J., giving the judgment of the court, stated that the applicant had been "sentenced on each "count concurrently," that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable, and "The conviction on the first count is "quashed . . . and there will be no alteration of sentence."

The applicant applied for a writ of habeas corpus directed to the governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence.

A. P. Marshall Q.C. and *Neil Butter* for the applicant.
Rodger Winn and *G. J. Bean* for the respondents.

The following cases were cited in argument: *Rex* v. *Grubb*,[1] *O'Connell* v. *The Queen*[2] and *Reg.* v. *Kelsall*.[3]

LORD GODDARD C.J. Mr. Marshall moves in this matter for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol where he is serving a sentence of four years' corrective training, with a view to his being discharged on the ground that his detention is illegal. The main ground put forward is that no sentence of the court was ever passed upon him. [His Lordship stated the facts and continued:] The point made here is that the sentence of four years' corrective training was duly endorsed on the indictment but that the endorsement did not show four years' corrective training on each of the counts, nor did the recorder use the words

[1] (1945) 30 Cr.App.R. 148; 61 T.L.R. 288.

[2] (1844) 11 Cl. & F. 155; 5 St.Tr. (N.S.) 1.

[3] March 4, 1957 (unreported).

1958

Hastings, *In re.*

Lord Goddard C.J.

"concurrent on each count." Accordingly, Mr. Marshall in the course of a learned and clear argument has submitted that as the sentence was passed on an indictment containing five counts, conviction on one of which has been quashed, there is nothing to show to which count the sentence is applicable. He contends that no sentence was passed on the count at all, therefore there has been no legal sentence passed and there is no authority for holding the applicant in gaol.

In my opinion, the question is simply one of construction. Mr. Marshall agrees that if the word "concurrent" had been used, or if the recorder had said "on each count," he would have no ground on which he could sustain the motion. It seems to me that it is obvious that the recorder meant to pass a sentence of four years on each count of the indictment. It is to be noticed that each count of this indictment was for quite a separate and distinct offence. They were not alternative offences; they were offences each of which would support a sentence of four years' corrective training, as they would have sustained a sentence of four years' imprisonment; the recorder was dealing with a course of fraud and was saying that he was sentencing the applicant for systematic frauds. Every one of these cases was a case of fraud. It is true that the first case was a felony and the others misdemeanors, but there is no point in that, because the four convictions which stood were all convictions for fraud, and of course the first crime, larceny as a bailee, depends on the fraudulent conversion of the property entrusted to the bailee. If there was a bailment, then by statute the offence of larceny as a bailee can be sustained. I am clearly of opinion that the intention of the recorder was to pass a concurrent sentence, although he did not use the word "concurrent." It is not a question of the exact words that are used, but of what the court considers to be the intention of the recorder when passing the sentence, and one can see that the recorder meant that on each of these counts a sentence of four years' corrective training was to be passed. That was the view which the Court of Criminal Appeal took when this matter was brought before them, for the point had been raised in the notice of appeal, but the court in quashing the conviction on count 1 expressly said that they were not making any difference in the sentence because of the gravity of the crimes committed by the applicant which formed the subject of the other counts. It would follow that if the point Mr. Marshall has strenuously urged on us is right, it applies equally to the judgment of the Court of Criminal Appeal. Pearson J., who gave the judgment of that court, started his judgment by saying: "In this case the "appellant was convicted on five counts involving fraud in the "Liverpool Crown Court, and he was sentenced on each count "concurrently to a term of imprisonment. Leave to appeal was "given with regard to three counts only, and leave to appeal "was given only in respect of conviction. That, in fact, was all "that was asked for, but in any case the actual sentence given

"was in our view a reasonable sentence and there would be no "reason for interfering with it on any view." Then at the end of his judgment: "The conviction on the first count is quashed, "in other respects the appeal fails, and there will be no alteration "of sentence." In my judgment, the real question which we have to decide is: What was the true effect of the words used by the recorder? I think that it is abundantly clear that their effect is that he intended this to be a sentence concurrent on each count. For that reason, therefore, this application fails.

I need only say one or two more words with regard to the authorities which have been cited to us. Reference was made to *O'Connell* v. *The Queen*,[1] a case in the House of Lords in 1844 on a writ of error. In that case there were 11 counts, and five counts turned out in the opinion of the House to be defective and were quashed as bad counts. I do not know that there would be any difference whether they were quashed as bad counts or if the verdict on those counts had been Not Guilty. In those days the way of challenging a criminal conviction was by way of writ of error, and when the writ of error was brought before the House of Lords it appeared that the judgment recorded was that "for the offences aforesaid" the sentences should be given. The majority of their Lordships, contrary to the opinions which the judges who had been called on to assist the House had given, came to the conclusion that there had not been a judgment on all the counts. It is obvious from reading the opinions of Lord Denman[2] and Lord Cottenham[3] that they were very much impressed by the inconveniences which they thought could arise in those days, but things are very different now, because there is a Court of Criminal Appeal and such a matter could be easily brought before that court. In those days a general sentence became defective if it was given on a number of counts some of which were afterwards quashed, but if a case comes before the Court of Criminal Appeal in which there has been a sentence of this sort pronounced, which the court thinks means concurrent sentences, or if, for instance, two or three counts in an indictment containing a large number of counts are quashed, it is always open to that court, whether there has been an appeal against sentence or not, to say: "Having quashed the convictions on "certain counts, that makes such a difference that we shall "reduce the sentence." That is a question of the court exercising its discretion, but there was nothing said in *O'Connell* v. *The Queen*[4] in the House of Lords to the effect that a general sentence cannot be given. I do not propose to go at length into the history of the abolition of writs of error which are no longer available to a prisoner. His privileges are now given to him by the Criminal Appeal Act, 1907, and I see nothing here to force us to say that the recorder in passing the sentence he did was

[1] (1844) 11 Cl. & F. 155.
[2] Ibid. 351.
[3] Ibid. 388.
[4] Ibid. 155.

1958

Hastings, *In re.*

Lord Goddard C.J.

not passing a sentence on each count of the indictment. Therefore, in my opinion, the sentence of four years' corrective training is applicable to counts 2, 3, 4 and 5, and accordingly this motion fails.

There are two things which I wish to add. Everybody knows that it is the commonest thing in the world, whether at assizes or at quarter sessions, for a sentence to be pronounced in this manner, but since 1844 no appeal has ever been brought before the court on that ground, although if the mere fact that the judge had omitted to use the word "concurrent" made a difference, it is to be supposed that many prisoners would have escaped.

The other matter is that this case has perhaps shown that it is always desirable for the court to use words such as "on each "count" or "concurrent." Although in this case we have no difficulty in holding that that was the recorder's intention, and we can see that from the use of the word "frauds" in the plural, it would be desirable to use some such words to prevent this kind of question arising hereafter. In this case, however, we cannot say that no proper sentence was passed merely because one set of words was used rather than another.

Streatfeild J. I am of the same opinion and I want to make it clear that I would certainly uphold the principle which Mr. Marshall has insisted on, that a court should make it clear that it is in fact passing a sentence in respect of each count on which the accused person has been found guilty or has pleaded guilty; in that respect the judgment of Humphreys J. in *Rex* v. *Grubb* [5] is very much in point. At the same time, I do not think that any particular form of words is necessary, provided that it is made clear that a sentence which is passed is in fact applicable to each count of an indictment on which there has been a finding of guilt. It may be convenient that some phrase such as "upon each count" or "counts numbers" so and so "the sentence shall be" such and such a term should be used. It may be that the use of the word "concurrently" would put the matter beyond all doubt, but provided that the meaning is clear in the passing of the sentence, and is made clear to the defendant, no particular form of words is necessary.

In my view this case narrows down to the one question as to what is the proper interpretation of the words used by the recorder in passing sentence, not merely what he meant, but what he actually said. I agree with my Lord that the words of the recorder's sentence are really perfectly clear. He is referring to an indictment which contained five counts, one of which was for larceny as a bailee and the others for frauds, three of them being false pretences and the other one fraudulent conversion. He refers throughout to those frauds in the plural. He then puts the matter beyond all argument by going on to categorize the people who have been victimized by those frauds, and he ends

[5] (1945) 30 Cr.App.R. 148; 61 T.L.R. 288.

by saying "You will go to prison for four years' corrective train-"ing." It is to my mind obvious that he was applying his mind to each one of those frauds. Indeed, it would actually seem that the word "fraud" was more applicable to the last four counts of the indictment than to the first one for larceny, but, having regard to the use of the plural in that way, it is clear that the recorder made up his mind, perfectly correctly, that, having regard to the record of the applicant, each count merited a sentence of corrective training, and that when he proceeded to pass the sentence of corrective training it clearly must refer to each and all of those frauds to which he has alluded. In my judgment, therefore, although he has not used the words "upon "each count" separately, nor the word "concurrently," it is almost too clear for argument that the totality of the words used by him amounts to a sentence of four years' corrective training in respect of each and every one of the five counts of the indictment.

In those circumstances, the remainder of Mr. Marshall's argument does not really arise, but it would seem likely, without expressing any further opinion on the matter, that section 5 of the Crown Cases Act, 1848, was passed with the express purpose of getting rid of the difficulties which arose in *O'Connell's* case.[6] Nowadays it would seem that those difficulties can equally well be dealt with by the Court of Criminal Appeal under either sections 4 or 5 of the Criminal Appeal Act, 1907. However, having come to the conclusion which I have come to as to the proper interpretation of the judge's sentence, those latter matters do not arise and I found my judgment on what I believe to be the interpretation of the sentence, as I have already indicated. In my view it was the perfectly clear intention that these were in fact concurrent sentences on each one of the counts. For those reasons, therefore, I agree with the judgment of my Lord.

SLADE J. I agree. From the language used by the recorder, I think the conclusion is almost irresistible that he intended his sentence of four years' corrective training to relate to each of the five counts of the indictment. I am fortified in this view by asking myself the question, if that is not its true interpretation, to which one or more of the five counts did he intend his sentence to relate? It has been suggested that the sentence was intended to relate only to count 1 because that is a felony while counts 2 to 5 are misdemeanors, but I cannot help thinking that that suggestion was made solely because the felony was the only count quashed by the Court of Criminal Appeal. The word "frauds" in the plural which the recorder used before passing sentence is more appropriate to the four counts of misdemeanor than to the count of larceny, though it is true that in this particular case the same word in the singular would also be appropriate to count 1 because that count was in respect of larceny by a bailee and the words "fraudulently converts" appear in section 1 (1) of the Larceny

[6] 11 Cl. & F. 155.

1958

Hastings, *In re.*

Slade J.

Act, 1916. I am satisfied that the only reasonable construction of the words used by the recorder is that he intended to pass a sentence of four years' corrective training on each of the five counts of the indictment.

Application dismissed.

Solicitors: *Field, Roscoe & Co. for Keith Moore, Chester; Treasury Solicitor.*

J. F. L.

[MANCHESTER ASSIZES.]

1957 *Dec.* 16, 17.

Lynskey J.

* BLAKELEY *v.* C. & H. CLOTHING CO. (A Firm) and Another.

[1952 B. No. 7294.]

Factory—Lift—Gates—Duty to prevent person coming into contact with moving part—Person inserting hand through gates—Injury to hand by movement of lift—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 22 (3).

The plaintiff was employed by a firm who occupied two floors of a three-storey building in which there was a lift which was under the control of the owners of the building and supplied by them for the use of the employers' workmen. The plaintiff, having in the course of his employment left the lift and shut the gates, thought that the inner gate was not properly shut and inserted his hand through the outer gate to close the inner gate properly. As he did so the lift moved and the plaintiff's hand was injured. In an action against the employers and the owners of the building:—

Held, that section 22 (3) of the Factories Act, 1937,[1] imposed an absolute obligation to provide the lift with gates of a character which, when shut, would prevent people from coming into contact with the lift when moving, and, accordingly, the owners of the building were in breach of their statutory duty.

Action.

The plaintiff, Derek Blakeley, was employed by the first defendants, a firm of clothing manufacturers, who occupied the first and second floors of a building owned by the second defendants, J. G. Needham Ltd. The second defendants were in control of a lift in the building, which they maintained and

---

[Reported by E. Somerset Jones, Esq., Barrister-at-Law.]

[1] Factories Act, 1937, s. 22 (3): "Every hoistway or liftway shall be "efficiently protected by a substantial "enclosure fitted with gates, being "such an enclosure as to prevent, "when the gates are shut, any person "falling down the way or coming "into contact with any moving part "of the hoist or lift."

supplied for use by, inter alia, the employees of the first defendants.

On August 23, 1951, the plaintiff, who was then about 15 years old and had just left school, used the lift in the course of his employment to go up to the top floor of the premises. He stepped out of the lift and closed both gates behind him. Having done so, he saw, as he thought, that the inner gate was open and, with the intention of closing the inner gate properly, inserted his hand through the outer gate and onto the inner gate to push it to. As he did so, the lift started to move and caught his hand, causing him severe injuries. His hand was subsequently amputated. The plaintiff, who at the time of the accident had been in the first defendants' employment for some three days and had received some instruction in the use of the lift, brought this action by his mother and next friend against the first defendants on the ground that they were in breach of their common law duty towards him as his employers, and against the second defendants on the ground that they were in breach of the statutory duty imposed by section 22 (3) of the Factories Act, 1937.

Lynskey J., exonerating the first defendants, found that the danger inherent in the plaintiff's action, owing to the possible risk of the lift moving by someone pressing the button on a lower floor, was an obvious danger which did not require warning even to a boy of 15 or 16 years of age.

Alexander Karmel Q.C. and *A. Logan Petch* for the plaintiff.

Fenton Atkinson Q.C. and *W. G. Morris* for the first defendants.

J. D. Cantley Q.C. and *W. D. T. Hodgson* for the second defendants.

The case cited in argument is referred to in the judgment.

LYNSKEY J., after stating the facts which are substantially summarized above and holding that the first defendants were not in breach of their common law duty to take reasonable care for the safety of the plaintiff, continued: The next question is in relation to the second defendants. It is agreed that the statutory duty imposed by section 22 of the Factories Act, 1937, in relation to hoists and lifts is on the second defendants alone. The plaintiff relies on section 22 (3). [His Lordship read the subsection and continued:] It was submitted on behalf of the second defendants, first of all, that the subsection is dealing primarily with hoistways or liftways, and not with gates at all, and that I ought to construe it on the basis that what has to be provided is some form of construction holding the lift which, of itself plus the gates, would prevent people falling down or coming into contact with moving machinery. My difficulty in doing that is because of the wording of the subsection itself: " . . . being such an " enclosure as to prevent, when the gates are shut, any person

1957

Blakeley v. C. & H. Clothing Co. (a Firm).

Lynskey J.

"falling down the way or coming into contact with any moving "part of the hoist or lift." That seems to me to mean that these hoists or lifts must be provided with gates of a character which will prevent people from coming into contact with the lift when moving, or with any moving part of the lift including the inner gates which move up and down with the lift. The obligation imposed by section 22 (3) is an absolute one. The hoist, in conjunction with the gate, must be of such a character as to prevent anyone coming into contact with any moving part of the hoist or lift. That, on the face of it, seems to me to be the ordinary meaning of the words and there is nothing to qualify it. That is the meaning of the subsection and there is an absolute obligation on persons responsible for complying with that statutory duty in relation to lifts.

It was then said on behalf of the second defendants that, in construing an absolute obligation, one ought to have regard to what has been said in relation to other sections of the Act where the obligation is to make secure or securely fence, and matters of that sort. In *Walker* v. *Bletchley Flettons Ltd.*[1] du Parcq J. said[2]: "A part of machinery is dangerous if it is a possible "cause of injury to anybody acting in a way in which a human "being may be reasonably expected to act in circumstances which "may be reasonably expected to occur." Without deciding if that is the proper test to be applied in the construction of section 22 (3), but adopting it for the purpose of this case and applying that principle to the facts, it seems to me clear that what the plaintiff did in this case is something which could have been reasonably anticipated or reasonably expected to occur. Here, a boy came out of the lift and knew that both gates must be closed; he thought he had closed them both, found that one was not properly closed, and put his hand inside the gates to try and push the inner gate to, to close it properly. I do not say it was a wise or good thing to do. It was obviously one of those things which any person, thinking about the matter, might say that people might be reasonably expected to do, and that people sometimes fail to take care of themselves.

Whether one adopts the strict interpretation or the more lenient interpretation of foreseeability, I am satisfied that there has in either event been a breach by the second defendants of their statutory duty. This type of lift is a type which is generally adopted and still in use in many business premises. We are dealing, not with the common law duty, but with the statutory liability and, that being what it is, there has been a breach of statutory duty despite regular inspection and the adoption by other people of similar types of lifts. Accordingly, the plaintiff is entitled to recover against the second defendants.

[His Lordship assessed the damages at £5,001 and, apportioning the blame for the accident as to two-thirds to the second

[1] [1937] 1 All E.R. 170. [2] Ibid. 175.

defendants and as to one-third to the plaintiff, gave judgment for the plaintiff for £3,334, with costs against the second defendants.]

1957

BLAKELEY v. C. & H. CLOTHING CO. (A FIRM).

Judgment for the plaintiff against the second defendants.
Judgment for the first defendants against the plaintiff.

Solicitors: *Leslie M. Lever & Co., Manchester; John Whittle, Robinson & Bailey, Manchester; A. W. Mawer & Co., Manchester.*

[CHANCERY DIVISION.]

* *In re* GRIMTHORPE, DECD.

1958
March 4.

Danckwerts J.

[1956 G. 709.]

Costs — Trustee — Indemnity as to costs — Counsel's fees — Hearings adjourned and curtailed—Payment of full fees demanded—Whether trustees entitled to indemnity.
Barrister—Fees—Brief fee—Hearings frequently adjourned—Trustee's right to indemnity.

The intention of the Practice Direction dated October 27, 1953,[1] is to secure the result that trustees are entitled to be indemnified against all costs and expenses properly incurred by them in the course of their duties as trustees.

Where, therefore, trustees have paid in good faith to counsel fees, which, having regard to the particular circumstances, the complexity of the matter, and the standing of counsel in question, are not improper, the taxing master is not entitled to tax down those fees merely because he thinks counsel might have been paid a smaller sum having regard to the curtailment of the hearings of the matter in question.

ADJOURNED SUMMONS.

By this originating summons, the applicants, the trustees of the will and codicils of Lord Grimthorpe, deceased, asked for an order that their objections to the taxation of costs in the action under an order of Wynn-Parry J. dated May 13, 1957, might be allowed and that the matter might be referred back to the taxing master to vary his certificate accordingly.

On April 23, 1956, the trustees as applicants took out an originating summons to obtain directions enabling them to widen the range of investments of the trust moneys. The Attorney-General representing the charity beneficially interested under the will, was the only respondent.

The matter came first before Roxburgh J. in chambers, on June 4, 1956; after an hour's hearing the judge stood the summons over. On October 27, 1953, the matter came in chambers before Vaisey J. who was inclined to take an adverse

1958

Grimthorpe, decd., *In re.*

view. On that occasion the matter only took some 12 minutes. Counsel's opinion was obtained in November, 1956. On May 13, 1957, the matter was heard in chambers before Wynn-Parry J. and an order was obtained in which a direction for taxation of the trustees' costs was given in the form of the Practice Direction, dated October 27, 1953.[1] The result of the taxation before the taxing master was that the fee which the trustees had paid to counsel in respect of the first hearing, before Roxburgh J. of £16 5s., was taxed down to £11; the fee of £11 which had been paid to counsel on the second hearing before Vaisey J. was taxed down to £5 10s.; the fee paid for the opinion of counsel was taxed down from £11 to £5 10s., and the fee paid at the final hearing before Wynn-Parry J. (which was to different counsel as the other counsel had taken silk more than a year before) of £16 5s. was taxed down to £5 10s.

Objections were taken on behalf of the trustees, which were as follows: "(i) The order of the Honourable Mr. Justice Wynn-"Parry dated May 13, 1957, provided for the costs and expenses "of the applicants of and incident to their application to be "taxed by the taxing master. (ii) Having regard to the pro-"visions of section 30 (2) of the Trustee Act, 1925, and to the "Practice Direction of October 27, 1953, and the observations "made thereon by the Honourable Mr. Justice Vaisey on "November 3, 1953,[2] this form of order requires the taxing "master to allow to the applicants all the expenses properly "incurred by them in relation to these proceedings and no item "should be disallowed except on the basis of a finding that it was "improperly incurred. (iii) None of the items disallowed was "improperly incurred."

The taxing master in reply to that referred to the Practice Direction laying down a new standard for the taxation of the costs of trustees, and continued: "It provides a more generous "taxation than as between solicitor and client payable out of a "common fund, giving the trustee all the costs which he is "entitled to recover from the trust fund, and as stated by "[Vaisey J.] in the final paragraph [of the Practice Note] this "means 'almost the same as costs on an indemnity basis.' The "word 'almost' presumably means that a trustee or his solicitor "should not have an entirely free hand to incur expenses out of

[1] Practice Direction dated October 27, 1953 [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159: "In cases "in which trustees are parties in "their capacity as such, and in which "it is appropriate that they should "be indemnified as to their proper "costs and expenses of the proceed-"ings, the order as to the costs of "the trustees should direct taxation "of their 'costs and expenses of and "'incident to this action [application] "'[matter]' without the addition of "the words 'as between solicitor and "'client.' On such a direction all "costs and expenses properly incurred "by the trustees will be allowed by "the taxing master. Compare Trus-"tee Act, 1925, s. 60. The costs of "other parties to the proceedings will, "as hitherto, be ordered either (*a*) "'to be taxed' (i.e., as between "party and party) or (*b*) 'to be "'taxed as between solicitor and "'client.'"

[2] [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408.

" the trust fund, nor should the discretion of the taxing officer as " to allowance or disallowance of items, or as to the quantum " of costs incurred, be fettered. The basis upon which all costs " are to be allowed by the taxing master is set out in [R.S.C.] " Ord. 65, r. 27 (29) as being what shall appear to him to have " been necessary and proper, and no costs shall be allowed, save " as against the party who incurred the same, which appear to " the taxing master to have been incurred or increased (inter " alia) ' by payment of special fees to counsel.' Although the " case was on a somewhat different point, the words ' special " ' fees ' were interpreted by Buckley J. in *Cavendish* v. *Strutt*,[3] " as meaning ' unusual or extraordinary or generous fees.' The " order under which the plaintiff's costs have been taxed related " to an application by trustees of a charity fund (inter alia) to " vary the investment clause of the trust. It was decided at an " early stage not to proceed under paragraphs 2 and 3 of the " originating summons, and the matter came before the judge " in chambers on June 4, 1956, when after one hour's argument " it was adjourned sine die in view of the Trustee Investment " Bill which was then before Parliament. This Bill was subse- " quently withdrawn and the case restored and further heard by " the judge in chambers on October 29, 1956. After twelve " minutes' argument the judge raised a question of jurisdiction " and adjourned the case into court for further argument. The " further hearing took place in chambers (by arrangement not in " court) on May 13, 1957, and the judge after reading a decision " in a similar case made his order. This hearing lasted ten " minutes. The total time covered by all three hearings was " one hour twenty-two minutes and but for the fact that the " hearings took place in different terms no further fees in addition " to the original brief fee would be allowed. I have, however, " taken into consideration the basis upon which these costs should " be taxed as mentioned above in the two opening paragraphs of " this answer, and in view of all the facts have allowed a fee of " ten guineas on the brief and further fees of five and ten guineas " respectively on the further hearings making a total of twenty- " five guineas. Another factor I have taken into account is the " change of counsel during the course of the proceedings. I am " of the opinion that it would be wrong to allow higher fees than " those I have allowed to be paid out on this trust fund, and " that those allowed by me are fair and reasonable in all the " circumstances, and that the total fees of forty guineas charged " are excessive and are not therefore properly incurred. They " should, under R.S.C., Ord. 65, r. 27 (29) only be paid, if at all, " by the party who has incurred them, namely the trustees per- " sonally and not out of the trust fund.

" It is significant, although not a matter which has finally " influenced me in coming to the above decisions that the

[3] [1904] 1 Ch. 524, 531.

1958

Grimthorpe, decd., *In re.*

"[Attorney-General's] counsel . . . charged one fee of 10 "guineas to cover all three attendances."

The applicants now sought an order that their objections be allowed.

John Pennycuick Q.C. and *John Arnold* for the applicants.
Denys Buckley for the Attorney-General.

Danckwerts J. This is a matter which has arisen on the taxation of trustees' costs under a Practice Direction, issued in 1953 [1] which provides: "In cases in which trustees are parties in "their capacity as such, and in which it is appropriate that they "should be indemnified as to their proper costs and expenses of "the proceedings, the order as to the costs of the trustees should "direct taxation of their 'costs and expenses of and incident to "'this action [application] [matter]' without the addition of "the words 'as between solicitor and client.' On such a direct-"tion all costs and expenses properly incurred by the trustees "will be allowed by the taxing master. Compare Trustees Act, "1925, s. 60. The costs of other parties to the proceedings will, "as hitherto, be ordered either (a) 'to be taxed' (i.e., as between "party and party) or (b) 'to be taxed as between solicitor and "'client.'" The reason for a direction of that kind was that it had been realized that a taxation on the basis of solicitor and client was merely on a slightly more generous scale than taxation on the basis of party and party, and that it did not restore to the person whose costs were being taxed amounts which in many cases had been paid out quite properly by the person in question and in the ordinary course of the duties of a trustee.

A long series of cases had established the position in regard to a taxation between solicitor and client, and it is not necessary for me to go through them. This direction was explained subsequently by Vaisey J. in a Practice Note that is headed "Practice "Note (Trustees' Costs)," [2] and it reads as follows: "At the "sitting of the court on November 3, 1953, Vaisey J. made "a reference to the Practice Direction with regard to trustees' "costs.[3] In the course of his observations his Lordship said:— "'For years, ever since I can remember, it has been the practice "'on a summons by trustees, for such a purpose as the con-"'struction of a will, to direct that the costs of all parties "'should be taxed as between solicitor and client. That has "'continued, as I say, ever since I can remember, and has been "'the normal practice. It has recently been realized that, under "'a solicitor and client taxation, the trustees may not get the "'whole of what they are entitled to. A solicitor and client "'taxation is on a lower basis, not a higher basis, than the basis "'which is appropriate when trustees' costs are being dealt with.

[1] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159.

[2] [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408.

[3] [1953] 1 W.L.R. 1365.

" 'The matter arose, in a very plain form in the case of *In re* " ' *Robertson, decd.*,[4] where the Public Trustee, who had his " ' costs taxed as between solicitor and client, was disallowed the " ' sum of £2 1s. in respect of a payment made for taking a " ' shorthand note and for a copy of the transcript. That case " ' came before me, and in point of fact I felt able to vary the " ' taxing master's certificate and to allow that sum of £2 1s. " ' One thing is perfectly plain, and it is important that the pro- " ' fession should understand it. If a trustee submits to having " ' his costs taxed as between solicitor and client, he is entitled " ' to his costs as so taxed and nothing more. He is not entitled " ' to take the taxing master through his bill and then, when the " ' taxing master disallows certain items, to go away and say: " ' " That does not matter. I know I have wasted the taxing " ' " master's time, but I do not care about that. I do not care " ' " what he taxes off. I will help myself to whatever he has " ' " disallowed." That is wrong, and, hoping that I could help " ' resolve that difficulty in which trustees have found them- " ' selves, I, with the assistance of the chief registrar and the " ' chief taxing master and with the approval of all the judges of " ' the Chancery Division, came to the conclusion that a form of " ' words should be used which would give trustees more than " ' solicitor and client costs, that is to say, give them all the " ' costs to which they are entitled. The form of words which " ' was adopted for that purpose is taken from section 60 of the " ' Trustee Act, 1925, which relates to orders appointing new " ' trustees and is in these words [he read it and continued:] " ' It is, I think, plain that those words " the costs and expenses " ' " of and incident to any application " are intended to cover " ' the whole of the costs that the trustees were entitled to, and " ' mean almost the same as costs on an indemnity basis, or costs " ' as between solicitor and own client. It seemed appropriate " ' to use the words of the statute. Any suggestion that trustees " ' are being deprived of costs, and that this would be a more " ' hostile taxation than there has been under the old solicitor " ' and client taxation is absolutely wrong; the whole point of " ' making this change was to give the trustees more, to give " ' them a wider range and to make sure that all costs and " ' expenses which had been properly incurred would be allowed " ' on the taxation. It is an attempt to get the taxation on a " ' better, juster and higher basis than the old taxation, which, " ' in the judgment of myself and my brother judges, did not " always give the trustees that to which they were entitled.' " There is, of course, the word " almost " used there, which may be of some importance and with which I shall deal presently. In *In re Dargie*[5] Vaisey J. held that where Wynn-Parry J. had ordered that the trustees should get their costs on a solicitor and client basis on taxation, they were not entitled to pay themselves

[4] [1949] W.N. 225; [1949] 1 All E.R. 1042.

[5] [1954] Ch. 16; [1953] 1 W.L.R. 991; [1953] 2 All E.R. 577.

1958

Grimthorpe, Decd., *In re.*

Danckwerts J.

other expenses out of the trust funds, because there the costs they were to receive had been delineated by the judge in that way.

[His Lordship then stated the facts of the present case, and, having read the objections taken by the applicants and the taxing master's answer said:] The last observations of the taxing master seem to me to show a very strange appreciation of the position of a trustee. The taxing master's reference to the fee charged by counsel for the Attorney-General appears to me to be irrelevant.

It is commonplace that persons, who take the onerous and sometimes dangerous duty of being trustees, are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out. It seems to me that the whole intention of the practice as laid down in the Practice Direction to which I have referred is to secure that result; the only doubt arises perhaps upon the word "almost," used by Vaisey J. in his explanation of the Practice Direction, in which he refers to its being "almost the same as "costs on an indemnity basis, or costs as between solicitor and "own client."

Mr. Pennycuick has contended, and I think he is right, that the distinction between that of a person instructing his own counsel and solicitor is that in that case he might pay whatever he likes; but in the case of a trustee, he must use his judgment to try and save the estate money which should not be unnecessarily paid out. It seems to me quite wrong to look at the event afterwards, and counsel's fees having been incurred, and having been demanded by counsel's clerk on the basis that that fee was asked for, having regard to the complexity of the matter and the standing of counsel in question, to say that counsel has been paid too much. It would undo the whole effect which was intended by the Practice Direction if the master were entitled to tax fees to counsel, or other expenses that had been paid in good faith by the trustees, on the basis that they were payable by them. The trustees could not get out of paying them merely because the master thought that counsel might have been paid a somewhat smaller sum. It seems to me to be a wrong adoption of the standard laid down by R.S.C., Ord. 65, r. 27 (29), which does not really apply in this case at all; it is not a case of undue generosity —the standard is whether it is proper or improper. It seems to me that the remarks about "generous fees" and so on have really no application to the trustees, who have had to pay the fees to counsel as being the proper fees payable to them. In those circumstances, therefore, it seems to me quite plain that in the present case the taxing master went wrong in principle, and that his order must be set aside.

The taxation must be set aside in respect of these items, and the items actually paid by the trustees in good faith must be allowed.

Objections allowed.

1958

GRIMTHORPE, DECD., *In re.*

Solicitors: *Lee, Bolton & Lee; Treasury Solicitor.*

P. P.

[QUEEN'S BENCH DIVISION.]

1958 *Jan.* 27.

Lord Goddard C.J., Hilbery and Salmon JJ.

* *In re* SAGE.

Mental Deficiency—Detention order—Validity—Order on conviction—Conviction of larceny—Order under section 8 (1) (*b*) *of the Mental Deficiency Act,* 1913—*Medical evidence that defendant "a feeble-"minded person within the meaning of the Mental Deficiency "Acts"—Whether evidence sufficient—Whether consent of parent or guardian required—Mental Deficiency Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1 (1) (2), 6 (3), 8 (1) (*as amended by Mental Deficiency Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 33)).

Criminal Law—Mental deficiency—Detention order.

In October, 1952, the applicant, then aged 19, on pleading guilty to larceny, was placed on probation for one year. In January, 1953, he pleaded guilty to a breach of the terms of the probation and was remanded in custody for a medical report. On February 2, 1953, evidence was given before the justices by the prison doctor who had examined the applicant that he was of the opinion that the applicant was a feeble-minded person within the meaning of the Mental Deficiency Acts requiring care and treatment. The justices made a detention order under section 8 (1) of the Mental Deficiency Act, 1913, in respect of the applicant, "being satisfied on medical "evidence that the [applicant] is a defective within the mean-"ing of the Mental Deficiency Acts, 1913 to 1938, . . . being "a feeble-minded person." The applicant sought a writ of habeas corpus, alleging that the detention order was made without jurisdiction and was a nullity on the grounds (1) that since there was no evidence that he had suffered from a condition of arrested or incomplete development of mind before the age of 18, or that it was desirable in his interests that an order should be made, there was no evidence before the justices that he was a feeble-minded person or a defective within the meaning of section 1 (1) and (2) of the Act of 1913; and (2) that the provision of section 6 (3) of that Act requiring that the consent of a parent or guardian be obtained before a detention order was made applied to an order made under section 8 (1) (*b*), but that his parent or guardian had not given his consent:—

Held, (1) that there was evidence which entitled the justices to make the detention order—the statement made by the prison doctor was merely a compendious way of saying that he had examined the applicant and had come to the conclusion that the provisions of the Mental Deficiency Acts applied to him—and that, and on their own observation, the justices were justified in coming to their conclusion that the applicant was a feeble-minded person within the meaning of the Acts.

[Reported by RICHARD HARTLEY, Esq., Barrister-at-Law.]

1958

Sage, *In re.*

(2) That the requirement in section 6 (3) of the Act of 1913 that the consent of the parent or guardian be obtained before an order might be made was applied to a case where a petition was presented to the judicial authority under section 6 (2), and had no application to a case where an order was made under section 8 in respect of a breach of the criminal law. The applicant, therefore, was lawfully detained and there were no grounds for issuing a writ of habeas corpus.

Application for a writ of habeas corpus.

On October 15, 1952, the applicant, Cyril Montague Sage, then aged 19, pleaded guilty before Bearsted justices to stealing two and a half pints of milk and was placed on probation for one year. On January 13, 1953, he was brought before the Cranbrook justices for breach of the probation order (failing to notify the probation officer of change of address) and was remanded in custody until February 2, 1953, for a medical report. It appeared from the affidavits that at the resumed hearing on February 2 no written reports were before the justices but that a prison doctor who had examined the applicant gave oral evidence to the same effect as that contained in a letter which he had written to the justices' clerk; in that letter the doctor said inter alia, "His backwardness is not the result of insanity, but is clearly the result of mental defectiveness and his reasoning and judgment are grossly impaired. I am of the opinion that he is a feeble-minded person within the meaning of the Mental Deficiency Acts and that he requires institutional care and treatment." The justices, "being satisfied on medical evidence that the [applicant] is a defective within the meaning of the Mental Deficiency Acts, 1913 to 1938" as amended "being a feeble-minded person" made a detention order under section 8 (1) of the Act of 1913 committing him to an institution for mental defectives.

The applicant alleging that he was unlawfully detained now sought a writ of habeas corpus directed to the Board of Control and to the superintendent of Moss Side Hospital, Maghull (whence he had been transferred by order of the Board of Control). The grounds of the application were, inter alia, that the justices had made the detention order unlawfully and without jurisdiction and that it was a nullity because, (1) section 1 (1) of the Act of 1913 [1] provided that feeble-minded persons, that was, persons

[1] Mental Deficiency Act, 1913 (as amended) s. 1: "(1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:—. . . (c) Feeble-minded persons, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the protection of others. "(2) For the purposes of this section, 'mental defectiveness' means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."

S. 6 (3): "If the judicial authority is satisfied that the person to whom the petition relates is a defective and is also satisfied that he is subject to be dealt with under this Act, the judicial authority may,

in whose case there existed mental defectiveness which was so pronounced that they required care, supervision and control for their own protection or for the protection of others, should be deemed to be defectives within the meaning of the Act, and that under section 1 (2) of the Act of 1913 (as amended) mental defectiveness for the purpose of section 1 meant a condition of arrested or incomplete development of mind existing before the age of eighteen years and that, at the time when the order was made, there was no evidence before the justices that he had suffered from such a condition of mind existing before the age of eighteen years or that it was desirable in his interests that an order should be made ordering him to be sent to an institution; and (2), that section 8 (1) (*b*) of the Act of 1913 gave the justices power to make any order which, if a petition had been duly presented under the Act the judicial authority might have made but that under section 6 (3) if the petition was not presented by a parent or guardian an order should not be made by the judicial authority without the consent of the parent or guardian unless it was proved that such consent was unreasonably withheld, and there was no evidence before the justices that the applicant's father had consented to the order or had unreasonably withheld his consent.

Peter Pain for the applicant.
Rodger Winn for the respondents.

No cases were cited in argument.

LORD GODDARD C.J. In this case Mr. Pain applies for a writ of habeas corpus to bring up and discharge the applicant, Cyril Montague Sage, who, on February 2, 1953, was committed by the Cranbrook justices to an institution for mental defectives acting under section 8 of the Mental Deficiency Act, 1913. The circumstances were that on a previous occasion before another court the applicant had pleaded guilty to a charge of larceny and had been put on probation; he had not fulfilled the terms of his

"if he thinks it desirable to do so in "the interests of such person, make "an order either ordering him to be "sent to an institution . . . , or "appointing a suitable person to be "his guardian, and the order shall "state the class of defectives to "which he belongs, and the circum-"stances which render him subject "to be dealt with under this Act: "Provided that—(*a*) where the peti-"tion is not presented by the parent "or guardian, the order shall not be "made without the consent in writing "of the parent or guardian, unless it "is proved to the satisfaction of the "judicial authority that such consent "is unreasonably withheld, or that "the parent or guardian cannot be "found, but consent shall not be "deemed to be unreasonably withheld "if withheld with the bona fide in-"tention of benefiting the defective."

S. 8: "(1) On the conviction by "a court of competent jurisdiction of "any person of any criminal offence "punishable in the case of an adult "with penal servitude or imprison-"ment . . . the court, if satisfied on "medical evidence that he is a defec-"tive within the meaning of this "Act, may . . . (*b*) in lieu of passing "sentence . . . itself make any order "which if a petition had been duly "presented under this Act the judicial "authority might have made, which "order shall have the like effect as "if it had been made by a judicial "authority on a petition under this "Act."

1958

Sage, *In re.*

Lord Goddard C.J.

probation, and he was therefore brought by the probation officer before the court. The justices, hearing that the applicant was living in a hut on a farm—whether in wretched circumstances I do not know, but at any rate living in a hut on a farm—and that he was then only just 20, wishing to know whether he was a mental defective or not remanded him for a medical report. It is to be observed that the justices had an opportunity of seeing the applicant in court and hearing about him, and then they remanded him for the report. He was remanded to Canterbury jail where he was examined by the prison doctor, a man well acquainted with the Mental Deficiency Act who has the medical experience necessary to enable him to give evidence on these matters; and the prison doctor came before the justices and said that the applicant was a feeble-minded person within the Act. Assuming that that is exactly what he said—and we are invited to say that is all he said—that is only a compendious way of saying that the doctor had examined the applicant and had come to the conclusion that the provisions of the Mental Deficiency Acts applied to him, and that he was a person who could properly be dealt with by the court under those Acts.

We are asked to say that there was no evidence which would justify the justices in making the order. We take a contrary view. We think that on the evidence of the doctor and on their own observations it was open to the justices to make that order. On an application for habeas corpus we have to see whether the detention is lawful. The detention is lawful here because an order which Parliament has authorized to be made under section 8 of the Mental Deficiency Act was made; if it could have been shown that the justices had made the order without evidence, we could have gone behind the order and interfered, but it is clear in this case that there was evidence on which the justices could make the order.

The last point put by Mr. Pain was really, if I may say so, raised as a matter of despair. If a petition is presented for the detention of a person under the Mental Deficiency Acts, that is to say, if a person is not alleged to be guilty of any offence, but the justices are simply being asked to make an order that he should be sent to an institution for mental defectives, then, under section 6 (3) of the Act of 1913 the consent of the parent or guardian must be obtained or it must be shown that the parent could not be found or that the parent was unreasonably withholding his consent. Of course that does not apply when the justices have to decide what is the proper order to make in respect of a person who has committed a breach of the criminal law. The court is not bound to consult the parent whether he likes or wishes a particular sentence to be passed. What section 8 (1) (*b*) says is that in such a case the court itself may make any order which if a petition had been presented the judicial authority might have made. Before the judicial authority may make an order under section 6 (2) a petition has to be

presented; the justices may make the same order which could be made if the judicial authority had a petition duly presented to them but it is not for them, in making up their minds whether a defendant ought to be dealt with as a mental defective, to consider whether or not a petition has been duly presented or what would have happened if it had been. They are entitled to make the same order as if a petition had been duly presented, but it is not necessary for them to ask anything of the parent or guardian.

In the opinion of this court, there is no ground for granting a writ of habeas corpus in this case. In our opinion the applicant is lawfully detained under the Act, and this application fails and is dismissed.

HILBERY J. I agree.

SALMON J. I agree.

Application dismissed.

Solicitors: *Walter Stein and Grover; Solicitor, Ministry of Health.*

[CHANCERY DIVISION.]

* *In re* S. (AN INFANT).

1958
Feb. 28.
Roxburgh J.

Infant—Custody—Appeal from justices—Order directing change of custody—Stay pending appeal often necessary—Guardianship of Infants Acts, 1886–1951.

Infant—Custody—Chancery Division—Hearing in open court—Question raised of great public importance.

S., an infant under the age of five years, had always lived with his mother. The parents were married, and S. was born on October 16, 1953. The mother left the father at Easter, 1956, but S. continued to live with her; the father saw S. at fortnightly intervals for about a year thereafter. On the application of the father to the justices on February 24, 1958, an order was made giving custody of S. to the father with limited access to the mother. The justices gave no reason for their decision, and counsel for the mother at once applied for a stay of the order pending an appeal. The justices refused the application and again gave no reasons. The father made an attempt to take S. from the mother, but she refused to part with him; a disturbance and a scuffle ensued with the result that the mother took S. away with her and retained custody of him:—

Held, that the infant should remain in the custody of the mother until the hearing of the appeal.

Per curiam. As it was not a good thing for a child of tender years to be bandied about between contending and conflicting parents, where there was no urgency for the transfer of custody of an infant, it was not normally in the interests of the infant to

---

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

1958

S.
(An Infant),
In re.

refuse a reasonable stay pending appeal, provided that the justices were satisfied that there was a genuine intention to appeal.

Further, if the justices thought that they ought to refuse a stay, then, unless there was an even greater sense of urgency, they ought not to make the order to take effect instanter as distinct from, say, seven days thereafter, so as to enable the aggrieved party to apply to the Chancery judge to grant a stay.

Motion.

The mother of S., an infant under 5 years, applied for an order that the custody of the infant should remain with her pending the hearing of her appeal against an order of the Bedford justices dated February 24, 1958, that she deliver up custody to the father.

By their order, the Bedford justices, on the application of the father had granted him legal custody of the infant with a limited right of access by the mother. On February 25, 1958, the mother served notice of appeal against the justices' order, and on February 26, 1958, on the application of the mother, ex parte, an order was made, in chambers in the Chancery Division, that the infant should remain in the custody of the mother until February 28, 1958, or until further order, the mother being granted liberty to serve notice of motion for that day.

By order of Roxburgh J. the hearing of the motion was in open court.

The facts are fully stated in the judgment.

T. A. C. Burgess for the mother.
W. A. B. Forbes for the father.

No cases were referred to in argument.

Roxburgh J. I am hearing this case in open court because it raises a matter of, as I see it, great public importance and one which causes me a good deal of embarrassment very often when I hear—as I often do because I am the assigned judge—appeals from magistrates about the custody of infants. It is common knowledge that it is not a good thing for a child of tender years to be bandied about between contending and conflicting parents; at any rate, that is my view, and, accordingly, I often feel when I hear appeals that one reason why I ought not to vary an order is that, the order having been carried out by the transfer of the care and control of the infant, if I reverse the order that means handing back the child to the former care and control, and that is exactly the process that I think everybody concerned with the welfare of infants deprecates. Therefore, I often say to counsel who appear before me, because these cases are generally heard in camera: "Why did you not ask for a stay from the magistrates? "It would have been much easier for you to have succeeded on "this appeal if you had, because there would not then have been "this bandying about of the infant," and some counsel have

indicated that it is not very easy to get a stay. If this case is at all typical, that indication from counsel must be overwhelmingly true and, as I think the lamentable events which did, in fact, follow the refusal of the magistrates to grant the stay must really be attributed to that refusal which in my judgment, was not justified, this is a very good occasion on which to point out why it is desirable that magistrates should grant a stay when their order involves a change of custody, if they are satisfied that there is a genuine intention to appeal. Of course, there are cases where even a day's delay, or even a week's delay, might prejudice the welfare of the infant. This, quite obviously, is not in that category or anywhere near it, as the facts to which I am going to refer make plain; but I want to make it clear that I do recognize that there are cases in which it would be quite right to refuse a stay even though there is a change of custody, and even though there is a genuine intention to appeal. As I say, there might be such cases. I know that magistrates do not order a stay pending an appeal when they think that the emergency is too great. I can hardly believe that this case was in that category, but if it seemed to them to be in that category they could at least have said that the order should not take effect for four days; that is to say, they could have made the transfer of care and control take effect four days after the decision. Again, there might be a case of extreme urgency in which that might be the wrong thing to do, but normally that would not be the wrong thing to do, and then the unseemly events which have happened in this case would not have happened. It is for those reasons, not with any desire to make a public display of what has happened in this case, that I have dealt with this in public.

The facts of this case are these: The father and mother are married. The child was born on October 16, 1953 (it was a boy), and is, therefore, under five. The mother left the father at Easter, 1956, with the child, and the child has always been under her care and control down to today, and is still under her care and control and will, for some time at any rate, continue so to be. On February 24, 1958, the Bedford justices heard a complaint by the father that he and the mother were separated and living apart, and alleging that he was better fitted to have the legal custody of the child. The order which they drew up—and I put it in that way because I have before me an affidavit by a solicitor that the order contained something which the written order certainly did not contain, and which, therefore, cannot in any way have effect as an order—is an order giving custody of the infant to the father with access to the mother between 2 p.m. and 5 p.m. on Sundays. On the making of that order the justices gave no reason for their decision. Counsel on behalf of the mother at once applied for a stay of the order pending an appeal, but the justices refused the application and gave no reason. I will come back to that presently. For my own part, I cannot think of any reason for refusing the stay, and the justices even

1958

S.
(An Infant),
In re.

Roxburgh J.

now—and I am not blaming them, because they had no obligation to do so—have not given me their reasons for refusing a stay. But I will go on with the story in order that it may be abundantly clear what lamentable consequences ensued from this sort of position, namely, an order for the immediate transfer of a small child of under five from the custody of the mother (which had been existing ever since the child was born) to the father, a person with whom the child had not lived. I believe the father had some access, but the child had never lived with the father since Easter, 1956. There was this order to operate immediately and the stay of execution was refused.

Of course, it is no part of my duty to decide whether anybody ought to be summoned for assault, that can be dealt with in Bedford together with the other matters with which I am not concerned; but the story must be told as an indication of the consequences of that sort of action. In his affidavit the solicitor for the mother stated: "After the hearing the father made an "attempt forcibly to take the infant from the mother, but she "refused to part with the infant and there was, in my presence, "some disturbance among the persons present when, in my view, "the father assaulted the mother's sister. I am informed by "the mother and verily believe that when the father attempted "to take the infant away from the mother the infant clung to "her and commenced screaming and said 'Don't let him take "'me. Take me home mummy.' I am also informed by the "mother and verily believe that when the father and his sister "and the mother and her sister together with the infant were in "the waiting room before the hearing of the summons the infant "inquired 'who that man was,' indicating the father. The "mother further informed me and I verily believe that before "the hearing the infant was living with her at an address in "Bedford."

That is one side of the story of the scuffle, but I think I ought to read the other side of the story in case it should be thought that I am necessarily accepting one view rather than the other. I do not mind who was responsible for the scuffle; my point is that it was a most unseemly and improper event and, as I see it, almost the natural consequence of the refusal of a stay in this particular case.

The other side of the story is told by a woman police officer. She says she was on duty on this occasion and I think she quite clearly confirms the account which I have given of what took place so far as the magistrates are concerned. She says in her affidavit: " . . . The magistrates returned at about 12.55 and the "chairman announced that an order for custody of the child "would be made in favour of the father, the mother to have "certain rights of access." Then comes this, and it is very important: "A legal argument then took place respecting an "appeal and a stay of the order. Whilst this was going on, I "went and stood near the mother. I heard the chairman say

"that the order would take effect at once. The court then rose "and I opened the door to allow the mother to leave. The "mother's sister was standing outside the door with the child. "The mother then went out of the door, picked up the child "and carried it hurriedly along the landing towards the stairs. "The mother's sister followed her. When the mother got to the "stairs, she started to run down them still carrying the child. "Her sister followed at the same speed. I ran after them, as I "thought the mother was taking the child away in breach of the "order of the court. I tried to overtake the mother's sister but "was prevented from doing so as she had her hand on the "banisters. She may have been trying to stop me, but I "cannot be sure. When we reached the bottom of the stairs, "I said to the mother 'You can't take the child away,' and she "said 'You try and stop me.' She was still holding the child. "I then asked her to go into the waiting room at the foot of the "stairs, which she and her sister did, taking the child with them. "The father and his sister had followed me downstairs and were "behind me when the mother said 'You are not going to take "'him.' She then tried to leave the waiting room and the "father and I restrained her. There was then a lot of shouting "and the child began to scream and appeared to be very "frightened. At this stage I telephoned Horne Lane police "station for assistance. When I returned, I saw the mother's "sister give the father a violent push in the chest and he then "hit her on the arm with his hand. She did not fall but backed "into the table which slid across the room. At this time the "father's solicitor had arrived and come into the waiting room, "which was then rather crowded. The mother then hit the "solicitor quite a spiteful blow with her hand on the left of his "face. The solicitor then came out of the waiting room and did "not retaliate. A general melée then took place between all "concerned. . . ."

That is the description of what happened in the precincts of the local court. As I say, I am not concerned to choose between those two stories. I give them with complete impartiality, and if there are summonses for assault, I have said nothing in favour of anybody or against anybody, except that it was a most unseemly procedure.

That was not all the father and his adviser did. His solicitor knew full well that the mother had instructed her solicitor to appeal. This is the solicitor's own affidavit: "On the following "morning I telephoned the mother's solicitors and inquired if "the mother was then willing to deliver the said infant to the "father, but was unable to obtain any information except that the "said solicitors had instructions to proceed with an appeal to this "honourable court." That is why I say, and it is his own admission, that he knew perfectly well that they had instructions to proceed with the appeal. "I informed the solicitors that if I "could not be assured that custody would be given, a complaint

1958

S.
(An Infant),
In re.

Roxburgh J.

"would be made to the justices in accordance with the advice of "counsel to that effect. No such assurance was given to me." Then—and he seems to think it rather a point against the mother, but I do not—he said he could not readily find her, but she was still in Bedford. Then he goes on: "Having regard to the "matters referred to in paragraph 15 of this affidavit"—that is the passage to which I have just referred—"I laid a complaint on "behalf of the father before the justices and requested the clerk "of the court to expedite the issue of service and hearing of the "relevant proceedings. I informed the clerk of the court that "I had seen the mother and the said infant in a certain shop. "I then wrote a letter in the name of my firm to the mother's "solicitors, which was delivered to the office of the said solicitors "at or about 1 p.m."

I will read that letter: "We enclose herewith copy order "made yesterday by the court on the hearing of the summons "for custody. We understand that your client persists in her "refusal to comply with the terms of the order. Furthermore, "we have ascertained that she has not today sent her child to the "nursery school to which she referred in her evidence before the "court, but that, on the contrary, she has him with her at the "shop in which she works. This, of course, is totally unsatis-"factory and entirely contrary to the interests of the child. We "are therefore arranging for the immediate issue of a summons "for the committal of your client pending compliance with the "order," and I point out that they knew she had instructed her solicitors to appeal. The summons was issued, but the mother applied to me ex parte bringing her notice of motion, but no affidavit, and I was so astonished that the magistrate had not allowed even sufficient time for the mother to apply to me for a stay of execution before insisting on the change of custody that I took what is a most unusual step—and I want to point out that it is most unusual, but I am very glad that I took it—and I granted an ex parte order without any affidavit that the infant do remain in the custody of the mother until after today, and I gave leave to serve notice of motion.

As I have already said, there can be, and I dare say there quite often are, cases in which it is quite right to refuse any stay of an order transfering the custody of a child from one parent to the other, and I am going to look in a minute to see whether this is, by any possible criterion, such a case; but I do wish to say that where there is no urgency for the transfer—and I do underline those words "where there is no urgency for the transfer"—it is not normally in the interests of an infant to refuse a reasonable stay pending appeal if the magistrates are satisfied that there is a genuine intention to appeal. Further, if they think that they ought to refuse a stay, then, unless there is an even greater sense of urgency, they ought not to make the order to take effect instanter as distinct from, say, seven days thereafter, so as to enable the aggrieved party (that is to say, the party aggrieved by

their refusal to grant a stay) to apply, as that party is quite entitled to apply, to this court to ask for a stay so that there should not be fights over the child and the handing back of the child to one or other of the contending parties.

Therefore I propose now to look and see whether there was any conceivable justification in this case for refusing a stay. I must be careful to remember that I am not hearing the appeal. I must be particularly careful about that because the reasons which the magistrates did not give are now before me in fact. I do not know whether I ought to have looked at them, but counsel for the father was anxious that I should, and I have looked at them, and I take no objection to them. I only want to say this: The prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent upon it to make sure that there really are sufficient reasons to exclude the prima facie rule. I am not going further than that. I am not going to say, because it would be wrong for me at this moment to say, whether, in my judgment, there are sufficient reasons in this case for excluding the prima facie rule; but I propose to say two things which are, I think, inescapable: One is that if there are sufficient reasons, they are much weaker than would be the position in a normal case in which care and control is given to the father of a child of such tender years as this child. Secondly, there can be nobody in this land who could deny that the appellant has a reasonable chance of success on this appeal. In those circumstances, I am sure that one must look for some ground of urgency to justify an immediate order for the transfer of possession of the child to the father. The child has never suffered any injury from being with the mother—there was no suggestion of that, anyway—and there is no suggestion that I can see that it will suffer any injury. I cannot believe that a matter of a few weeks would make the slightest difference one way or the other to the welfare of the child. I have studied the reasons they have given for their decision to find in them any inkling of urgency, and I can find absolutely none. I therefore order that the infant do remain in the custody of the mother until the hearing of the appeal.

Order accordingly.

Solicitors: *Waterhouse & Co. for Burgess & Chesher, Bedford; J. D. Langton & Passmore for Mellows & Sons, Bedford.*

[QUEEN'S BENCH DIVISION.]

1958
Feb. 26, 27.

Diplock J.

* MARGULIES BROTHERS LTD. *v.* DAFNIS THOMAIDES & CO. (U.K.) LTD.

Arbitration—Award—Form—Implied term that award capable of enforcement as judgment—Jurisdiction to remit—Uncertainty—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 26.

Contract—Implied term.

By three contracts the applicants agreed to sell 100 tons of cocoa, 3 per cent. more or less, to the respondents, and by another three contracts the applicants agreed to buy the same quantities of cocoa from the respondents. Differences having arisen, the contracts were submitted to arbitration and thence to the Board of Appeal of the Cocoa Association, who decided that the second three contracts should be applied against the first three, and the resultant differences should be paid to the applicants. On a motion by the applicants to remit the award on the ground that, by a decision of the Court of Appeal it had been held, in its present form, the award was not enforceable as a judgment:—

Held, (1) that the court was not limited as to the grounds on which it would, in the exercise of its discretion, remit an award, but in the present case the award should be remitted on the well-recognized ground that it was bad on its face as it did not define the quantity of cocoa within 3 per cent. which was to be taken into account for the purpose of calculation of the sums payable to the applicants (although the parties were in fact agreed as to the method of calculation).

Dictum of Fletcher Moulton L.J. in *In re Baxters and Midland Railway Co.* (1906) 95 L.T. 20, 23; 22 T.L.R. 616 applied.

(2) Alternatively, that it was an implied term of an arbitration agreement that an award for the payment of money should be in a form which was capable of being enforced in the same manner as a judgment; that as the board of appeal had failed to comply with this implied term they were guilty of misconduct and, therefore, the court had jurisdiction to remit on this ground also.

(3) That the fact that the respondents might have a counterclaim against the applicants was not a good reason for refusing to remit the award.

Action to remit an award by the Board of Appeal of the Cocoa Association of London Ltd.

By contracts dated November 8, 18, and December 12, 1957, the applicants, Margulies Brothers Ltd., agreed to sell to the respondents, Dafnis Thomaides & Co. (U.K.) Ltd., 50 tons, 25 tons and 25 tons of Ghana cocoa, 3 per cent. more or less c.i.f. Hamburg at a certain price, and by contracts dated September 19, November 4 and 6, 1957, the applicants agreed to purchase from the respondents the same quantities of cocoa at lower prices. Each of the contracts contained a provision that any dispute arising out of any contract should be settled by arbitration in London as provided for by the rules of the Cocoa Association of London Ltd. A dispute having arisen on the contracts, it was referred to arbitration and an award was made on December 30,

1957, providing that the applicants were not entitled to immediate settlement of the differences arising out of the contracts. On appeal by the applicants to the board of appeal, the board made an award that the second three contracts should be applied against the first three contracts, and the resultant differences plus interest should be paid by the respondents to the applicants.

In an affidavit by the applicants it was stated that the amount payable under that award was £4,075, but on February 24, 1958, the Court of Appeal, on appeal from an order of Havers J., held that an award in this form would not be enforced in the same manner as a judgment under section 26 of the Arbitration Act, 1950. The applicants now applied under section 22 of the Act of 1950 to remit the award to the board of appeal in order that the actual sum payable by the respondents to the applicants should be calculated.

R. H. Bernstein for the applicants.

C. P. Harvey Q.C. and *J. F. Donaldson* for the respondents.

It was not argued whether it was an implied term of the submission to arbitration that the award should be in a form which was capable of being enforced like a judgment under section 26 of the Arbitration Act, 1950.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Becker Shillan & Co. and Barry Brothers* [1]; *Crane* v. *Hegeman-Harris Co. Inc.* [2]; *In re Walker and Beckenham, Kent, Local Board* [3]; *In re Boks & Co. and Peters, Rushton & Co.* [4]; *Kiril Mischeff Ltd.* v. *Constant Smith & Co.* [5]

DIPLOCK J. This is a motion to remit, under section 22 of the Arbitration Act, 1950, to the Board of Appeal of the Cocoa Association of London Ltd. an award made by them on January 24, 1958, the scope of the remission being limited to the calculation of the sum of money payable by the respondents to the appellants under the award.

The award (so far as is relevant) is in the following terms: "The board of appeal elected to hear the appeal presented by "Messrs. Margulies Brothers Ltd." [the applicants] "against "the award of Mr. F. C. Bevis dated December 30, 1957, in "respect of six parcels of 50 tons, 25 tons, 25 tons, 50 tons, 25 "tons and 25 tons respectively of G.F. Ghana cocoa sold under "contracts dated September 19, November 4, 6, 8 and 18, "and December 12, 1957, having considered the case do hereby "decide that the original award be varied and that contracts

[1] [1921] 1 K.B. 391; sub nom. *Becker, Shillan & Co.* v. *Barry Brothers*, 37 T.L.R. 101.

[2] [1939] 4 All E.R. 68.

[3] (1884) 50 L.T. 207.

[4] [1919] 1 K.B. 491.

[5] [1950] 2 K.B. 616; 66 T.L.R. (Pt. 1) 742; [1950] 1 All E.R. 890.

1958

Margulies Brothers Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.

Diplock J.

"Nos. 2101, 2168, 2174 shall be applied against contracts Nos. "2184, 2207 and 2265 respectively, and the resultant differences "plus interest at 8 per cent. per annum from December 14, 1957, "to date of payment shall be paid by [the respondents to "the applicants] within seven days, and we further award that "the fees and expenses of the original arbitration be paid by [the "respondents]."

This award does not purport to be a mere declaratory award; but, although it is one for the payment of money, it does not specify the actual sum to be paid but sets out the manner in which the sum ordered to be paid is to be calculated.

It was determined by the Court of Appeal on February 24, 1958, that an award in this form cannot be enforced in the same manner as a judgment under section 26 of the Arbitration Act, 1950; and the purpose of the present application is to get the award amended to a form in which it can be so enforced. The application is resisted on two grounds: first, that the award is complete and valid on its face and the circumstances disclosed give me no jurisdiction to remit it, or, perhaps, more accurately, the authorities show that it would be an unjudicial exercise of my discretion if I were to do so; secondly, that in the particular circumstances of this case I ought not to exercise my jurisdiction to remit the award, since the applicants' proper remedy, even if the award were amended, would be to bring an action on the award, and this they can do with the award in its present form.

Mr. Harvey argues, on behalf of the respondents, that the jurisdiction of the court to remit an award is limited to four grounds: (1) that the award is bad on the face of it; (2) that there has been misconduct on the part of the arbitrator; (3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and (4) where additional evidence has been discovered after the making of the award. He cites as authority for that proposition *Montgomery Jones & Co.* v. *Liebenthal & Co.*[1] The statement on which he relies is a submission which was made by counsel in the argument in that case. It was approved by A. L. Smith L.J. and Chitty L.J. expressed approval, but found it unnecessary to decide whether the list was exhaustive. The approval of A. L. Smith L.J., as well as that of Chitty L.J., was obiter, since the only question was whether an award could be set aside for a mistake of law not apparent on its face when the arbitrator did not request remission. Furthermore, although A. L. Smith L.J. treats the law as having been so laid down in *In re Keighley, Maxsted & Co. and Durant & Co.*,[2] the statement which he approved in fact extends the law as laid down in that case, which referred not to "mis-"conduct" of the arbitrator in general as a good ground for remission, but only to fraud, corruption and excess of jurisdiction. To the opposite effect of the dicta to which I have referred is the

[1] (1898) 78 L.T. 406.

[2] [1893] 1 Q.B. 405; 9 T.L.R. 107.

dictum of Fletcher Moulton L.J. in *In re Baxters and Midland Railway Co.*,[3] which is in the following terms: "Counsel for the "railway company seemed to me to treat the authorities they "relied upon as though they cut down the jurisdiction of the "court. The jurisdiction of the court is statutory, and cannot be "increased or cut down in that way. The reported decisions of "the court only show the principles which have guided the court "from time to time in exercising its jurisdiction, and, though "they may afford a valuable guidance they do not restrict either "the jurisdiction of the court in deciding other cases or the duty "of the court to look at the facts in each particular case. When "the facts of any particular case before the court are the same "as the facts in the cases cited no doubt the court will follow "those cases. But it must not be supposed that reported "decisions prevent the court from deciding whether in the "interests of justice it ought to send the matter back to the "arbitrator."

I do not think that I am limited by authority to the four grounds for remitting awards approved in the *Montgomery Jones* case,[4] although I should naturally hesitate before exercising my discretion to remit in a case which does not come within any one of the four categories there approved. Of those categories, the first is the only relevant one: Is the award good on the face of it? Looked at by itself, it is not merely uncertain, but unintelligible. The respondents submit that I am entitled to look at the documents referred to in the appeal award—that is to say, the original award appealed against and the contracts. If I do so, I find that the contracts are three contracts of sale of Ghana cocoa c.i.f. Hamburg, January/February/March shipment by the respondents to the applicants at certain prices, and three corresponding contracts of sale of the same quantities of cocoa c.i.f. Hamburg, January/February/March shipment by the applicants to the respondents at higher prices. It then becomes apparent that the resultant differences from applying one contract against another are the differences in the purchase price of each of the corresponding pairs of contracts of purchase and sale. The amount awarded, say the respondents, is therefore a matter of mere arithmetic from the award, and the documents referred to in it, and the award is sufficiently certain on the maxim id certum est quod certum reddi potest. In support of that proposition Mr. Harvey relied upon two ancient cases: *Wohlenberg* v. *Lageman*[5] and *Higgins* v. *Willes*.[6]

If I were to shut my eyes to evidence extraneous to the award and the documents referred to in it, which asserts that none of these contracts was a genuine contract of sale of goods, but that they were all in combination mere gambling in differences, I should have considerable doubt whether the award was certain;

[3] (1906) 95 L.T. 20, 22; 22 T.L.R. 616.
[4] 78 L.T. 406.
[5] (1815) 6 Taunt. 251.
[6] (1828) 3 M. & R.K.B. 382.

1958

Margulies Brothers Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.

Diplock J.

and since the time for the performance of none of the six contracts had expired, any breach by the respondents must have been anticipatory. The contracts are not for fixed quantities of cocoa but for "about" the specified quantities—"(3 per cent. "more or less)"—and could have been performed with least loss to the respondents so far as their sales were concerned by delivery of 3 per cent. less than the specified quantities. The award (and the documents referred to in it) does not, I think, in the absence of extraneous evidence, define what quantity of cocoa within 3 per cent. each way is to be taken into account for the purposes of the calculation. On its face, therefore, I think that there is a good deal to be said for the view that it is uncertain.

But Mr. Harvey argues that, even if there were uncertainty on the face of the award and the documents referred to in it, the parties are agreed as to the method of calculation. The applicants have stated their views as to the method of calculation in an affidavit, and Mr. Harvey, on behalf of the respondents, agrees with it. This is a matter (he says) like the shares in the ship in *Wohlenberg* v. *Lageman*,[7] which is not in dispute between the parties. It is quite true that the point that the award was uncertain was first raised by me and not by Mr. Bernstein on behalf of the applicants. Indeed, the whole basis of his unsuccessful application to enforce the award in the same manner as a judgment which went to the Court of Appeal must, I think, have been that it was certain. But Mr. Bernstein is naturally not unwilling to avail himself of the point, even at the eleventh hour, if he can; and I see nothing to estop him from doing so if he wants to. I think that this award on its face is uncertain and comes within the first category approved in the *Montgomery Jones* case,[8] in which awards can be remitted to the arbitrator.

But even if I am wrong in thinking that the award is uncertain on its face, I still think I have jurisdiction to set it aside. It is, in my view, an implied term of an arbitration agreement made since 1889 (when the provision for enforcing an award in the same manner as a judgment was first introduced) that an award for the payment of money—as contrasted with a mere declaratory award—shall be in a form which is capable of being enforced in the same manner as a judgment. That this remedy should be available is one of the main purposes of an arbitration agreement, and I have no hesitation in holding that I have jurisdiction to remit an award for the payment of money so that it may be amended to put it in a form in which it will be so enforceable. If this extends the categories in which cases can be remitted to the arbitrator which was approved in the *Montgomery Jones* case,[8] I will cheerfully, encouraged by Fletcher Moulton L.J. in *Baxter's* case,[9] so extend them: but if I be right in my recent decision in *London Export Corporation Ltd.* v. *Jubilee Coffee*

[7] 6 Taunt. 251.
[8] 78 L.T. 406.
[9] 95 L.T. 20.

Roasting Co. Ltd.[10] that in arbitration law "misconduct" of an arbitrator includes any failure by the arbitrator to comply with the terms, express or implied, of the arbitration agreement, the case falls within the second category approved in the *Montgomery Jones* case,[11] namely, that there has been misconduct on the part of the arbitrators in failing to comply with the implied term that the award for the payment of money shall be in a form which is capable of being enforced in the same manner as a judgment. I hold, therefore, that I have jurisdiction to remit the case to the board of appeal to calculate the sum of money due to the applicants, and that it would not be an unjudicial exercise of my discretion if I were to do so.

I have, however, still to deal with Mr. Harvey's second submission, that in the particular circumstances of the case I ought not to remit the award since the proper remedy of the applicants is to bring an action on the award.

If I am right in thinking that the award is uncertain, the dispute has not been settled and decided by arbitration, and, accordingly, by rule 10 of the Market Rules of the Association, which are incorporated in the contracts, no action can be brought. The applicants would therefore be left without any remedy unless the award were remitted. But if I am wrong as to this, and the award is enforceable in its present form by action, why should I refuse to the applicants the right to put themselves in a position to enforce it directly in the same manner as a judgment?

What Mr. Harvey is really saying is that, even if the award were in a form in which it could be enforced as a judgment, the court, in the exercise of its discretion under section 26 of the Arbitration Act, 1950, ought to refuse leave so to enforce it. and leave the applicants to their remedy by an action on the award. The grounds on which he says so did not commend themselves to Havers J.; they do not commend themselves to me; but it is probably some consolation to him that, even if my order in this case is upheld by the Court of Appeal, he will have a third chance before yet another judge when the applicants apply to enforce the amended award.

In those circumstances I can give my reasons for rejecting the second submission briefly. An affidavit has been put in on behalf of the respondents alleging, first, that these were not intended to be genuine contracts of sale but were gambling transactions in differences, sales being married against purchases of similar quantities; secondly, that an oral agreement was made on November 8, 1957, that in consideration of the respondents continuing to deal in cocoa with the applicants for December, 1957/February, 1958, January, 1958/March, 1958, and February, 1958/April, 1958, deliveries, the applicants would make no request to the respondents to put up the margin; thirdly, that the applicants broke the oral agreement by refusing to accept orders

[10] [1958] 1 W.L.R. 271; [1958] 1 All E.R. 494.

[11] 78 L.T. 406.

1958

Margulies Brothers Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.

Diplock J.

given in December, 1957, by the respondents for cocoa for delivery in January/March, 1958, and February/April, 1958; fourthly, that the respondents, as they were entitled to, accepted such breach as a wrongful repudiation of the oral agreement; and, fifthly, that they have a large counterclaim for damages for such repudiation which will reduce their total indebtedness to the applicants to between £1,850 and £3,350.

It is not suggested in the affidavit that there is any claim for rectification of the agreements which are the subject-matter of the award; but all that the affidavit amounts to is that the respondents allege that they have a counterclaim arising out of transactions closely connected with those which are the subject-matter of the award. No authority has been cited to me in which the existence of a counterclaim has been held to be a good reason for refusing to allow an award to be enforced as a judgment. I do not think that the existence of a counterclaim is a good reason. I think that it would be contrary to the purpose of section 26 of the Arbitration Act, 1950, if, in a case where the validity of the award and the right to proceed upon it is beyond doubt, it should be given less effect than a judgment. I think that the cases in which an award will not be enforced as a judgment are correctly set out in Russell on Arbitration, 16th ed., at pp. 269 to 271, and that the existence of a prima facie counterclaim is not one of them. Even, therefore, if I thought that a prima facie counterclaim were established, I should not regard it as good ground for refusing to allow the applicants to enforce the award in the same manner as a judgment, and, a fortiori, as good ground for refusing to remit the award to the board of appeal so that it may be amended to a form in which the applicants can apply to some other judge for leave to enforce it in that manner.

As the respondents have already issued a writ in respect of their counterclaim it is desirable that I should not appear to prejudge it. There may be evidence to support it additional to that which appears in the affidavit and exhibits before me. But I have to exercise my discretion on the only evidence which is before me, and limiting myself to that evidence it is right to say—for it is a further reason for the exercise of my discretion—that I think the alleged counterclaim implausible.

The applicants are, accordingly, entitled to an order remitting the award to the appeal board for the purposes indicated.

Award remitted.

Solicitors: *Dubovie, Freeman & Co.; E. F. Turner & Sons.*

J. D. P.

[COURT OF APPEAL.]

* *In re* GREEN (A BANKRUPT), *ex parte* THE TRUSTEE.

C. A.

1958
Mar. 18.

Jenkins, Romer and Ormerod L.JJ.

[No. 183 of 1956.]

Court of Appeal—Hearing in camera—Bankruptcy—Application for private examination of witness—Interests of justice—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 25.
Bankruptcy—Hearing in camera—Court of Appeal.

When the interests of justice require it, the Court of Appeal will hear in camera an application under section 25 (1) of the Bankruptcy Act, 1914,* for the private examination of a person said to have had dealings with the debtor.

APPLICATION ex parte.

The trustee in bankruptcy of one Green, in view of certain matters which had come to his knowledge, desired to have a private examination of one M., who (it was said) had had dealings with the debtor in the past. An ex parte application pursuant to section 25 of the Bankruptcy Act, 1914, having been refused by the registrar, the trustee renewed the application before the Court of Appeal.

Muir Hunter for the trustee. The trustee desires that this application may be heard in camera. It was first before the court on March 10, and was adjourned. As a result of the publicity which it received on that occasion, annoyance was caused to the debtor and the proposed witness, who was also made aware of the trustee's desire to have him examined. Moreover, the interests of justice require that the application shall not be heard in public.

[JENKINS L.J. You have to satisfy us as to our jurisdiction to hear applications in camera. You will have to satisfy us that it is a proper course for the court to take.]

The trustee's report prepared pursuant to rule 72 in support of the application is highly confidential; it is not disclosed to anyone, is not placed on the file, and is not used in any other proceedings. There is no precedent for the appearance of counsel for interested parties on such an application.[1] To read in open

* Bankruptcy Act, 1914, s. 25: "(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property . . . (3) The court may examine on oath . . . any person so brought before it concerning the debtor, his dealings, or property."

S. 167: " . . . 'The court' means the court having jurisdiction in bankruptcy under this Act; . . ."

[1] Certain counsel representing interested parties were present at the opening of the application, but were informed by the court that they had no locus standi.

C. A.
1958
Green (A Bankrupt), *In re. Ex parte* The Trustee.

court the matters on which the trustee relies would be to disclose the applicant's brief to the proposed witness, and might go far to destroy the purpose of the examination which was sought.

The jurisdiction of the bankruptcy court may in general be exercised in chambers, except for certain specified matters of which this is not one; see section 101. This is not an appeal but the renewal of an application, and for this purpose the Court of Appeal is exercising the original jurisdiction of the registrar and bankruptcy judge, and is "the court" as defined by section 167.

The Court of Appeal has jurisdiction to hear matters in camera when justice so demands; see the notes to R.S.C., Ord. 36, r. 1, and Ord. 58, r. 9, in the Annual Practice. This is the result of certain decisions; there is no specific rule to that effect: see *In re Agricultural Industries Ltd.*[2] That case dealt with litigation inter partes. This is an a fortiori case, as it has been frequently stated that proceedings under section 25 are a matter between the trustee and the bankruptcy court and involve no lis. Even in litigation there are exceptions to the rule that the Court of Appeal should not sit in camera: see *Scott* v. *Scott.*[3]

Jenkins L.J. (after the court had conferred): We think that in the interests of justice this application is one which is proper to be heard in camera. We therefore direct that the court should be cleared of everyone except the party and the solicitor.

Solicitors: *Tringhams.*

F. R. D.

[2] [1952] W.N. 209; [1952] 1 All E.R. 1188.

[3] [1913] A.C. 417; 29 T.L.R. 520.

[chancery division.]

1958
Feb. 14, 17, 25; *Mar.* 7.
Vaisey J.

* WESTMINSTER BANK LTD. *v.* BARFORD (INSPECTOR OF TAXES.

Revenue—Income tax—Discontinuance of trade or profession—Company—Director—Periodical payments under agreement for special services—Payable to director or "his executors administrators or "assigns"—Liability to tax after his death—Schedule D, Case III—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123.

Under an agreement dated December 9, 1938, a company agreed to pay its managing director in respect of special services rendered by him to the company the sum of £3,000 and certain annual payments of varying amounts, payable to him, his "executors adminis-"trators or assigns." He died in 1941. The payments were to cease in any event on October 4, 1958, and had continued to be paid to his executors or trustees throughout the years since his death. A claim for income tax was made on the present trustees of his will under Case III of Schedule D on these periodical payments for the four years 1950–1951 to 1954–1955 inclusive.

It was contended on behalf of the trustee that these payments were in respect of services rendered by the director to the company and liable to tax under Schedule E and not Schedule D:—

Held, that the sums now in question were annual payments arising under a contract—the agreement of December 9, 1938—and it was to that agreement, rather than to the services of the deceased, that those payments were attributable; the consideration for the contract was those services, and the consideration for the payments was the contract, which itself by its independent vitality "generated "income." Even if they had been taxable under Schedule E during the testator's lifetime that could not affect the liability to tax of the actual recipients of them after his death; accordingly the claim to tax under Case III of Schedule D succeeded.

Stainer's Executors v. *Purchase* [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071 distinguished.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated by the commissioners so far as material provided.

At a meeting of the commissioners held on March 28, 1957, Westminster Bank, Ltd., in its capacity of trustee of the will of the Right Hon. C. A. McCurdy, deceased, appealed against income tax assessments under Case III of Schedule D [1] in respect of annual payments as follows:—

1950–1951	£372
1951–1952	£368
1952–1953	£101
1954–1955	£ 14

The question for their determination was whether these assessments under Schedule D were correctly made in respect of certain sums arising to the testator, his executors, administrators or assigns by virtue of an agreement dated December 9, 1938, between Trust of Insurance Shares Ltd., thereinafter called "the "company" and himself.

2. No oral evidence was given before them. The following facts were admitted:—(a) that the testator was chairman of the company's board of directors at all relevant times until his death; (b) that the company entered into the said agreement with him dated December 9, 1938; (c) that he died on November 10, 1941. It was common ground that the essentials of the matter were contained in the said agreement, and, in particular clause 2 thereof, and in article 72 of the articles of association of the company.

3. Article 72 so far as relevant, after providing for ordinary directors' salaries read as follows:—" . . . If by arrangement with

[1] Income Tax Act, 1952, s. 123: "(1) Tax under Schedule D shall be "charged under the following Cases ". . . Case III—tax in respect of— "(*a*) any interest of money, whether "yearly or otherwise, or any annuity, "or other annual payment, . . . either "as a charge on any property of the "person paying the same by virtue "of any deed or will or otherwise, "or as a reservation out of it, or as "a personal debt or obligation by "virtue of any contract, or whether "the same is received and payable "half-yearly or at any shorter or more "distant periods. . . ."

1958

West-minster Bank Ltd. v. Barford (Inspector of Taxes).

"the other directors any director shall perform or render any "special duties or services outside his ordinary duties as a "director, the directors may pay him special remuneration, in "addition to his ordinary remuneration, and such special "remuneration may be by way of salary, commission, participa-"tion in profits or otherwise as may be arranged."

In the agreement made on December 9, 1938, between Trust of Insurance Shares Ltd. (thereinafter called "the company") of the one part and the testator of the other part it was recited that:

(i) The company was manager of (inter alia) a unit trust entitled The Cornhill Trust of Bank and Insurance Shares and British Government Stocks (thereinafter called "the unit trust").

(ii) The unit trust was constituted by a trust deed dated October 15, 1937.

(iii) By the trust deed debenture units and deferred units were authorized to be created and to be issued upon such terms and subject to such conditions as in the trust deed were set forth.

(iv) By the trust deed the company was authorized to sell deferred units at a price calculated in the manner therein set forth, which price included an initial service charge ascertained as therein mentioned.

(v) The trust deed further provided that the trustees should on the last day of each distribution period (as therein defined) until the determination of the trust raise out of the trust fund thereby constituted and pay to the company (after any necessary deductions) a sum equal to one quarter of 1 per cent. of the mean market value of the trust fund as on such last day as aforesaid and that the company should be entitled to retain such payments (thereinafter called "management remuneration") for its own use and benefit in addition to the service charge in the last preceding recital referred to.

(vi) The trust deed further provided that subject to the conditions therein set out and after the date therein specified the company should have power to form a company (thereinafter called "the new company") with limited liability for the purpose of taking over the trust fund, in which event the company should thereafter receive such remuneration as might be agreed between the company and the new company.

(vii) The testator was chairman of the board of directors of the company and had by arrangement with the other directors rendered special and valuable services to the company in relation to the unit trust, and in particular he devised the scheme embodied in the trust deed, settled the trust deed, prepared prospectuses of and advertisements for sale of units, negotiated the sale of units exceeding in number 1,000,000 and underwrote a large number of such units upon a public issue thereof.

(viii) The management of the unit trust had resulted in substantial profit to the company and it was anticipated that in the

future further profits would be earned from the sale of units and also from the continued receipt of management remuneration.

(ix) The company recognized that the said services rendered to the company by the testator were special services outside his ordinary duties as director within the meaning of and as contemplated by article 72 of the company's articles, and the directors of the company had pursuant to that article agreed to pay him by way of special remuneration such amounts as were thereinafter mentioned, as follows:

"(1) The company shall forthwith pay to Mr. McCurdy an "amount equal to the service charge included in the purchase "price of the deferred units purchased by him less the standard "rate of commission allowed to Mr. McCurdy upon the purchase "of such units the amount so payable being agreed at £3,000.

"(2) After there has been deducted from the management "remuneration a percentage of 20 per cent. thereof as an agreed "contribution towards the cost of the management of the unit "trust for the distribution period for which such remuneration "is payable there shall be paid by the company to Mr. McCurdy "his executors administrators or assigns so much of the balance "as bears to the whole of the balance the same proportion as "158,904 bears to the total number of deferred units in issue at "the end of the last day of each distribution period. In the "case of management remuneration now already received the "due proportion shall be paid to Mr. McCurdy forthwith. In "the case of management remuneration hereafter to be received "the due proportion shall be paid to Mr. McCurdy his executors "administrators or assigns within 14 days of the receipt of the "remuneration by the company."

(3) If the new company should take over the trust fund in manner thereinbefore recited, then the testator should be entitled to receive a proportion equivalent to that provided for by clause 2 thereof of the remuneration of three-eighths per cent. per annum or such less remuneration as aforesaid (calculated as aforesaid) thenceforth paid to the company after there had been deducted from such remuneration the said percentage of 20 per cent.

. . . . . .

"(5) Sums from time to time payable to Mr. McCurdy under "... this agreement shall be and be deemed to be moneys had "and received by the company for and on behalf of Mr. McCurdy "his executors administrators or assigns."

4. It was an agreed fact that the trust created under the trust deed (mentioned in the recital to the agreement) which provided that the trust thereby created unless previously determined under the provisions therein contained should determine on October 4, 1958, had continued throughout all years since the testator's death. It was further agreed that the executors and trustees of his will had received payments from the company under the provisions of clause 2 of the said agreement every year and that the amounts so received for the years under appeal coincided

1958

West-minster Bank Ltd. v. Barford (Inspector of Taxes).

with the amounts of the income tax assessments under Case III of Schedule D, subject to the statutory basis of computation on the income of the year preceding the year of assessment.

It was also agreed that in each of the relevant years in which the company made the payments under the provisions of clause 2 of the said agreement:

(i) The company made the payments in full without any deduction for income tax;

(ii) the company had deducted the said payments as a business expense in computing its profits for income tax purposes;

(iii) the company had been assessed to income tax on its profits on the footing that the said payments were allowable expenses; and

(iv) the said payments were less than the amount of the company's profits assessed to income tax.

5. It was contended on behalf of the bank:

(i) That the payments were remuneration for the testator's services as a director of the company;

(ii) that the remuneration so paid could not be assessed under Case III of Schedule D by reason of the decision in *Stainer's Executors* v. *Purchase*.[2]

6. It was contended on behalf of the inspector of taxes:

(i) That the payments in question made by the company under the agreement of December 9, 1938, were annual payments assessable under Schedule D on the trustee of the testator's will;

(ii) that the proper construction of the said agreement was that it provided for a series of payments to the testator during his lifetime and to his representatives after his death for the period of the existence of the trust, such payments being irrespective of the employment of the testator by the company or the holding by him of office as a director of the company;

(iii) that *Stainer's Executors* v. *Purchase* [2] had no application to the present case.

7. The commissioners gave the following determination in writing on April 23, 1957: Their first consideration was the character, from the point of view of taxation, of the payments arising to the testator, his executors, administrators, or assigns under clause 2 of the agreement of December 9, 1938, at the time that they first arose. They appeared to bear, as between the company and him, the character of remuneration for past services. But it did not follow that they were necessarily taxable under Schedule E upon the recipient. The payments bore also the characteristics of annual payments "... by virtue of "any contract," chargeable under Case III of Schedule D, since they possessed the necessary qualities of periodicity, and were "pure income receipts": see *Earl Howe* v. *Inland Revenue*

[2] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; *Purchase* v. *Gospel* [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

Commissioners.[3] The contention that they were not pure income receipts, because expenses could be charged against them under rule 9 of Schedule E, appeared to postulate that they were chargeable under Schedule E, and therefore to beg the question. If they were annual payments, were they properly chargeable under Case III as such? In view of the charging words of Schedule D, section 122 (1) (*b*), they could not be charged under Case III of Schedule D if they were chargeable under Schedule E as remuneration. They were of opinion, however, that they were not properly chargeable under Schedule E. Under rule 1 of the Rules of Schedule E in the Ninth Schedule, tax was to be annually charged in respect of all "salaries, fees, wages, etc., "*for the year of assessment*," and it appeared to them difficult, if not impossible, to discover for what years of assessment the sums arising under the agreement were to be paid. Were the said sums remuneration voted, long after, for the years in which the services were performed: see *Dracup* v. *Radcliffe*[4]? Or, was the sum that was immediately payable under the agreement remuneration for 1938–39 and the sums that were payable in the future remuneration for the years in which they were to be paid over by the company, bearing in mind the important circumstance that they would continue to be payable notwithstanding the testator's death or resignation, and to any person to whom he might assign his rights? Or, was the proper view that he received as remuneration for the year in which the agreement was entered into, first, the sum of £3,000 under clause 1, secondly, a sum in respect of management remuneration already received, and, thirdly, the capitalized value of the right to receive sums in respect of management remuneration thereafter to be received? There were great difficulties in accepting any of these solutions to the question and it appeared to them that in view of such difficulties the payments were, from their inception, not assessable under Schedule E and were therefore assessable under Schedule D, Case III, as annual payments. If so, they would continue to be so assessable after his death. They had naturally been pressed with the similarity of the payments in *Stainer's Executors* v. *Purchase*.[5] But in that case the payments to be made did not have the quality of being "pure income payments," since they were admittedly to be included among the gross receipts of a profession, the profits of which could only be ascertained after deduction of expenses. There was therefore no question of a choice in that case of assessing either under Case II of Schedule D, or under Case III as annual payments. In the present case, however, it seemed to them that the sums to be received under the agreement did not flow from the testator's office as a director and they could be isolated from any director's remuneration assessable under Schedule E. The said sums sprang entirely from certain special services rendered before the

[3] [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 289.

[4] (1946) 27 T.C. 188.

[5] [1952] A.C. 280.

1958

West-minster Bank Ltd. v. Barford (Inspector of Taxes).

date of the agreement and expressed to be outside his ordinary duties as a director. It was true that the testator was a director at the date the agreement was made, but neither the quality nor the quantity of the said sums was in any way affected by his continuance in office or the carrying on of any sort of employment with the company after the moment when the agreement was signed.

[The findings of the commissioners on a second contention were not pursued on appeal and are not here set out.]

They confirmed the assessments.

Charles Beattie for the Westminster Bank Ltd.

Cyril Harvey Q.C. and *Alan Orr* for the Crown.

The following cases, not cited in the judgment, were referred to in argument: *Lockhart* v. *Moldacot Pocket Sewing Machine Co. (Ltd.)* [6]; *Mudd* v. *Collins* [7]; *Shipway* v. *Skidmore* [8]; *Heasman* v. *Jordan* [9]; *Parkins* v. *Warwick* [10]; *Inland Revenue Commissioners* v. *Bew Estates Ltd.* [11]; *Cowan* v. *Seymour* [12]; *Bennett* v. *Ogston* [13]; *Carson* v. *Cheyney's Executor*, [14] and *Allen* v. *Trehearne*. [15]

Cur. adv. vult.

March 7. Vaisey J., having stated the facts, read the following judgment: The consideration for the contract of December 9, 1938, was the performance by the testator of certain special services to the company, rendered by him in his office of chairman of its board of directors.

It seems to me that he was taxable under Schedule E in respect of the £3,000, and under Schedule D (or perhaps Schedule E) in respect of the annual payments which fell due during his lifetime. It was suggested that he could, and perhaps should, have been charged under Schedule E on the value of the total benefits accruing to him under the said agreement estimated, presumably, as at the date of the agreement. This did not happen, and it seems to me most unlikely, for surely it could not be suggested that such an assessment would free him, and also his executors, administrators and assigns, from all further claims for income tax in respect of the annual payments. *Stainer's Executors* v. *Purchase* [1] is, in my opinion, a very different case.

[6] (1889) 5 T.L.R. 307.

[7] (1925) 41 T.L.R. 358; 9 T.C. 297.

[8] (1932) 16 T.C. 748.

[9] [1954] Ch. 744; [1954] 3 W.L.R. 432; [1954] 3 All E.R. 101; 35 T.C. 518.

[10] (1943) 25 T.C. 419.

[11] [1956] Ch. 407; [1956] 3 W.L.R. 139; [1956] 2 All E.R. 210; 36 T.C. 476.

[12] [1920] 1 K.B. 500; 36 T.L.R. 155.

[13] (1930) 15 T.C. 374.

[14] [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391.

[15] [1938] 2 K.B. 464; 54 T.L.R. 826; [1938] 2 All E.R. 698; 22 T.C. 15.

[1] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

1958

WEST-MINSTER BANK LTD. v. BARFORD (INSPECTOR OF TAXES).

Vaisey J.

As I view the position, the company gave to the testator a contract under which the annual sums in question were payable to his executors, administrators or assigns subject to tax under Schedule D. In other words, the benefit which he received from the company was a contract for the payment of periodical sums of indeterminate amounts which were always subject to and never free from tax. Even if the annual sums payable during his life were in strictness, as they came to his hands, taxable under Schedule E, I cannot see how that could affect the liability to tax of the actual recipients of the same sums after his death. His sequels in title, whether testamentary (executors) or statutory (administrators) or arising from an act inter vivos (assigns) are, in my judgment, liable to tax under Schedule D, and it makes no difference that historically the sums originated from services rendered by him in his office of director. The four sums now in question are annual payments arising under a contract—that is, under the agreement of December 9, 1938—and it was to that agreement, rather than to his services as director, that those payments were attributable. In other words, the consideration for the contract was the services of the testator, and the consideration for the payments was the contract, which itself by its independent vitality "generated income": compare *Stainer's Executors* v. *Purchase*.[2]

In my judgment, the assessments were properly made, and this appeal fails.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co.; Solicitor, Inland Revenue.*

I. G. R. M.

[2] [1952] A.C. 280, 291.

[CENTRAL CRIMINAL COURT.]

* REGINA v. BASTIAN.

1958
Jan. 29.

Donovan J.

Criminal Law—Murder—Diminished responsibility—Right of prosecution to prove insanity—Onus of proof—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2.

Criminal Law—Insanity—Diminished responsibility—Right of prosecution to prove insanity on plea of diminished responsibility.

Where, on a charge of murder, the defence put forward a plea of diminished responsibility within section 2 of the Homicide Act, 1957, it is the duty of the prosecution, if they have evidence tending to prove insanity, to cross-examine on that basis and to call evidence to prove insanity.

TRIAL ON INDICTMENT.

Cerbert Bastian was charged on an indictment containing two counts charging him with the murder of his two sons on

1958

Regina
v.
Bastian.

December 18, 1957. On arraignment he pleaded guilty but, after some discussion, that plea was withdrawn and a plea of not guilty entered. At the close of the case for the prosecution counsel for the defence stated that he had no instructions from his client to put forward a plea of insanity, but that he proposed to call medical evidence to show that the defendant was suffering from diminished responsibility within section 2 (1) of the Homicide Act, 1957. Counsel for the prosecution contended that if such evidence was called he would be entitled to cross-examine to show that the degree of abnormality was such as to amount to insanity and to call evidence to that effect.

Christmas Humphreys and *Griffiths-Jones* for the Crown.
F. H. Lawton Q.C. and *Roger Frisby* for the accused person.

The following case was referred to in argument: *Rex* v. *Dashwood.*[1]

Donovan J. The view I take is that if the defence put in issue the state of a man's mind to show that he was suffering from such an abnormality of mind as produced diminished responsibility, the prosecution are under a duty, if they have evidence to support it, to cross-examine the witnesses for the defence to show that the accused was insane at the time when he committed the offence, and to call evidence to that effect.

Counsel for the defence then called two medical witnesses in support of a plea of diminished responsibility and asked for a verdict of manslaughter. Counsel for the Crown called one medical witness in rebuttal and asked for a verdict of guilty but insane.

Donovan J. directed the jury that, the prosecution having proved that the accused killed his two children, the issue was what his mental state was at the time, namely, whether he was guilty of the act, but insane at the time he did it or whether his mind was so affected by some disturbance that his responsibility was diminished and that, therefore, the proper verdict was one of manslaughter. His Lordship continued: If he raises this plea of diminished responsibility it is for him to prove that he was suffering from such abnormality as was described in section 2 of the Homicide Act, 1957. He does not have to prove it with the same certainty that the prosecution have to prove guilt, the balance of probabilities will do, but he has to prove it. The onus is on him. [His Lordship reviewed the medical evidence and continued:] I think that is the full extent of the assistance that I can give you upon this matter, except to say that I will not ask you to try and bear in mind the wording of the section which

[1] [1943] 1 K.B. 1; [1942] 2 All E.R. 586.

defines diminished responsibility, but I will give you the section itself so that you can take it out when you retire to consider your verdict, which I will ask you now to do.

1958

REGINA v. BASTIAN.

Donovan J.

The jury returned a verdict of manslaughter on both counts and the accused was sentenced to imprisonment for life.

After the accused had left the dock:

DONOVAN J. It occurred to me after I had summed up to the jury that if the prosecution say, in effect: "This is not merely "a case of diminished responsibility, it is insanity," then the proper direction to the jury would be: "It would be for the "prosecution to satisfy you that the state of the accused person's "mind went beyond what the defence are alleging, and that at "the time of the offence he was insane within the legal meaning "of that term." That should be borne in mind when the matter next arises. It has not arisen in the present case.

Solicitors: *Director of Public Prosecutions; W. Timothy Donovan.*

J. D. P.

[COURT OF APPEAL.]

* RUTHERFORD *v.* R. E. GLANVILLE & SONS (BOVEY TRACEY) LTD.

C. A.

1958 *Feb.* 10.

Lord Goddard C.J., Morris L.J., and McNair J.

Factory—Dangerous machinery (fencing)—Injury from fence—Carborundum wheel—Disintegration—Fence shifted—Injury—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16.

The plaintiff was employed in the defendants' factory on a cutting machine which incorporated an abrasive carborundum wheel. The wheel, which revolved at a high speed and which was apt to disintegrate, was guarded by a fence in the shape of a hood. While the plaintiff was working on the machine, the wheel disintegrated and lifted the guard in such a way that it struck and injured the plaintiff.

The trial judge dismissed an action founded on a breach of statutory duty under sections 14 and 16 of the Factories Act, 1937,[1] and on negligence at common law. On appeal, on the sole ground of breach of statutory duty:—

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery . . . shall be securely "fenced . . . Provided that in so far "as the safety of a dangerous part of "any machinery cannot by reason of "the nature of the operation be secured "by means of a fixed guard, the re-"quirements of this subsection shall "be deemed to have been complied "with if a device is provided which "automatically prevents the operator "from coming into contact with that "part."

S. 16: "All fencing or other "safeguards provided in pursuance of "the foregoing provisions of this Part "of this Act shall be of substantial "construction, and constantly main-"tained and kept in position while "the parts required to be fenced or "safeguarded are in motion or in "motion or in use. . . ."

C. A.

1958

Rutherford v. R. E. Glanville & Sons (Bovey Tracey) Ltd.

Held, that the carborundum wheel was a dangerous part of machinery and had not been securely fenced; that the fence had not been securely maintained or kept in position, and the defendants were, therefore, in breach of their statutory duty under section 14 of the Factories Act, 1937, and the injury which the plaintiff had sustained was the direct result of the defendants' breach.

Nicholls v. *F. Austin (Leyton) Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92 distinguished.

Appeal from Streatfeild J., sitting at Devonshire Summer Assizes.

The defendants were the owners and occupiers of a small engineering works at Bovey Tracey where they employed a few men. Among the machines in their works was one called an abrasive wheel cut-off machine. This consisted of an abrasive carborundum wheel which was driven at about 4,000 revolutions per minute. The machine, which was controlled by a switch and a handle, had a guard on it. The carborundum wheel was very apt to disintegrate because of the high speed at which it was working, and had commonly to be replaced. Therefore the guard, which was in the shape of a hood, was designed to protect the workmen if the wheel should disintegrate in the course of the working of the machine. On April 2, 1952, the plaintiff, who was employed in the defendants' factory, was working the machine when the carborundum wheel disintegrated and lifted the guard, which turned towards the plaintiff and cut his wrist. The plaintiff brought an action for breach of statutory duty under sections 14 and 16 of the Factories Act, 1937, and at common law to recover damages for the injuries which he had sustained.

Streatfeild J. gave judgment for the defendants. The plaintiff appealed.

John Thompson Q.C. and *E. H. Laughton-Scott* for the plaintiff.

Montague Berryman Q.C. and *D. P. Croom-Johnson* for the defendants.

Apart from the case referred to in the judgment, the following cases were referred to in argument: *Dickson* v. *Flack* [2]; *Smith* v. *Morris Motors Ltd. and Harris* [3]; *Carroll* v. *Andrew Barclay & Sons Ltd.* [4]; *Kilgollan* v. *William Cooke & Co. Ltd.* [5]

Lord Goddard C.J. stated the facts and continued: We have not been asked to decide this case on the basis of the common law liability of the defendants. The judge rejected the common law liability and I am going to assume for the purpose of my judgment that his judgment was right.

We have, however, been asked to reverse his finding on the

[2] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.

[3] [1950] 1 K.B. 194; 65 T.L.R. 642; [1949] 2 All E.R. 715.

[4] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[5] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294.

liability which is alleged to exist by reason of a breach of sections 14 and 16 of the Factories Act, 1937. Section 14 provides that all dangerous parts of machinery must be fenced when they are working and section 16 provides for the proper maintenance of the fences which must be provided under section 14.

This machine had to be fenced because there was a risk of the carborundum wheel, which it protects, disintegrating and thereby causing injury. The wheel did disintegrate and there can be no doubt whatever that the disintegration by some means or other caused this guard to shift and to cut the plaintiff's wrist.

It is said, following on the decisions of the House of Lords (which I need not go through at any length because they are very well known decisions), that the object of the fence is not to prevent things flying out; it is to prevent the human body coming into contact with the dangerous part of the machine. From that it is argued that unless the human body comes into contact with the dangerous part of the machine, no liability is incurred under the provisions of the Act. But there has never been a case on all fours with the present case. It seems to me that, if one states the plain facts of the case, it would be a very curious and narrow reading if one could say in this case that no liability was incurred under the Factories Act, 1937. The Act requires the dangerous part of the machine, which, in this case, is the carborundum wheel, to be fenced; one of the reasons why this carborundum wheel is dangerous is because of the risk of disintegration. Therefore a guard is provided to guard against the risk of disintegration, because if there is disintegration personal injury will probably result. There was disintegration and personal injury did result; and it resulted because the disintegration affected the guard in some way. It was the guard which caused the injury but only because the disintegration of the wheel caused it to shift. I cannot see that it would be otherwise than a very unfortunate and remarkable result that if the wheel disintegrated with such force that it caused a fracture in the guard and a piece of the carborundum wheel struck the plaintiff, the plaintiff would be able to recover, whereas if it did not cause a fracture but the force of the disintegration bent or turned the guard onto the plaintiff's hand, the plaintiff could not recover. Again it would be a remarkable result that if the explosion fractured the guard and a piece of the carborundum wheel flew out of the guard and hit the plaintiff, he would be able to recover, but if, as the result of the fracture, a splinter of the guard flew up and injured the plaintiff, he would not be able to recover.

In my opinion this machine cannot be said to be securely fenced if it does not protect the workman when the very thing happens against which the fence is required to protect him. I look upon it as a case in which the machine has to be fenced because of the risk of disintegration and, if there is disintegration, personal injury will probably result. There was disintegration

C. A.
1958
Rutherford v. R. E. Glanville & Sons (Bovey Tracey) Ltd.

and personal injury did result; and the personal injury resulted because the guard did not effectively prevent that personal injury happening when there was disintegration.

In my opinion, therefore, this machine was not securely fenced and, accordingly, I would allow this appeal.

Morris L.J. I am of the same opinion. Mr. Thompson has not invited us to deal with the case on the common law basis but has invited us to deal with the position under the Factories Act, 1937. It seems to me that there are two main questions. First, was there a breach of the obligations under section 14? Secondly, if there was such a breach, did the injury which the plaintiff suffered result from the breach of section 14?

It is really common ground that the abrasive wheel was a dangerous part of the machinery. My Lord has described the machine and has referred to the dangerous features of the abrasive wheel when in use. There was the danger that the hand of somebody operating the machine might come into contact with the wheel revolving at 4,000 revolutions a minute. But another danger, and possibly the chief danger, was the danger that the abrasive wheel after being in use for some time might break up and split into a number of fragments, which fragments would be ejected with the centrifugal force resulting from revolutions at the rate of 4,000 a minute. That was clearly a considerable danger. It is, therefore, I think, not in dispute that the wheel was a dangerous part of the machinery.

Section 14 (1) provides: "Every dangerous part of "any machinery, other than prime movers and transmission "machinery, shall be securely fenced . . ." There are certain exceptions which need not be mentioned. If section 16 is to be regarded as defining or explaining the extent of the obligations under section 14, then from section 16 it is seen that fencing and other safeguards which have to be provided in pursuance of section 14 must be "of substantial construction, and constantly "maintained and kept in position while the parts required to be "fenced or safeguarded are in motion or in use."

In the present case it appears that the guard or fence was, by the action of the disintegrating parts of the wheel, caused to be thrust up so as to rise apparently in a vertical direction. Following on that the plaintiff suffered his injury. It seems to me impossible to hold, on those facts, that the fence that was provided was secure or that it was of substantial construction and constantly maintained and kept in position while the wheel was in motion or in use. The obligation under section 14 is an absolute obligation, and it seems to me that the admitted facts of this case lead inevitably to the conclusion that there was a dangerous part of this machine which was not securely fenced: the fence was not kept in position. I cannot appreciate the notion which is advanced that there was secure fencing, albeit by

a fence that was admittedly insecure, inasmuch as it left its position.

On the first question I am of the opinion that there was a dangerous part which had to be securely fenced and which, on the facts of this case, was not securely fenced. There was, therefore, a breach of the obligation under section 14.

The next question, as it seems to me, is whether it is shown that the plaintiff's injury was caused by that breach of section 14. [His Lordship then read the proviso to section 14 (1).] The concluding part of section 14 is as follows: "The Secretary of "State may, as respects any machine or any process in which a "machine is used, make regulations requiring the fencing of "materials or articles which are dangerous while in motion in "the machine." Cases have arisen in which the question has been raised whether damages under section 14 can be recovered where materials being worked in a machine are ejected so as to cause injury. A point which has been taken by the defendants both on appeal and in the court below was thus expressed by the trial judge in his judgment. He said: "It is conceded by "Mr. Croom-Johnson that section 14 does apply not only to pro-"tecting workmen from coming into contact with the dangerous "part but also to protect them against dangerous portions of the "machine from flying out. It is also said by Mr. Croom-Johnson "that a dangerous part of this machine was not the thing which "did the damage but the guard, which was there to prevent the "damage." Mr. Croom-Johnson following Mr. Berryman in his submissions in this court has said that before the plaintiff could recover on the facts of this case it would have to be shown that the guard itself was a dangerous part of the machine. I cannot agree with that submission, and it seems to me that it would lead to a very artificial result.

Reliance was placed in support of that submission upon some passages in the speeches of their Lordships in the House of Lords in *Nicholls* v. *F. Austin (Leyton) Ltd.*[1] In that case the plaintiff, while operating a circular saw belonging to her employers, was injured through a piece of wood flying out of the machine, which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations, 1922, which by section 159 (1) of the Act were to be deemed to have been made under that Act.

We were referred to the language of Lord Thankerton where he said[2]: "My Lords, on consideration of the terms of section "14, I am of opinion that there is a simple answer to the "contention of the appellant, namely, that the obligation to "fence imposed by subsection (1) is an obligation to provide a "guard against contact with any dangerous part of a machine, "and that it does not impose any obligation to guard against "dangerous materials or articles ejected from the machine in

[1] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[2] [1946] A.C. 493, 499.

C. A.
1958
Rutherford v. R. E. Glanville & Sons (Bovey Tracey) Ltd.
Morris L.J.

"motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section," which is the section to which I referred. Lord Macmillan also referred to the point that was under consideration in that case. He said [3]: "The question of importance in the case is whether the statutory duty imposed by section 14 of the Act of 1937 to fence securely every dangerous part of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it; or whether the duty also extends to fencing the dangerous part so as to prevent any part of the material on which the machine is working from flying off and striking the operator." We were, of course, referred to passages in the other speeches and notably to passages from the speech of Lord Simonds.[4]

But it does not seem to me that their Lordships in that case were dealing with the rather unusual situation that occurred in the present case. If a piece of the wheel that disintegrated had by the force of the disintegration gone straight through the guard and struck somebody working in the factory, then Mr. Croom-Johnson, for the purposes of the present case, concedes that there would be liability; but he says that if it was not a part of the wheel itself which struck the plaintiff but a piece of the guard that was projected outwards by the piece of the wheel, then there would be no liability. That seems to me to be so artificial a distinction that it could not be right and it does not appear to me to be rational. Here was an obligation to fence a dangerous part. The obligation was imposed by that Part of the Act that dealt with safety. There was an obligation to prevent the dangers that would result from this dangerous part of this machine. The dangers to which the plaintiff was exposed included the liability to encounter the forces of disintegration. It was those very forces which came into being and which projected the guard itself so as to cause it to be the actual immediate instrument of the physical injury to the plaintiff.

It seems to me that on those facts the only reasonable conclusion is that there was causation of the injury by the breach. I do not think that it was the intention of their Lordships in *Nicholls* v. *F. Austin (Leyton) Ltd.*[5] to say anything, in the passages to which I have referred, leading to a different result. It is quite clear that if, in the present case, there had been a fence which was secure, or a fence which was kept in position, or a fence which was an adequate fence for its purpose of containing anything that was the result of disintegration, then there would have been no accident. But whether it is enough to put it in that way or not, it seems to me that this injury was, on a common-sense analysis, caused by the fact that there occurred the very danger that was contemplated, the danger against which

[3] [1946] A.C. 493, 501.
[4] Ibid. 504, 505.
[5] [1946] A.C. 493.

there should have been protection, the danger against which there should have been fencing, and by the fact that there was no fencing which guarded against the consequences of the danger. In this case the fencing was insecure, inadequate and not kept in position. It was fencing which failed to do what it was there to do. It failed to prevent the very danger which was realized to be a danger and which might result in injury to somebody working in close proximity to that danger.

It seems to me, therefore, on the second question which I propounded, that it is shown here that the injury to the plaintiff was caused by the breach of section 14 of the Factories Act, 1937. I therefore think that the plaintiff was entitled to recover as on a breach of statutory duty.

McNAIR J. I agree that this appeal should be allowed; but in deference to the judge, from whose views we are differing, I should like to add a few words of my own, which do not substantially differ from what has been stated by my Lords.

The two questions, quite clearly, are, first, has the plaintiff established that there has been a breach of section 14 of the Factories Act, 1937, as extended or explained by section 16 of that Act? And, secondly, has he established that his injuries were the direct result of that breach? The judge in his judgment described this machine and in particular described the characteristics of the carborundum wheel. He said: "As is pretty well "known, and indeed requires little imagination, carborundum "wheels of this nature are very liable to break. If the slighest "excessive pressure is put upon the handle it may well be that it "will cause the disc wheel to disintegrate, and it is for that reason "it is of the utmost importance, obviously, that the abrasive "wheel shall be securely guarded, not only to prevent a man "from inadvertently catching his hand against the wheel but "also to prevent the scattering of fragments when a wheel "happens to break, which was a common experience occurring "almost daily." It seems to me, and it is in line with what the judge has said, that this wheel was a dangerous part of the machinery within the meaning of section 14 of the Factories Act, 1937, because the wheel revolving at 4,000 revolutions per minute had this potentiality of disintegration, as the result of which forces would be set up and one of the forces would be the flying of the pieces of fragmentation. Section 14 (1) requires such a dangerous part of the machinery to be securely fenced and section 16 adds to that the requirements that the fencing or other safeguards shall be of substantial construction and constantly maintained and kept in position. The first question is: Was this hood, which admittedly came unseated through the operation of these forces of disintegration, such that it securely fenced the dangerous part? In my judgment you cannot say that a hood provided as a guard for this type of machinery is a secure fence unless the forces of disintegration which are known to be likely

C. A.
1958
Rutherford v. R. E. Glanville & Sons (Bovey Tracey) Ltd.
McNair J.

to be set up in the normal working of the machine, including the flying of fragments of the wheel in all directions, are really taken care of and taken up by the hood. Accordingly, in my judgment, it is quite clear that this hood or guard did not form a secure fence for this machine.

The second question is whether it has been established that injury was directly caused by that breach. I bear in mind that these sections do not entitle an injured person to recover if the injury can properly be said to be the indirect result of the breach, as was observed by Lord Simonds in *Nicholls* v. *F. Austin (Leyton) Ltd.*[6] But here if the facts are, as I apprehend them to be, that no independent cause came into operation between the disintegration of the wheel and the impact of the guard upon the man's wrist, it seems to me that the disintegration of the wheel which resulted in fragments of the wheel itself being thrown against the guard so that the guard struck the man's wrist means that the flying of those fragments against the guard was the direct cause of the guard striking the man's wrist, or, putting it the other way round, that the injuries flowing from the striking of the man's wrist were the direct result of the flying fragments of the wheel coming into contact with the guard.

In those circumstances the plaintiff has in my judgment established the two points which it is necessary for him to establish and, in my opinion, this appeal should be allowed.

Appeal allowed.

Solicitors: *Arnold Carter & Co., agents for Hamlyn Taylor & Neck, Paignton; Pullan, Davies & Co., Leeds.*

[6] [1946] A.C. 493, 504.

[CHANCERY DIVISION.]

1958
Feb. 26.
Roxburgh J.

* WILSON and Another *v.* THOMAS.

[1957 W. No. 318.]

Vendor and Purchaser—Specific performance—Proof of title—Action for —Plaintiffs' title derived from will containing latent ambiguity—Whether extrinsic evidence admissible in specific performance action.

By an agreement at an auction sale, subject to certain printed conditions, the plaintiffs agreed to sell and the defendants agreed to buy the plaintiffs' reversionary shares of and interests in certain trust funds, the title to which depended on a will which contained a latent ambiguity requiring extrinsic evidence to resolve it. The defendant refused to complete on the ground that the plaintiffs had failed to make a good title. In an action for specific performance of the agreement, the plaintiffs sought to adduce extrinsic evidence which they contended would resolve the latent ambiguity and clear their title.

One of the conditions of sale provided: "A purchaser shall "assume as is the case that the persons who executed a [certain] "deed of family arrangement are the same persons as the benefi- "ciaries under the will. . . ." The purchaser objected that this was misleading, as a perusal of the documents showed the assumption to be untrue in fact:—

Held, (1) that the purchaser was entitled to take the objection, as on its true construction the condition meant that as some of the names in the will were slightly different from those in the deed, the purchaser was to assume these to be identical.

(2) That it would not be right to admit extrinsic evidence to resolve the latent ambiguity in the will in an action for specific performance, and that the proper course was for the plaintiffs to take out an originating summons to have the will construed.

Dictum of Lord Cozens-Hardy M.R. in *In re Nichols' and Von Joel's Contract* [1910] 1 Ch. 43, 46 applied.

Smith v. *Colbourne* [1914] 2 Ch. 533, and *Johnson* v. *Clarke* [1928] Ch. 847 considered.

ACTION.

The plaintiffs, Henry Talbot Wilson and Albert Wellesley Wilson, claimed (1) specific performance of an agreement made on September 26, 1956, between them and the defendant, Benjamin Alfred Allden Thomas, whereby the defendant agreed to purchase from the plaintiffs the plaintiffs' reversionary shares of 66/1041 each of certain trust funds being lot 6 in an auction sale held on September 26, 1956, by Messrs. Foster and Cranfield in London; (2) damages for breach of contract in lieu of or in addition to specific performance.

The following facts are taken from paragraphs 1 to 9 of the statement of claim, and were admitted by the defendant.

By an oral agreement dated September 26, 1956, and made between Messrs. Foster and Cranfield, a firm of auctioneers who were at all material times the agents of the plaintiffs, and the defendant, the plaintiffs agreed to sell and the defendant agreed to purchase for the sum of £5,425 the plaintiffs' reversionary shares and interests of 66/1041 parts each of certain trust funds, being a will fund and a settlement fund described as lot 6, subject to the reservations and the general and special conditions in the particulars of sale. It was further provided by the agreement that £542 10s. should be paid by the defendant by way of deposit to Messrs. Foster and Cranfield as stakeholders, and the deposit was duly paid on September 26, 1956, and a memorandum of the sale was duly endorsed on the particulars of sale and signed by the defendant. The special conditions of sale provided by clause 3 that the sale should be completed on October 29, 1956. The special conditions of sale provided by clause 6 that the position as to death duties as stated in the particulars of sale, that no claim for estate duty would arise on the death of the life tenant in respect of the settlement fund, but a possible claim might arise on the death of the lady aged 75 should she survive the life tenant was based on replies given by the Estate Duty Office in reply to queries put to them by the

1958

Wilson v. Thomas.

plaintiffs' solicitors on June 27, 1956, but the plaintiffs accepted no responsibility as to what duties should in fact become payable, and no compensation should be paid or allowed in respect of such duties, and the reversions were sold subject to all death duties which might be payable on the death of the life tenant or otherwise.

Clause 7 of the special conditions of sale provided that the purchaser should assume "as is the case that the persons who "executed a deed of family arrangement dated November 28, "1936, are the same persons as the beneficiaries under the will "of the testator," and the purchaser should not be entitled to raise any requisition or objection in respect thereof nor to require the vendors to supply any proof thereof.

The general conditions of sale provided that should the completion of the purchase be delayed from any cause whatever other than the wilful default or neglect of the vendors beyond the date fixed for completion, the purchaser should pay interest on the balance of the purchase money from the day fixed for completion until the completion of the purchase at the rate of 5 per cent. per annum. The general conditions further provided that if through any mistake the lot should be improperly described, or if there should be any error, omission or misstatement in the particulars, such error, omission or misstatement should not vitiate the sale, but the vendors or purchaser should pay or allow a proportionate value according to the average of the whole purchase money as a compensation either way. The general conditions further provided that should the purchaser neglect or fail to comply with any of the conditions of sale, the deposit money should be forfeited and the vendors should be at liberty to resell the property sold and to recover from the purchaser by way of liquidated damages the deficiency (if any) arising by such second sale, together with all charges attending the same. On October 11, 1956, the defendant delivered certain requisitions on the plaintiffs' title, and on November 1, 1956, the plaintiffs delivered their replies. The defendant refused to complete and asked for the return of his deposit. The plaintiffs alleged that they were willing to fulfil all their obligations under the agreement of which they now claimed specific performance.

Roy Woolley for the plaintiffs.
F. G. King for the defendant.

The cases cited in argument are referred to in the judgment.

Roxburgh J. read the statement of claim and continued: By his defence, the defendant, having admitted paragraphs 1 to 9 of the statement of claim, his refusal to complete the agreement, and his request for the return of the deposit continued: "For "the reasons hereinafter given the defendant contends that the "plaintiffs have failed to show a good title in accordance with

"their contract to the interest agreed to be sold or alternatively "that the title in the circumstances is not one which the defen- "dant ought to be compelled to accept." Pausing there, it is indubitably the normal course to leave questions of title to a master, but as in this case it is plain that there is no issue between the parties except as to title, I agreed to try those questions, and for that purpose the defendant opened his objections to the title, which fall into two divisions. The first group of objections relates to estate duty, and it is alleged that special condition 6 is misleading in that regard. In the view which I take of this case it is unnecessary to determine that question.

I come now to the point which I have to decide which is raised by paragraph 4 of the defence: "The defendant further "contends that special condition 7 is misleading since on reading "it he was entitled to assume that the deed herein referred to "was executed by all persons beneficially interested in the "property the devolution whereof the deed purported to regulate. "This is not the case since the shares of certain of the persons "beneficially interested were settled on protective trusts with "remainders in favour of persons who were not parties to the "deed." That is plainly true, namely, that the shares of certain persons beneficially interested were by the will settled on protective trusts with remainders in favour of persons who are not parties to the deed. That is the kernel of this case. The defence continues: "The defendant will contend that the administration "of either the will fund or the settlement fund as in the par- "ticulars mentioned in accordance with such deed would con- "stitute a breach of trust of which the defendant as successor in "title to the plaintiffs would be stopped from complaining and "for which the defendant's shares might be in part impounded "to make good the breach or otherwise diminished by the costs "of litigation." The defendant on both grounds which I have specified claimed a declaration that he was entitled to rescind the agreement and to repayment of the deposit.

By the defence to counter-claim the plaintiffs contended: "Special condition 7 states that the purchaser shall assume that "the persons who executed the deed of family arrangement dated "November 28, 1936, are the same persons as the beneficiaries "under the will. . . ." It does not. It says that he shall "assume, *as is the case*; that makes all the difference. The defence to counterclaim continues: ". . . and in fact "the said deed was executed by all the beneficiaries then "in being." In fact that is not true either because technically there was a beneficiary in being who did not and could not execute the deed owing to extreme infancy but fortunately the case does not turn on that. The defence to counterclaim continues: "In any event the said deed of family "arrangement does not purport to vary the trusts of the shares "of the beneficiaries under the will but to place on record that "by the words 'Allan Hewitt' contained in the will the testator

1958

Wilson
v.
Thomas.

Roxburgh J.

"was referring to the two persons mentioned in the said deed. "It is contended that there is no such one person as 'Allan "'Hewitt' and the said deed of family arrangement does not in "any way affect the proper construction of the said will having "regard to the admissible evidence of the surrounding circum-"stances that the words 'Allan Hewitt' mean the said two "persons referred to by the testator by their respective popular "Christian names. Alternatively if the defendant was misled "by special condition 7 (which is not admitted) then the plaintiffs "contend by reason of what is hereinbefore set out . . . the same "has not in any way whatsoever affected the reversions as afore-"said which the defendant has agreed to purchase. It is further "contended that on the footing that 'Allan Hewitt' are two "persons then the shares of the plaintiffs are 66/1041 each and "these shares are in fact the shares contracted to be sold. If on "the other hand 'Allan Hewitt' is one person (which is denied) "then the shares of the plaintiffs are even greater but in that "event only the shares contracted to be sold will be assigned. "In further alternative it is admitted that in the unlikely event of "a court of construction deciding that each of the two persons "mentioned in the said deed is not entitled and that one person "only 'Allan Hewitt' is entitled and further in the event of the "Trustees having paid these two persons their respective shares a "claim under section 62 of the Trustees Act, 1925, could arise but "the plaintiffs contend that such a contingency is not real but "remote and shadowy and in response to a request therefor "made by the defendant with a view to him proceeding with the "sale and affirming the contract the plaintiffs are and have "always been ready and willing as indicated to the defendant "long before the commencement of this action to indemnify the "defendant against any effect (if any) upon the shares contracted "to be sold by any such impounding or diminishing thereof by "costs of litigation or otherwise."

Now the point upon which I am going to decide this case is a short one which is not, I think, covered by direct authority.

The first question I have to decide, although it is not the main point of the case, is what is the true construction of the opening words of special condition 7: "The purchaser shall "assume as is the case that the persons who executed a deed "of family arrangement dated November 28, 1936, are the same "persons as the beneficiaries under the will of the testator . . . "and the purchaser shall not be entitled to raise any requisition "or objection in respect thereof nor to require the vendors to "supply any proof thereof." I think all that really was intended to mean was that, as some of the names in the deed are slightly different from those in the will, the defendant was to assume identity as between the persons named in the will and the persons named in the deed.

In so far as it meant to say that, there is nothing wrong with the document. But it does not touch the point in the case

because, if I take that to be the true meaning, then it follows that it does not preclude the defendant from taking the objection, which is a true objection in fact, that many beneficiaries under the will, one in existence and many who were liable to come into existence within the permitted period, were not in any way bound by the deed. Thus, whichever way I construe it, it comes to the same thing. The main deed is not effective to alter the devolution of the estate, and so there is nothing in special condition 7 which precludes the objection which has been taken by the defendant. That is the first point.

The testator names a very large number of relations; and it is a fact, I think, that although not always correctly he names them all, with the possible exception of Allan Hewitt, with two Christian names. I think that nobody looking at the will uninstructed, and that is the important point for the moment, would doubt that the testator had a nephew whose name was Allan Hewitt. The plaintiffs admit that a lot of people who could be beneficially interested in the estate were not parties to the deed, and therefore it cannot alter the devolution of the estate, but they say that if I were to try the question of construction of the will, admitting such extrinsic evidence as would be admitted in a will case, I should come to the same conclusion about the construction of the will as the parties to the deed did; and the question is whether I ought to allow them in this action to call evidence for that purpose. It is quite clear that such a course has never yet been taken in any reported case.

Before I come to the law I propose to read the deed of family arrangement, dated November 28, 1936. The deed is made between a number of beneficiaries under the will, thereinafter called "the beneficiaries," and the trustees of the other part; and it is stated to be supplemental to the will. Then it continues as follows: " . . . each of the beneficiaries being satisfied that the "testator so intended hereby authorizes and directs the trustees "to read and construe the principal will so that the same shall "take effect as if the words 'Frederick Allan Wilson and Henry "'Hewitt Wilson' were substituted for the words 'Allan Hewitt' "where they appear in clause 5 of the principal will and each "of the beneficiaries [and that includes the two vendors in "this case] hereby covenants and agrees with each of the other "of them that the principal will will take effect accordingly, and "so not only in respect of the property now subject to the trusts "of the principal will and the property from time to time repre-"senting the same but in respect of any other property which "may accrue or be added thereto by virtue of any dis-"position hereinafter made and the property from time to time "representing the same."

From that I cannot see why the parties entered into this deed of compromise. They may or may not have reached their conclusions on matters entirely outside the evidence which any court is entitled to regard. I cannot tell. There is no statement in

1958

Wilson
v.
Thomas.

Roxburgh J.

the recitals that there is no such person as Allan Hewitt. That was the smallest precaution which should have been taken in that deed, if it was intended to be used for any purpose other than as a deed of reciprocal covenant. This, therefore, is quite plain, and this is what is important: If I look at the will as a document for the purpose of construing it without regard to extrinsic evidence I could not possibly arrive at the conclusion that Allan Hewitt was two persons. On the other hand, it might well be that, in a summons taken out to construe the will, evidence could be adduced which would enable the court to construe the will in the manner in which it was construed by the deed. In those circumstances, what ought I to do?

There are three cases on this matter. Two of them were in the Court of Appeal. It is bad fortune for me that the first case in the Court of Appeal was not cited to the Court of Appeal which decided the second case. That situation is apt to embarrass puisne judges. There is also a relevant passage in a decision of Maugham J. which, in my view, is obiter dictum. Where I have two cases in the Court of Appeal, not altogether in harmony, my proper course is to try to see where the two decisions come together to make a reconcilable whole, and that is what I propose to do.

The first case in the Court of Appeal which is very near the present case is *In re Nichols' and Von Joel's Contract.*[1] In that case the title depended upon the construction of an obscure will. This case depends upon what admissible extrinsic evidence can be deduced. What happened was this, as appears from the headnote[2]: " . . . The purchaser having objected to the title, the " vendors took out a vendor and purchaser summons for the " purpose of getting the question of construction determined. " Neville J. offered to adjourn the case to enable the vendors to " take out an originating summons, and, on the refusal of this " offer, held that the title was too doubtful to force upon the " purchaser. The vendors appealed, and on the appeal the " Court " [of Appeal] " made the same offer, which was " accepted. Upon the originating summons the question of con- " struction was decided in favour of the vendors, and on the " adjourned hearing of the appeal it was declared that the vendors " had shewn a good title, and the order of Neville J. was dis- " charged on the subsequent matter:—*Held*, that the vendors " ought to pay the costs of the appeal and in the court below."

In the course of his judgment Lord Cozens-Hardy M.R. said this[3]: " I should be very sorry to have it supposed that it is " my view that upon a vendor and purchaser summons it is not " the habit and duty of the court in ordinary cases to construe " a will or document forming part of the title, but I also think " it is quite plain that when there is real difficulty or doubt in " construing a will, and when there is, according to the rules of

[1] [1910] 1 Ch. 43.
[2] Ibid.
[3] Ibid. 46.

"the court, a very easy mode in which that construction can be "determined in such a manner as to bind everybody, it is not "right for the court to force a title upon a purchaser which "merely may mean that he is buying a lawsuit. . . . Here the "vendors said they had a good title; the purchaser objected that "they had not. The vendors might have obtained a decision "upon the construction of the will which would have bound "everybody, but they preferred to take out a vendor and pur-"chaser summons, the result of which would be to get the will "construed at the expense of the purchaser." I stress that passage. "Neville J. took the view that this was not a matter "which ought to be decided simply as between vendor and pur-"chaser. He said, 'There is a real point of difficulty and I will "'not decide it one way or the other. I offer you an opportunity "'of taking out a construction summons.' That offer was "refused."

I am entitled to adhere to the view expressed by Lord Cozens-Hardy M.R. in spite of the cases to which I am about to refer. What he said was not considered in *Smith* v. *Colbourne*,[4] but nobody with authority to criticize him has ever done so. Therefore I am going to make bold to adopt his very words; I should be very sorry to have it supposed that it is my view that on a vendor and purchaser summons it is not the habit and duty of the court in ordinary cases to construe a will or document forming part of the title, but I also think it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules of the court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the court to force a title upon a purchaser which merely may mean that he is buying a lawsuit.

When I come to *Smith* v. *Colbourne*,[5] in which the Court of Appeal were not referred to the case which I have just read, I want to make it plain that I am not suggesting there is any discrepancy between what was decided in the two courts. The discrepancy, if any, is in the way in which the propositions were stated, but the court does in the later cases require perhaps a greater degree of difficulty than would be postulated by the words which I have just read. I think that is as far as it goes. Indeed, I am inclined to think that today, if there was a mere question of construction not requiring extrinsic evidence and not involving any particular difficulty, the court probably would not take the course which Neville J. took. I am not in any position to judge how difficult was the question of construction in *In re Nichols' and Von Joel's Contract*,[6] though it is certainly treated by the Court of Appeal as one of what they call "real difficulty." That is quite a different matter from what I am concerned with here.

[4] [1914] 2 Ch. 533.
[5] Ibid.
[6] [1910] 1 Ch. 43.

1958

Wilson v. Thomas.

Roxburgh J.

In *Smith* v. *Colbourne*[7] it became necessary to construe a number of written documents. I need not state what they were. The point is that it was not necessary or even desirable to call any oral evidence about any of the matters with which the court was there concerned. They were, strictly speaking, questions of the construction of documents. Therefore nobody would doubt that the conclusion which the Court of Appeal reached in that case was entirely consistent with the conclusion which that court reached in the earlier case. The only question is whether the language does not go further. Swinfen Eady L.J. said this[8]: "It was then urged by the defendant that the position of a "purchaser with regard to these windows would be one of some "doubt, and that the title ought not to be forced upon him, but "the rule of the court is that enunciated by James L.J. when "delivering the judgment of the Court of Appeal in *Alexander* "v. *Mills*,[9] 'As a general and almost universal rule, the Court "'is bound as much between vendor and purchaser, as in every "'other case, to ascertain and determine as it best may what "'the law is, and to take that to be the law which it has so "'ascertained and determined.' In my opinion the position of "the purchaser after completion with regard to these five new "windows will not be one of any doubt." If by "law" is meant law in the narrow sense, that is to say, a question of law including a question of mere construction as distinct from a question of fact or a question of mixed law and fact, there would I think be no discrepancy between that proposition and the proposition in the other case. But if the word "law" includes questions of mixed law and fact, then I think it does go much further. Indeed, that proposition is not reconcilable with what was said in the earlier case, and I would prefer what was said in that earlier case.

The position here is this. In the ordinary way this kind of question is raised by an originating summons, and anybody wishing to say that Allan Hewitt was two persons would be bound to file evidence; otherwise he could not hope to succeed because, prima facie, Allan Hewitt is not two persons. Therefore the first thing that he would have to show is that there was no such person as Allan Hewitt. That no doubt would open up an inquiry which might end in the result which was reached by the parties to the deed of family arrangement. But it would always be open to persons interested in contending the contrary —obviously there might be such persons in this case because several of them have been born since—to bring in evidence tending to show that the testator probably did not mean the two persons who have been selected. Then the court would have to adjudicate upon the matter by balancing the evidence. In such a case each side would have an opportunity of tendering what evidence they possess, and the court would do the best it could

[7] [1914] 2 Ch. 533.
[8] Ibid. 544.
[9] (1870) L.R. 6 Ch. 124, 131.

on that evidence. But what would anyone think of a judge who, on an originating summons involving such a question, said: "I "have read the plaintiff's evidence that the testator meant "two persons, but I am not going to allow anybody to file any "evidence to the contrary." He would hold up his hands in horror. I have merely said that because this is not a technical question, and in that way this case is entirely differentiated from the case before Maugham J. to which I shall refer presently. It is not merely a question whether or not the many persons interested in remainder will be bound by this arrangement, because obviously they will not be, but it is this: the purchaser is not to be assumed to know anything whatever about the relationship of the testator to various members of his family. If I were to allow this matter to be litigated before me, in these proceedings, it would throw on the purchaser the burden of seeking for evidence amongst a large number of persons, all of whom are strangers to him. How can that be fair on the purchaser? The duty of the plaintiffs is to make a good title. The deed of family arrangement shows that the matter was regarded as doubtful. There is the covenant which might involve the vendors and their interest in this fund in liability, if the court decided another way. Why should the vendors be entitled to have the title cleared, a step which they significantly failed to take when the deed of family arrangement was entered into, because it could have been done with the sanction of the court? They did not do it. They entered into the document which binds nobody except the parties to it, and they failed to clear the title. They make this cryptic reference in special condition 7 to the deed of family arrangement which I have read, and I have given the draftsman the benefit of the doubt about it. Though not intended to mislead, it certainly was bound to mislead a purchaser. Why should the matter be litigated at the expense of the purchaser, not only at his expense but to his great disadvantage in seeking to clear the title in this way? The plaintiffs have got the benefit of knowing all the members of the family, and the defendant presumably knows few, if any, of them.

In my view this case is stronger than *Nichols'* case.[10] There the only difficulty was one of construction in the narrow sense of the word. Here the difficulty is one of evidence and of obtaining evidence. Taking the words of James L.J. in *Alexander* v. *Mills*,[11] as quoted in *Smith* v. *Colbourne*,[12] "'As a general and "'almost universal rule, the court is bound as much between "'vendor and purchaser, as in every other case, to ascertain and "'determine as it best may what the law is . . . ,'" even if I give it (which I am not disposed to do) the wide meaning as including a mixed question of law and fact, I should say that, even if the rule is almost universal, this is a case in which it would be contrary to natural justice to apply it.

[10] [1910] 1 Ch. 43.
[11] L.R. 6 Ch. 124, 131.
[12] [1914] 2 Ch. 533, 545.

1958

Wilson
v.
Thomas.

Roxburgh J.

I must refer to the decision of Maugham J. in *Johnson* v. *Clarke*.[13] That case is important in the present context because (although not a will case) it is the only case in which any question involving evidence of the position as between the vendor and a third party has been found in the reports. It is a singular case, and I derive some satisfaction from some of the things which Maugham J. said although the decision was the other way. In that case there was a document which was believed by the vendors to be merely a tenancy from year to year, but the tenant put up a claim to a much more extensive tenancy, and that was taken as an objection to the vendors' title. In that case the tenant did in fact give evidence. Apparently no question was raised about it at that stage, and therefore the judge had before him not only the document but every fact which the tenant could have put before the court if he had been a party. Let us consider the difference between that case and this where there is not before the court, as far as I know, any single person who wishes to contest the propriety of the deed of family arrangement. The report contains a number of misprints. Having heard the tenant, Maugham J. said[14]: "Now, I should like to say at the "outset for myself that I have a great deal of sympathy with "the view that it is hard upon a purchaser that he should be "bound on occasion to accept a title which is open to a doubt "arising from the circumstance that the decision of the court "in a specific performance action does not technically bind—[I "stress those words which were truly applicable in *Johnson* v. "*Clarke*,[15] but not I think in every case]—the person who may "be thought to have a claim adverse to the title sold, and "accordingly that in fact there is a title being forced upon a "purchaser which may involve a law suit." Then he cites *Smith* v. *Colbourne*[16] and also *Alexander* v. *Mills*,[17] and continues[18]: "Now, I do not think that the previous decision of the "Court of Appeal in the case of *In re Nichols' and Von Joel's* "*Contract*[19] in any way conflicts with that decision. *In re* "*Nichols'*[20] was a case where the title depended upon a question "of construction arising under a will involving real difficulty, and "what was held was this—that inasmuch as there is according "to modern practice a very easy mode in which the construction "of a will can be determined in such a manner as to bind all "the persons interested under that will it is not right in that "case for the Court to force a title upon the purchaser which "may mean that he is buying a law suit. If then there were in "this case [I stress these words] some easy method of ascer-"taining whether Mr. Richards has got the rights which he no "doubt claims under the document of March 20, 1915, I am "not at all sure that it would not be right for me to refuse the

[13] [1928] Ch. 847.
[14] Ibid. 854, 855.
[15] Ibid. 847.
[16] [1914] 2 Ch. 533.
[17] L.R. 6 Ch. 124.
[18] [1928] Ch. 847, 855, 856.
[19] [1910] 1 Ch. 43.
[20] Ibid.

"present order and to say that [the vendor]"—there is a misprint there—"should clear his title; but I do not myself see "that there is any easy method of determining that question." Then follows a passage which must I think again contain some misprint. I will read it as it appears to me that it must be intended to be read. I think it should continue thus [21]: "I think, "therefore, that although there is, as I have said, the exception "of a case where an originating summons would clear up the diffi-"culty, to suggest [such a summons] or something of that sort, "here, would still leave the court in the position that the question "would have to be determined in the absence of Mr. Richards; "and upon the authorities I am unable to hold that the right "thing to do is to compel the vendor to commence an action "against Mr. Richards to determine in some way whether a "document which they say is not binding has any validity or "not. Accordingly, unless there is going to emerge from the "circumstances that I am going to mention some very great or "serious difficulty"—pausing there, I wholeheartedly adopt the word "serious"; I am not sure whether it need be very great, but I am of opinion that if it has to be very great it is very great in this case—"with regard to the document in question, I think "it is the duty of the court to ascertain as best it can to use, "I think, the phrase of James L.J.,[22] whether Mr. Richards has "any enforceable right against the estate of the testator other "than that which arises from his having paid rent for a number "of years and being a tenant from year to year. I have to "consider that in the light of the evidence before me."

At that stage I thought that I was going to get the answer to my problem, but I do not because in this case both the parties were called, the writer of the letter and Richards, the alleged tenant. As they had been called, there was no further evidence which could possibly be of assistance. As I have already said, I prefer to base myself upon the proposition as stated in the first of these three cases, *In re Nichols' and Van Joel's Contract*,[23] but I should be prepared to say that this case is outside the scope of any of the three previous cases and is a much stronger case than any of them because it would not be fair to expect the purchaser to look for and obtain extrinsic evidence on a matter of this kind, namely, extrinsic evidence to destroy a latent ambiguity in the will. When one reads the will, there does not seem to be any ambiguity at all. If there be any, it is by the introduction of the fact that there was no person named Allan Hewitt; therefore it is plainly latent. It could hardly ever be right to adjudicate upon the question of a latent ambiguity without having either all the beneficiaries before the court or at any rate a sufficient number of them to induce the court to make a representation order. It has not been suggested in the present case that there is any difficulty in having this matter adjudicated

[21] [1928] Ch. 847, 856.
[22] L.R. 6 Ch. 124, 131.
[23] [1910] 1 Ch. 43.

1958

Wilson v. Thomas.

Roxburgh J.

upon by an originating summons, in the matter of the will trusts, and I know of none. There is nothing to prevent the trustee asking a court to determine the question; he may well be indemnified for the purpose by the vendors. Once it had been determined in proceedings of that sort, that would be the end of that point.

In my judgment it would be altogether wrong for me to allow this specific performance action to become a medium to construe the will in the absence of a large number of persons beneficially interested and when the evidence which they might be able to give to the court might have a vital bearing upon the result. Accordingly, as my offer of an adjournment was declined, on terms which I said I should have to consider, my decision is the same as was the decision of Neville J. in the comparable case which I have cited.

Judgment for the defendant.

Solicitors: *Ridsdale & Son for Rex Taylor & Co., West Kirby; Edward Montague Lazarus & Son.*

P. P.

[COURT OF APPEAL.]

C. A.

1958 *Feb.* 25, 26, 27.

Lord Evershed M.R., Parker and Sellers L.JJ.

* DAVIES *v.* PRICE and Others.

Agriculture—Agricultural holding—Notice to quit—Interests of efficient farming—Duty of tribunal to compare existing régime with that proposed by landlord—Jurisdiction of tribunal—Appeal—Certiorari or case stated—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 25 (1) (*a*), (5)—*Agriculture* (*Miscellaneous Provisions*) *Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 39), *s.* 6 (1).

Crown Practice—Certiorari—Error of law on face of record—Agricultural land tribunal—Whether statement of case part of record—Wrong exercise of jurisdiction—Whether case stated or certiorari appropriate remedy.

By section 25 (1) (*a*) of the Agricultural Holdings Act, 1948, one of the grounds on which a Minister may consent to the operation of a notice to quit served by a landlord on the tenant of an agricultural holding is that "the carrying out of the purpose for which "the landlord proposes to terminate the tenancy is desirable in the "interests of efficient farming, whether as respects good estate "management or good husbandry or otherwise."

The tenant of an agricultural holding applied for an order of certiorari to quash the decision of an agricultural land tribunal who confirmed the consent of the Minister (given through the local agricultural executive committee) to the operation of a notice to quit. The tenant submitted that there was an error on the face of the record of the proceedings in that the order made by the tribunal showed that they had not answered the question which was before them for decision in applying section 25 (1) (*a*). The tribunal in giving their decision stated: "The landlords have satisfied the "tribunal that it is in the interests of efficient farming of the land "in question to terminate the tenancy of the appellant." Secondly, it was submitted that the tribunal had acted in excess of jurisdiction in confirming or giving consent on a ground which was not one

of those stated in the section, namely that the landlords wished to sell with vacant possession. The tenant alleged that a statement of the case and grounds prepared by the secretary of the local agricultural executive committee, which the committee were required to prepare for the tribunal on a reference being made and which set out the arguments put and the facts proved before the tribunal, formed part of the record:—

Held, (1) that the proper application of section 25 (1) (*a*) required the tribunal to compare the relative merits of the régime under the existing tenant with those of the proposed régime if the tenancy were to be terminated; consequently the mere fact that the tenant was a bad farmer and that the tribunal had so found would not be a sufficient ground for giving consent.

Reg. v. *Agricultural Land Tribunal for Eastern Province of England, ex parte Grant* [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321 applied.

(2) That the tenant had not proved that the tribunal had erred in not considering the right question, and that in considering what was advanced and argued before the tribunal the statement of case prepared by the local agricultural executive committee was not of assistance because the hearing before them was a hearing de novo at which it was open to the parties to adduce new facts and new arguments.

(3) That even if it had been proved, which was not the case, that the tribunal had misconstrued the statute or had acted on no evidence, the proper course was to appeal against the decision under section 6 of the Agricultural (Miscellaneous Provisions) Act, 1954,[1] for that submission went not to want of jurisdiction but to the wrong exercise of a jurisdiction which the tribunal undoubtedly had, whether to give or to withhold consent to the operation of a notice.

Rex v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128; 38 T.L.R. 541 applied.

MOTION for orders of certiorari and mandamus.

On November 26, 1956, Madeline Lloyd Price and Helen Lloyd Price (hereinafter called "the landlords") served on Owen Lewis Davies (hereinafter called "the tenant") a notice to quit the agricultural holding known as Springhill Farm, Holywell, in the County of Flint, to expire as to the land on November 30, 1957, and as to the house buildings and boozy pastures on May 1, 1958. On December 11, 1956, the tenant served a counter-notice requiring that section 24 (1) of the Agricultural Holdings Act, 1948,[2] should apply and on January 7, 1957, the landlords applied

[1] Agriculture (Miscellaneous Provisions) Act, 1954, s. 6: "(1) Any question of law arising in the course of proceedings before an Agricultural Land Tribunal may, at the request of any party to the proceedings, be referred by the Tribunal to the High Court for decision, whether before or after the Tribunal have given their decision in the proceedings."

[2] Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

S. 25: "(1) Without prejudice to the discretion of the Minister in a case falling within paragraphs (*a*) to (*e*) of this subsection, the Minister shall withhold his consent under the last foregoing section to the

C. A.
1958
Davies
v.
Price.

in the prescribed form for the Minister's consent to the operation of the notice to quit. On February 25, 1957, the application was heard by the Agricultural Executive Committee of the County of Flint and on March 4, 1957, they gave their consent in writing to the operation of the notice. The tenant appealed to the Agricultural Land Tribunal for Wales, but they dismissed the appeal on October 14, 1957, in the following terms: "The tribunal "established in pursuance of the Agriculture Act, 1947, to consider the appeal of Owen Lewis Davies, of Springhill Farm, "Holywell, in the County of Flint, against the decision of the "Minister of Agriculture, Fisheries and Food to grant consent "to the operation of a notice to quit in respect of the holding "known as Springhill Farm in the Parish of Holywell Urban in "the said County of Flint, containing 68·555 acres or thereabouts, in the occupation of the said Owen Lewis Davies as "tenant thereof, sat at the Court Room, Holywell aforesaid, on "August 30, 1957, and October 12, 1957. Having heard the "evidence of all parties concerned and made an inspection of the "land, the tribunal hereby determines as follows:—the landlords "have satisfied the tribunal that it is in the interests of efficient "farming of the land in question to terminate the tenancy of "the appellant. The appellant has been employed as a full-"time shift worker at a factory in Flint since 1954; the standard "of production is and has been for some time unsatisfactory; and "the holding has been inefficiently farmed in many important "respects. The tribunal finds no ground upon which to exercise "its discretion in favour of the appellant, and the appeal is "accordingly dismissed." The tribunal then went on to extend the time for the operation of the notice to quit.

The tenant applied ex parte to the Divisional Court of the Queen's Bench Division for leave to apply for an order of certiorari to quash the tribunal's decision and for an order of mandamus directing them to hear and determine the reference to them of the decision of the Minister by way of appeal and to withhold consent to the operation of the notice to quit. The grounds for the application as set out in a statement filed pursuant to R.S.C., Ord. 59, r. 3 (2), were first, that the tribunal

"operation of a notice to quit an "agricultural holding or part of an "agricultural holding unless he is "satisfied—(*a*) that the carrying out "of the purpose for which the land-"lord proposes to terminate the "tenancy is desirable in the interests "of efficient farming, whether as "respects good estate management or "good husbandry or otherwise. . . . "(4) If the landlord or the tenant is "dissatisfied with the Minister's "decision to withhold or to give his "consent as aforesaid, the landlord "or tenant may within the prescribed "time and in the prescribed manner "require that the matter shall be re-"ferred to the Agricultural Land Tri-"bunal. . . . (5) Where the Minister or "the Agricultural Land Tribunal con-"sent under the last foregoing section "to the operation of a notice to quit, "the Minister or the Tribunal may "impose such conditions as appear to "the Minister or the Tribunal requi-"site for securing that the land to "which the notice relates will be used "for the purpose for which the land-"lord proposes to terminate the "tenancy." [The functions of the Minister in regard to the granting or withholding of consent have been delegated by him to the local agricultural executive committees.]

had erred in law in failing to ensure that the requirements of section 25 (1) (*a*) of the Agricultural Holdings Act, 1948,[2] had been satisfied and second, that they had failed to satisfy themselves, as required by that provision, that the carrying out of the purpose for which the landlords proposed to terminate the tenancy was desirable in the interests of efficient farming, etc. The tribunal had purported, it was said, to be satisfied that it was in the interests of efficient farming to terminate the tenancy without reference to the purposes for which the landlords proposed to terminate the tenancy. Finally, it was said that at the hearing before the tribunal it had been stated on behalf of the landlords that the purpose for which they wished to terminate the tenancy was to sell the farm with vacant possession and that the tribunal could not have been satisfied that the carrying out of the stated purpose was desirable in the interests of efficient farming.

The Divisional Court refused the leave sought and the tenant applied for leave to the Court of Appeal. They granted leave to issue notice of motion. Accordingly, the tenant moved for the orders, on the following grounds additional to any set out in the application. First, that there was an error on the face of the record of the proceedings before the Agricultural Land Tribunal in that by their order the tribunal had stated that they were satisfied that it was in the interests of efficient farming of the holding to terminate the tenancy whereas the question before them for decision was whether they were satisfied that the carrying out of the purpose for which the landlords proposed to terminate the said tenancy was desirable in the interests of efficient farming whether as respects good estate management or good husbandry or otherwise as was provided by section 25 (1) (*a*) of the Act of 1948. Second, that the tribunal had acted in excess of jurisdiction in supporting the consent to the operation of the notice to quit on grounds not authorized by the statute, namely on the ground that the landlords wished to sell with vacant possession.

E. P. Wallis-Jones for the tenant.

Ronald Waterhouse for the landlords.

The Agricultural Land Tribunal for Wales were not represented.

In addition to the case referred to in the judgments, the following were cited in argument: *Reg.* v. *Medical Appeal Tribunal, ex parte Gilmore*[3]; *Martin-Smith* v. *Smale*[4]; *Reg.* v. *Income Tax Special Purposes Commissioners.*[5]

LORD EVERSHED M.R. I will ask Parker L.J. to deliver the first judgment.

[3] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796.

[4] [1954] 1 W.L.R. 247; [1954] 1 All E.R. 237.

[5] (1888) 21 Q.B.D. 313; 4 T.L.R. 636.

C. A.
1958
Davies
v.
Price.

Parker L.J. In this case Mr. Wallis-Jones moves on behalf of Owen Lewis Davies, a tenant of a farm known as Springhill Farm, Holywell, in the County of Flint, for an order of certiorari to bring up and quash a decision of the Agricultural Land Tribunal for Wales, dated October 14, 1957, upholding the Minister's consent to the termination of the applicant's tenancy of that farm. Mr. Wallis-Jones also asks for an order of mandamus directed to the tribunal to hear and determine the matter according to law. That, of course, only arises if and when this court grants an order quashing the decision.

The order of certiorari is asked for on two grounds: (1) that there is an error of law on the face of the record, and (2) that the tribunal acted in excess of jurisdiction. Each of those grounds, if proved, would entitle the applicant to an order of certiorari.

The Agricultural Holdings Act, 1948, substantially interfered with the ordinary law of landlord and tenant in regard to agricultural holdings, and in particular imposed restrictions in regard to the operation of notices to quit.

[His Lordship read sections 24 (1), 25 (1) and (5), commenting that the functions of the Minister with regard to the granting or withholding of consent had been delegated by him to the local agricultural executive committees, and that that was the first stage of the procedure. His Lordship then read subsection (4) and continued:] While considering the Act, it is, I think, convenient to refer to certain other provisions whereby the landlord can get possession of an agricultural holding. Thus by section 27 procedure is provided for the landlord applying to the Minister for a certificate that the tenant is not fulfilling his responsibilities to farm in accordance with the rules of good husbandry. If the Minister does so certify, then, going back to section 24 (2) (*c*), if the landlord within six months of that certificate serves notice to quit which, on its face, refers to the certificate, he is enabled to get possession without applying for any consent at all.

Accordingly, there are broadly speaking two ways by which a landlord can get possession: first, by showing that the tenant is a thoroughly bad farmer and getting a certificate of bad husbandry, in which case, as I have said, the consent of the Minister is not required, or he can proceed by serving a notice to quit and obtaining consent, always assuming a counter-notice has been served by the tenant, under one of the heads set out in section 25 (1).

[His Lordship referred to the facts and read the decision of the Agricultural Lands Tribunal, a certified copy of which was produced, as provided by article 17 of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954 (S.I. 1954, No. 1138).]

It will be observed at once that the opening sentence of that decision does not follow the wording of section 25 (1) (*a*), which is the only relevant head under which consent could be granted.

It makes no reference at all to the purpose for which the landlords proposed to terminate the tenancy, and does not on its face consider whether user as proposed by the landlords is more desirable in the interests of efficient farming than continued user by the tenant. The only reason expressed in the decision is that the tenant is a thoroughly bad farmer. This, says Mr. Wallis-Jones, discloses an error of law since, as he contends, that of itself is not a sufficient ground for giving consent under this section. If that could be said to be the only ground for the decision, then I think that the tribunal might well be said to have erred in law. As I have said, section 25 is not dealing with the case where the landlord seeks permission on the ground alone that the tenant is a bad farmer. In such a case, as I have pointed out, there is a remedy under section 27 and section 24 of the Act. This provision in section 25, as it seems to me, involves a comparison between what I may call the present régime under the existing tenant and the proposed régime which will appertain in future if the tenancy is terminated. For myself, I think that subsection (5), to which I have referred, supports that view because, under that subsection, the tribunal may impose such conditions as appear to it to be requisite for securing that the land to which the notice relates will be used for the purpose for which the landlord proposed to terminate the tenancy. No doubt the less efficiently the land is being farmed by the existing tenant, the easier it will be for the landlord to say that the proposed user, if the tenancy is terminated, will be more efficient. But it seems to me that a landlord must give some evidence of the proposed user and the tribunal can then and must proceed to make a comparison.

Indeed, I think support for that view is to be found in the decision of this court in *Reg.* v. *Agricultural Land Tribunal for Eastern Province of England, ex parte Grant.*[1] I need only refer to a short passage in the judgment of Singleton L.J.[2] where, in granting an order of certiorari, he said: "They," that is the tribunal, "will be entitled to bear in mind the quality of the "farming of the landlord. They will ask themselves whether they "are satisfied that it is desirable that consent should be given "in the interests of efficient farming, and they will be entitled "to bear in mind the position of the landlord's present holding "and farm buildings in relation to this land, which must, I think, "have a bearing on the efficient farming of this piece of land. "If they come to the conclusion that they are satisfied that the "requirements of paragraph (*a*) of subsection (1)"—that is of section 25—"are fulfilled, they will ask themselves whether or "not, in their discretion, they should give their consent to the "notice." It seems to me that he is there saying what I have sought to say, that there must be a comparison between the existing régime and the proposed régime.

[1] [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321.

[2] [1956] 1 W.L.R. 1240, 1249.

C. A.
1958
Davies
v.
Price.
Parker L.J.

So much I think is clear in regard to the construction of that provision in section 25, but the question remains whether on the face of this decision it can be said that the tribunal have erred in not making that comparison. In regard to that, the onus is, of course, upon the applicant to satisfy this court that such an error is manifest on the face of the record. For myself, I do not think that such an error is established. The tribunal, though bound to give a written decision, are not bound to state their reasons, or indeed any reasons. In the present case they do not say that the reason given is their only reason. Indeed, if they had said: "Having regard to the declared purpose of the landlords, we are "satisfied," etc., there would be no question of there being any challenge of their decision. I do not think that we can infer that they did not consider any declared purpose of the landlord, and indeed, as it seems to me, the very wording of that first sentence supports their view because the tribunal say that they are satisfied that it is in the interests of the efficient farming of the land in question to terminate the tenancy of the appellant, and those very words, as it seems to me, involve that they are comparing the position before the operation of the notice to quit with what it is if the notice to quit operates. Accordingly, if one looks at the decision alone, I am not satisfied that any error of law is manifest on its face.

But the matter does not rest there because Mr. Wallis-Jones has invited us to look at another document, a document headed: "Statement of case and general grounds for the Minister's "decision" as being a part of the record. This document is apparently a document prepared by the secretary of the agricultural executive committee pursuant to article 4 of the regulations, to which I have already referred, which is required to be sent to the tribunal once the landlord or the tenant have referred the matter to that tribunal and copies are sent to the interested parties. That document sets out the details of the holding and thereafter refers to the rival contentions of the landlord and the tenant and ends with the decision of the committee. From that document it appears that before the committee the contention of the landlords was that if they got possession of the holding they had not decided whether to sell or relet. There is no other statement than that in regard to what was proposed to be the user of the land if the tenancy was terminated. Such a declared intention, so runs the argument, would be insufficient to enable any comparison to be made between what I have referred to as the existing régime and the new régime, and accordingly supports the view that the tribunal gave their consent merely on the basis that this tenant was a thoroughly bad farmer.

I very much doubt whether this document can be said to form part of the record. In *Rex* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw*,[3] Denning L.J. at p. 351

[3] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

and continuing on p, 352, dealt with the question of what documents could be said to form part of the record. He says this [4]: "It appears that the Court of King's Bench always insisted that "the record should contain, or recite, the document or informa- "tion which initiated the proceedings and thus gave the tribunal "its jurisdiction; and also the document which contained their "adjudication," and he also says there that pleadings would form part of the record. So far as the present document is concerned, it is not in the nature of a pleading; it does not initiate proceedings because it only comes into existence once a reference has been made to the tribunal, and indeed it does not emanate from the landlord and could not well be said to be in any way binding upon him. It is for these reasons that I doubt, for my part, whether it does form part of the record, but in the present case I find it quite unnecessary to come to a concluded decision in the matter, and for this reason. As I have said, the document only sets out the arguments and facts proved before the committee. The reference to the Agricultural Land Tribunal is not strictly an appeal; it is a hearing de novo, and it is open to the parties to adduce new facts and to adduce new arguments. Accordingly, if one does look at this further document, it does not in the least help as to what was advanced and argued before the Agricultural Land Tribunal.

Finally, Mr. Wallis-Jones, as I have said, took the point that the tribunal in this case had exceeded its jurisdiction, and for that purpose he invited us to look at certain affidavits referring to what took place before the tribunal in order, as I understand, to show either that there was no evidence upon which they were entitled to give consent, or to show that they must have misconstrued section 25 (1) (*a*) or, as he put it, that they were advancing a further ground for granting consent beyond those enumerated in section 25. But even if on looking at those affidavits there was such evidence, this does not, as it seems to me, mean that the tribunal had acted in excess of jurisdiction. The matter was properly referred to them; they clearly had jurisdiction to decide whether to give or withhold consent, and if they misconstrued the statute or acted on no evidence, they merely erred in law, and unless that error is manifest on the face of the award, the decision cannot be challenged on proceedings for an order of certiorari.

That principle is I think well known and it is enough to refer to a short passage in Lord Sumner's well-known judgment in *Rex* v. *Nat Bell Liquors Ltd.*[5] He said this [6]: "It has been said that "the matter may be regarded as a question of jurisdiction, and "that a justice who convicts without evidence is acting without "jurisdiction to do so. Accordingly, want of essential evidence, "if ascertained somehow, is on the same footing as want of quali- "fication in the magistrate, and goes to the question of his right

[4] [1952] 1 K.B. 338, 352.
[5] [1922] 2 A.C. 128; 38 T.L.R. 541.
[6] [1922] 2 A.C. 128, 151.

C. A.
1958
Davies v. Price.
Parker L.J.

"to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all." That was the argument, and Lord Sumner goes on: "This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not." That principle applies whether it is a question of lack of evidence or, as it seems to me, of misconstruing a statute.

Accordingly, I myself would not look at those affidavits. If, as I have said, they disclose that there was no evidence on which the tribunal could have granted consent or showed that they must have misconstrued the statute, that is not a question of want of jurisdiction and there being no error of law on the face of the record, the only remedy is by appeal, if appeal is given by statute. It is to be observed that in 1954 in the Agriculture (Miscellaneous Provisions) Act of that year, section 6, specific provision was made for the first time for an appeal by way of case stated from Agricultural Land Tribunals to this court, and, as it seems to me, if the tribunal in this case had acted as it is said they acted, the proper remedy would be one by way of appeal under that section.

Accordingly, I would dismiss this application.

Sellers L.J. I am in full agreement with my Lord's judgment. I would only add that having listened to the argument, widened as it has been by the allegation of excess of jurisdiction, I have not felt satisfied that the tribunal did in fact arrive at its decision in accordance with law, but, on the other hand, I am not satisfied that any error is sufficiently revealed on the face of its decision to justify this court interfering by an order of certiorari.

Lord Evershed M.R. I also am of the same opinion and I only add a very few words of my own upon two points in the case because it is one of some significance and also out of respect to the very careful arguments by which Mr. Wallis-Jones and Mr. Waterhouse have instructed and assisted the court.

Upon the matter of construction, I wish to express my full concurrence with what has fallen from my brother Parker. As I read section 25 (1) (*a*), the part of the statute which has been most debated before us, it seems to me that if the Minister gives his consent to a notice to quit, then he must have been satisfied of what I will call the agricultural future of the land, the subject of the notice to quit. He must have been satisfied that the efficient farming of that land will be better served by the agricultural use of it which will be consequent upon the departure of the tenant than by the use to which the land will be put if the tenant remains. And if that is right, then the same considerations must govern the conclusion of the Agricultural Land Tribunal when its jurisdiction is invoked.

When I look, therefore, at the decision in the present case I observe that its first sentence reads: "The landlords have satisfied the tribunal that it is in the interests of efficient farming of the land in question to terminate the tenancy of the appellant." The phrase "efficient farming of the land in question" may be said to reflect the words of Singleton L.J. in *Reg.* v. *Agricultural Land Tribunal for Eastern Province of England, ex parte Grant*[7]: "I am of opinion, that the words 'in 'the interests of efficient farming' should be read as meaning 'the efficient farming of the land in respect of which the notice 'is given.'" So far, therefore, as the decision has said that it is in the interests of the efficient farming of this land that this tenant should go, it seems to me impossible for the applicant here successfully to assert that the tribunal have failed to consider what will be the alternative agricultural uses to which the particular land will be put whether the tenant stays, on the one hand, or goes, on the other.

The other point upon which I would like to say a word or two, though it is of careful reservation, is as regards the document called: "Statement of case and general grounds for the Minister's decision." The question has been whether that document should be regarded as part of the record. It owes its existence to the circumstance that such a statement is one of the documents which by the First Schedule to the Agriculture (Procedure of Agricultural Land Tribunals) Order of 1954, S.I. 1954, No. 1138, must be put before the Agricultural Land Tribunal in such a case as the present. As Parker L.J. has observed, however, the Agricultural Land Tribunal is dealing with this case de novo; it is a re-hearing in every sense of that term. What is more, the document "statement of case" etc., is not a document prepared by either party or the solicitors to either party. It would, therefore, seem to me somewhat strange if either party were to be held bound by the contentions therein attributed to him or her. But I agree with Parker L.J. that even if it were legitimate to treat this document as part of the record and, therefore, to look at it for the purpose of deciding whether or not there was on the face of the record an error in law, the document does not assist to such conclusion one way or the other.

In those circumstances I prefer for my part to express no opinion one way or the other whether a document of this kind in a case of this kind falls within the scope of the language of Denning L.J.'s observations in *Rex* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw*,[8] to which my brother referred: "I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them." I prefer to express no view at all whether I think this document is covered by the

[7] [1956] 1 W.L.R. 1240, 1245.

[8] [1952] 1 K.B. 338, 352.

C. A.
1958
Davies v. Price.

formula Denning L.J. uses (assuming, as I have, for the present purpose, though, again, not saying—for it is unnecessary for me to do so) that Denning L.J.'s formula is correct.

For the reasons which Parker L.J. has given and with which I concur and for those which I have myself added, I also think that this application fails and should be refused.

Motion refused. Notice to quit to operate.

Solicitors: *Rider, Heaton, Meredith & Mills for Clement Jones & Co. Holywell, Flintshire; Lightbounds, Jones & Co. for H. A. Cope & Roberts, Holywell, Flintshire.*

E. D.

[COURT OF APPEAL.]

C. A.
1958
Feb. 28; *Mar.* 3, 4.
Lord Evershed M.R., Parker and Sellers L.JJ.

* RUTTER *v.* SHERIDAN-YOUNG.

[1957 R. No. 1543.]

Solicitor—Costs—Lump or gross sum charge—Non-contentious business—Agreement for lump sum payment for costs—Whether client entitled to itemized bill—Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 57 (1).

A solicitor who acted for a client on the grant of a lease and in connexion with a proposed mortgage agreed with the client for a lump sum charge of 150 guineas for so acting. In writing to the client, when negotiating this agreement, the solicitor stated that his charges would, under Schedule II of the Solicitors' Remuneration Order, 1883 to 1953, be based on work actually done, and not a scale charge under Schedule I. It was conceded that the solicitor, not having complied with paragraph 6 of the order of 1883 as amended by the order of 1953, was not in fact entitled to make a higher charge under that schedule on the basis of work actually done. The client paid the solicitor £150 in respect of his costs, which he, by mistake, repaid to the client. In this action the solicitor claimed by specially endorsed writ to recover the sum of £150. The client sought to defend the action on the ground that he was entitled, notwithstanding the agreement, under section 57 (1) of the Solicitors Act, 1957,[1] to an itemized bill in respect of the transaction:—

[1] Solicitors Act, 1957, s. 57: "(1) Whether or not any order is in "force under the last foregoing "section, a solicitor and his client "may, either before or after or in the "course of the transaction of any "non-contentious business by the "solicitor, make an agreement as to "the remuneration of the solicitor in "respect thereof. . . . (4) The agreement may be sued and recovered "on or set aside in the like manner "and on the like grounds as an "agreement not relating to the "remuneration of a solicitor: Provided that if on any taxation of "costs the agreement is relied on by "the solicitor and objected to by the "client as unfair or unreasonable, the "taxing officer may enquire into the "facts and certify them to the court, "and if on that certificate it appears "just to the court that the agreement should be cancelled, or the "amount payable thereunder reduced, "the court may order the agreement "to be cancelled, or the amount payable thereunder to be reduced, and "may give such consequential directions as they think fit."

Held, (1) that on the true construction of section 57 (1) of the Solicitors Act, 1957, a client, who had made an agreement with his solicitor for the payment of a lump sum for non-contentious business, had not an unqualified right to ask for an itemized bill but that his right to require a bill was limited to cases where he could show, on the facts of the particular case to the satisfaction of the court, that there was something which as a matter of general principle or private right, or both, ought to be looked into;

(2) that having regard to the error in stating to the client that the solicitor was entitled to charge on the higher scale of Schedule II to the Solicitors' Remuneration Orders, 1883 to 1953, when he was not so entitled, and having regard to the fact that a solicitor's charges should not only be right but manifestly be shown to be right, an order for delivery of a bill should be made.

In re Palmer (1890) 45 Ch.D. 291; 6 T.L.R. 377; *In re Frape* [1893] 2 Ch. 284; *Ray* v. *Newton* [1913] 1 K.B. 249 applied.

Decision of Havers J. affirmed.

APPEAL from Havers J.

In this action Sydney Rutter, a solicitor, sought to recover the sum of £150 from a former client, Peter Dumaresq Sheridan-Young, being the balance of a lump sum for costs for non-contentious business which the defendant by an agreement of January 30, 1957, had agreed to pay. The defendant claimed that he was entitled by virtue of the provision of section 57 (1) of the Solicitors Act, 1957, to an itemized bill of costs. Havers J. held that he was so entitled.

The plaintiff appealed.

The facts are fully stated in the judgment of Lord Evershed M.R.

Maurice Lyell Q.C. and *Lewis Hawser* for the plaintiff.

M. E. Holdsworth for the defendant.

The following cases were referred to in argument which are not mentioned in the judgments: *In re Baylis* [2]; *Clare* v. *Joseph* [3]; *In re Simmons & Politzer* [4]; *In re Inderwick* [5]; *Duffett* v. *McEvoy* [6]; *In re West, King & Adams, ex parte Clough.* [7]

LORD EVERSHED M.R. This is an appeal from an order made by Havers J. in an action brought by a solicitor for recovery of a sum of £150. The events leading up to the action are a little complicated, but it will suffice if I say that the solicitor concerned, practising as Messrs. S. Rutter & Co., had acted for the defendant in two distinct matters: first, in an action brought by the defendant against his former wife, in an attempt to recover from her certain sums of money which he said she owed him; and, second, in respect of the acquisition by the defendant of a lease of certain premises in London, in Brunswick Gardens. During

[2] [1896] 2 Ch. 107; 12 T.L.R. 339.
[3] [1907] 2 K.B. 369; 23 T.L.R. 498.
[4] [1954] 2 Q.B. 296; [1954] 3 W.L.R. 423; [1954] 2 All E.R. 811.
[5] (1883) 25 Ch.D. 279.
[6] (1885) 10 App.Cas. 300.
[7] [1892] 2 Q.B. 102.

C. A.
1958
Rutter
v.
Sheridan-Young.
Lord Evershed M.R.

the period when the plaintiff solicitor was acting for the defendant he received on his account the proceeds of sale of a number of securities belonging to the defendant. In due course the plaintiff delivered an account to the defendant of the receipt by him of the proceeds of sale and also of the sum recovered by way of a settlement of the action against the defendant's ex-wife. It is unnecessary for present purposes to go at all into the details, but the present cause of action arose from the circumstance that, in delivering those accounts, the plaintiff omitted (as he says and I do not think it is in dispute) to give to himself credit for a sum of £150 which the defendant had, in two sums or possibly three sums, paid to the plaintiff in the month of March, 1956. The plaintiff, having received the £150, put it into his account in the name of his client, the defendant, although, as now appears with tolerable certainty, the sums were paid to the plaintiff in respect of costs, which the defendant was owing or would become liable to pay to the plaintiff, and although it was the clear intention that those sums amounting to £150 should be taken out of the client's account and put into the firm's account accordingly.

But the solicitor omitted to do that: the £150 remained, and was treated by him in the two accounts which he delivered as though it was part of the funds belonging to the client which the solicitor had received on his behalf; and so, in effect, he paid over to the defendant, as he said, £150 too much. The form of the claim in the action is (as a result of amendment) stated as being a claim to recover this £150 as money paid by the plaintiff to the defendant under a mistake of fact, full particulars being then delivered.

The case before us has been somewhat over-embellished with affidavits and exhibits; but the two accounts which are material show in each case credits to the defendant; and the sums for which thereby the solicitor acknowledged himself indebted to the defendant were paid over by the plaintiff to the defendant, in the one case the sum of £11,198, being the balance of the stock exchange sales, and in the other case a sum, considerably less, £477, being the balance of the figure received on settlement of the action of some £750. In making up these accounts there were included and debited against the defendant sums in respect of costs due, as was said, by the defendant to his solicitor, the plaintiff. One sum of costs was in respect of the litigation, the action by the defendant against his former wife, which was settled. The figure of £500, which was deducted for those costs, was deducted against the stock exchange proceeds.

There has been a certain amount of feeling (indeed that understates it) between the plaintiff and the defendant. The defendant has made charges against the plaintiff which, so far as the material before me enables me to judge, seem to me to be entirely without foundation. For example, as regards these costs for the contentious business, he has said that the plaintiff made some sort of threat that he would not proceed with the negotiations unless the

defendant agreed his costs at this figure. The costs were, however, in fact agreed at that figure, but, so far as those costs are concerned, it is not now in dispute, having regard to the form of the present legislation, that it is open to the defendant to go back upon his agreement and require delivery of an itemized bill for the costs of that contentious matter. I say, therefore, nothing further about that matter, save that the order appealed from does include a direction that the plaintiff should deliver a bill for this contentious matter which will be referred to taxation.

The relevance of these claims on the defendant's part (to have itemized bills delivered) to the cause of action is of course that should the defendant get a reduction in the costs which the plaintiff was entitled to charge him, and which had been agreed, then that reduction will serve by way of relief of what he owes the plaintiff for this overpayment of £150. But I need say no more about the contentious matter.

The non-contentious matter, the work done by the solicitor in regard to Brunswick Gardens, resulted in another agreement as to costs which was made in January of 1957. The deduction in respect of these costs was made from the amount eventually recovered as the result of the compromise by the defendant of his action against his former wife. When in January, 1957, that sum by way of settlement was received, the plaintiff solicitor proceeded to deduct from it, as well as a certain number of other deductions, an amount of 150 guineas which was described as: "Re profit charges, 54, Brunswick Gardens, W.8." That formula "profit charges" of course excludes out of pocket disbursements which amount to another £12 and as to which there is no question. The plaintiff then paid a balance figure, which was £477 odd, to the defendant and the receipt of that amount was acknowledged: thereby in effect the plaintiff received payment out of this money for his profit charges of 150 guineas for 54, Brunswick Gardens. But the defendant says that he is equally unbound by that agreement as regards the non-contentious business and that (in the same way as with regard to the contentious business) the plaintiff must deliver him an itemized bill and that bill ought to be taxed.

When the matter was before Master Clayton he concluded adversely to the defendant and he, therefore, made an order giving to the plaintiff leave to sign judgment for £150. That decision was reversed by Havers J., who gave unconditional leave to defend and also directed delivery of bills, both in respect of the contentious and of the non-contentious business, with directions as to taxation accordingly. No question now arises as regards the contentious business: Mr. Lyell concedes that he is unable to resist the order which the judge made and I now confine myself to the matter of the non-contentious business.

The right of a solicitor to charge by way of lump sum in non-contentious business is one which has been conferred upon him by statute for a considerable period of time. The first occasion

C. A.
1958
Rutter v. Sheridan-Young.
Lord Evershed M.R.

upon which such a right to make lump sum charges was conferred was the Attorneys and Solicitors Act, 1870. That provision was amended and replaced by the Solicitors' Remuneration Act, 1881, and now is to be found, after appearing in the Solicitors Act, 1932, in the recent Solicitors Act, 1957. Having regard to the dates in the present case, it is pointed out that possibly the relevant statutory provisions applicable to this case are those in the Act of 1932 rather than those in the Act of 1957. But it is also conceded that the relevant language in the sections is the same and I shall, therefore, for convenience now and henceforth refer to the Act of 1957. For a period of 100 years and more the right of solicitors to charge for their services has been thought by Parliament to require a certain degree of regulation by statute and by rules made under the statute.

In the Act of 1957 the subject of the remuneration of solicitors is found in Part III, which in turn is divided into separate sections or sub-headings: the first is sections 56 to 58 inclusive, the provisions relating to non-contentious business: sections 59 to 65 inclusive relate to contentious business and are not relevant for the present appeal; and finally, sections 66 to 74 inclusive relate to general matters and are entitled: "General provisions as to remuneration." It is to be noted (and this reflects the earlier law including the Solicitors Act of 1843) that by section 67 it is provided: "The jurisdiction of the High Court to make "orders for the delivery by a solicitor of a bill of costs and for "the delivery up of, or otherwise in relation to, any deeds, docu-"ments or papers in his possession, custody or power, is hereby "declared to extend to cases in which no business has been done "by him in the High Court." Mr. Holdsworth in the course of his argument also referred to section 68, which begins: "Subject "to the provisions of this Act, no action shall be brought to "recover any costs due to a solicitor until one month after a bill "thereof has been delivered." It was contended by him for the defendant that those general provisions disable the plaintiff from bringing any action to recover costs save after the delivery of a bill. For my part I think there is more than one answer to that contention. One is that this is not in form an action to recover costs at all. In the second place, notwithstanding Mr. Holdsworth's ingenuity, I feel no doubt that the words "subject to the provisions of this Act" at any rate cover the terms of section 57 of the same Act.

I return accordingly to that section, which is the section relating to agreements for lump sum bills, among other forms of bill, in the case of non-contentious business. Subsection (1) provides: "A solicitor and his client may, either before or after or "in the course of the transaction of any non-contentious business "by the solicitor, make an agreement as to the remuneration "of the solicitor in respect thereof." Subsection (2) states that the agreement may be either by way of a lump sum or percentage or in other forms. Subsection (3) states: "The agreement shall

"be in writing and signed by the person to be bound thereby or "his agent in that behalf." Then comes subsection (4), upon which the greater part of the argument in this case has turned: "The agreement may be sued and recovered on or set aside in "the like manner and on the like grounds as an agreement not "relating to the remuneration of a solicitor: Provided that if on "any taxation of costs the agreement is relied on by the solicitor "and objected to by the client as unfair or unreasonable, the "taxing officer may enquire into the facts and certify them to the "court, and if on that certificate it appears just to the "court that the agreement should be cancelled, or the amount "payable thereunder reduced, the court may order the agree-"ment to be cancelled, or the amount payable thereunder "to be reduced, and may give such consequential direc-"tions as they think fit." That form of words, which became crystallized in 1932, has an ancestry certainly as remote as the Attorneys and Solicitors Act, 1870. Both in that Act and in the Solicitors' Remuneration Act, 1881, there were provisions enabling solicitors to make lump sum charges. More particularly in the latter of those Acts, in the Solicitors' Remuneration Act, 1881, there was a provision closely resembling that now enshrined in the Act of 1957 for enabling a solicitor to make a lump sum charge by agreement in non-contentious business. As in the present Act, it was provided that such an agreement might be "sued and recovered on in the like manner and on the like "grounds as an agreement not relating to the remuneration of "a solicitor." But those words were followed, not by something expressed as a proviso but by something added by the conjunction "and"—"and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be "objected to" etc., etc.

I have made that much reference to the earlier legislation because of the cases which have been cited. My reading of the Act of 1957, and therefore of the Act of 1932 and also of the Act of 1881, shows that the subsection presents, at any rate, this obvious problem to the reader: Is the proviso in the modern legislation, or the added provision of the subsection in the earlier legislation, intended to be a qualification upon the rights of a solicitor to sue on a lump sum agreement and, therefore, to give to the court some jurisdiction only to be evoked when a solicitor does so sue, or is it in some sense and, if so, what, an independent provision? The problem necessarily emerges because it will be observed in the first place that the subsection confers apparently upon the solicitor an unqualified right to sue on his agreement for a lump sum bill, as upon any other valid agreement, and yet goes on to say that such an agreement may be looked into if "on "any taxation it appears," etc. Ex concessis, if you treat the business comprehended by the lump sum payment as the only business between these two people, there can be no taxation, until there has first been a bill, which the earlier part of the subsection

C. A.
1958
Rutter v. Sheridan-Young.
Lord Evershed M.R.

appears to be designed to say is not necessary at all. On the face of it, therefore, the two parts of the subsection appear only to be strictly consistent and coherent in the case where the lump sum bill is put forward not as the sole matter of accounting between solicitor and client but as part of a bill covering many other transactions, where there is found a certain section of the bill which the solicitor says is business covered by an agreement; and the bill as a whole being subjected to taxation it would then on the strict language of the subsection give rise to the particular problem which the proviso (as it now is) poses. But authorities, and authorities which I feel no doubt are binding on this court, have, as I think, qualified or put a gloss upon the reading of the subsection.

Mr. Holdsworth has argued strenuously and with great care (and obviously it is a matter to which he directed a great deal of attention) that these authorities do not really cover the present case or do not bind this court, having been, in effect, pronounced per incuriam. I must say at once that I feel no doubt whatever that though Mr. Holdsworth, had he been arguing in the year 1890, might perhaps have prevailed upon the court to come to a different conclusion from that at which it did then arrive, he cannot now ask us to say that what Cotton L.J. laid down in 1890 and which this court has twice expressly followed since, is not now applicable to such a case as the present.

The case in 1890, the first of the three cases, is that of *In re Palmer*.[1] Since the year was 1890 the relevant Act was the Solicitors' Remuneration Act, 1881, to section 8 of which I have made the necessary reference. The question in that case was whether a certain journeyman butcher, one Slater, could go behind an agreement which he had made, in form and in other respects properly in accordance with the section, to pay a lump sum of £20 to his solicitor for the work the solicitor had done in finding for Slater a mortgagee to lend him money on the security of his interest under an uncle's will. The Court of Appeal came to the conclusion, agreeing with North J. (though not quite on the same ground) that in the circumstances Slater was not entitled to impugn or go behind this agreement, and was not entitled to require the solicitor to deliver him an itemized bill and have it taxed. The argument for Slater in the Court of Appeal was presented by counsel with great experience, Mr. Cozens-Hardy and Mr. Farwell. The argument was that an agreement for a lump sum bill can be no bar to the right of a person to have a solicitor's bill of costs taxed, unless the agreement is one authorized by the Act, and then they went on to say that the particular agreement about this mortgage was not strictly within section 8 of the Act of 1881. On this ground, therefore, Mr. Holdsworth impugned all these cases; he said they never really put the proper point. The real point was that

[1] (1890) 45 Ch.D. 291; 6 T.L.R. 377.

section 8 of the Act of 1881 and all the subsequent legislation is not directed to preventing a client's ordinary right, either under the Act of 1843 or the common law, to have a bill presented as a matter of course. But it is, I think, clear that, even if the report of the argument puts the case somewhat narrowly for Slater, this court itself dealt with it on a broader ground, which would have covered such an argument as Mr. Holdsworth says Mr. Cozens-Hardy should have put forward; for this is Cotton L.J.'s language. I read it in full. The judgment is short but as it is expressly adopted in the later cases, I think it important that it should be read in full: "Then it is said that, having regard to the "fourth subsection of the eighth section, this agreement ought to "be referred to the taxing master. But the appellant has not "brought forward any evidence showing that this charge is unfair "or unreasonable; and although the fourth subsection does, in "my opinion, give the court power, where an agreement is so "impeached, to refer it to the taxing master to consider whether "the charge is fair and reasonable, no foundation for such an "order has been made. Mr. Farwell has argued that this is a "very unreasonable charge; but I do not think that he says it is "unfair. I consider, however, that the court ought not, merely "upon such an argument by counsel, unsupported by affidavit or "facts which will lead to that conclusion, to refer such an agree-"ment to the taxing master to exercise the power given by the "fourth sub-division of the eighth section." Bowen L.J. and Fry L.J. agreed with the judgment of Cotton L.J.

It will be observed that Cotton L.J. appears to put the case thus. He construed section 8 (4) of the Act of 1881, read no doubt against the background of the general law, as conferring a general power on the court, notwithstanding an agreement for a lump sum payment, to order that a bill be delivered and that bill be taxed. But, the Lord Justice said, such a power in the court will not be exercised merely because the client asks for it or because his counsel thinks of some argument for suggesting it would be a good thing to do, but only when the court considers that upon evidence there is shown to be a ground why the court ought to look into the matter to see whether upon investigation it was in truth a reasonable and fair charge. That I take to be the clear basis of this court's decision in 1890.

Having dealt with that case a little fully, I can deal more shortly with the two later cases. The first is *In re Frape, ex parte Perrett*,[2] three years after the *Palmer* case.[3] The facts of that case were, so far as is relevant, simply these, that an agreement had been made which in other respects complied with the requirements of the Act of 1881 for the payment of £80 as a lump sum payment by a client to a solicitor. There was challenge made, among other things, on the ground that on the face of it and on the facts presented £80 might not turn out to have been,

[2] [1893] 2 Ch. 284.

[3] 45 Ch.D. 291.

C. A.
1958
Rutter v. Sheridan-Young.
Lord Evershed M.R.

to put it no higher, a reasonable and fair charge, and in the end the court so concluded. But the first thing that I wish to draw attention to in the case is that in his leading judgment Lindley L.J. cited in full and adopted as correct the passage from the judgment of Cotton L.J. which I have read. He made that citation after having said [4]: "so long as the solicitor has a proper "opportunity of resisting taxation, it cannot matter whether the "application to tax is by writ or by a special petition"—that was dealing with an argument as to the form of the proceedings. "The client may say, 'I want an order to tax notwithstanding "'the agreement.' The agreement can be no answer to that, "if he can show reasons why there ought to be a reference to the "taxing master to inquire into that agreement. It appears to me "that the view taken of this section by Cotton L.J. is in accord-"ance with common sense," and he then read the whole of that judgment. He continued: "It appears to me that it would not "be right to say, upon the material before us, that this agree-"ment was unfair and unreasonable. On the other hand, the "evidence about it is such as to render it right to direct an order "to tax, and the taxing master will have to look into the "question and see what the truth is. The fact is, that it is "impossible to decide whether the agreement is unfair or "unreasonable without taxing the bill." In that case, putting quite briefly the figures, the solicitor had said: "I agreed £80 "and now I will show you that I can produce a bill up to £140." So far from that persuading the court, it acted, perhaps not unnaturally, as something of a boomerang—if the bill was going to be as big as that perhaps the whole thing had better be looked into. But the purpose of my reference is to show that three years after *In re Palmer*,[5] Cotton L.J.'s judgment was by three other Lords Justices treated as properly laying down the law which was to be found in section 8 of the Solicitors Act, 1881.

The third case was that of *Ray* v. *Newton*,[6] 20 years later, in 1913. That was a rather more complicated case. The cases of *In re Palmer* [7] and *In re Frape* [8] were brought to the attention of the court and Farwell L.J. and Hamilton L.J., as he then was closely followed what I take to be the ratio of those cases, and said that the right of a client, notwithstanding an agreement, is to have an order for delivery of a bill, provided he can show some prima facie case for saying that the question, aye or no, was it reasonable, should be inquired into—having due regard to the circumstance that for so long a period of time Parliament has thought it right that solicitors' charges should be somewhat strictly regulated. But even if it had been possible to say (as I think it would not) that these cases could be disregarded by us as having all proceeded on a misapprehension of the real point, the

[4] [1893] 2 Ch. 284, 295.
[5] 45 Ch.D. 291.
[6] [1913] 1 K.B. 249.
[7] 45 Ch.D. 291.
[8] [1893] 2 Ch. 284.

coup de grace to any such argument is presented by this circumstance. In 1932 Parliament re-enacted the law relating to solicitors. It is quite true that in 1890 and in 1913 the Solicitors Act, 1843, had not been repealed, and the provisions, particularly of section 37 of that Act (saying in general terms that there shall be no action by a solicitor to recover his fees until a month after his bill) were still on the statute book. But in 1932 Parliament repealed expressly the Act of 1843 and yet re-enacted the provisions of section 8 (4) of the Act of 1881, and, according to well-known principles, it must be taken to have done so with knowledge that the Court of Appeal had interpreted section 8 of the Act of 1881 as it had. It seems, therefore, quite plain to me that as a matter of general principle it is not right to say that a client, who has made an agreement for paying a lump sum for non-contentious business, has an unqualified right to come and ask for a bill. His right to require a bill is limited to cases where he can show, on the facts of the particular case, to the satisfaction of the court that there is something which as a matter of general principle or private right, or both, the court ought to look into. Indeed, I will go somewhat further and say that the Act of 1932 has made it even plainer than it was before, because the second part of the subsection, instead of being simply an addition to what goes before, is now expressed as a proviso: for as a general matter, a proviso should prima facie be construed as something which merely qualifies the general terms of what has gone before.

I therefore reject the argument of Mr. Holdsworth that, apart from any special circumstances he can extract from this case, he is now entitled to require the delivery of a bill. We are informed that Havers J. had taken the view that the client was so entitled and based his decision on that view. In so far, therefore, as he did so, I am bound to say that I am unable to agree with him; but on careful reflection I have come to the conclusion that his judgment should nevertheless be upheld on other grounds.

I turn, accordingly, to the question whether it is here established, the onus being clearly on the client, that there is good ground for saying that an itemized bill ought to be delivered and referred to the taxing master so that the court can see whether the agreement was in the circumstances unreasonable or unfair. I have referred to the somewhat prolific nature of the documents in this case, and I must now refer to the last affidavit which the plaintiff swore. That he was provoked into making another affidavit I am ready to concede; because, although in a very long earlier affidavit he had not in terms said that the £150, which was the subject-matter of the action, should have been paid over to his firm's account with the defendant's assent or agreement (as perhaps he might have done) the defendant's counsel, when the case was before the court, had apparently suggested that there had been no authority whatever for the solicitors making that transfer. How the defendant came so to instruct his counsel

C. A.
1958
Rutter v. Sheridan-Young.
Lord Evershed M.R.

I do not know, because it is quite plain from the correspondence that the sums were paid in respect of costs, and I am by no means clear why the plaintiff should keep sums paid in respect of costs to be incurred or already due indefinitely in the client's account. However, that is what the defendant told his counsel to say and, therefore, the plaintiff swore another affidavit producing certain letters refuting the suggestion which had been made. But then the plaintiff went on to expand the point that at the time the agreement was made for a lump sum charge, he, the plaintiff, had pointed out to the defendant that since this conveyancing matter of Brunswick Gardens appeared to be a somewhat complex and tortuous business, he would exercise his right, which has been recently conferred upon solicitors, to charge not according to Schedule I in the Remuneration Order but Schedule II, that is to say, not by way of a scale charge upon the consideration, the subject of the sale, mortgage or lease, but according to the work done. The provisions about this so-called election are, however, strict, and it is made quite plain that, if a solicitor desires to avail himself of the privilege of charging according to the work done under Schedule II, then there must be an election in writing by the solicitor before the work is undertaken. Paragraph 6 of the relevant order states: "In all cases to which the scales pre-"scribed in Schedule I hereto shall apply, a solicitor may, before "undertaking any business, by writing under his hand, communi-"cated to the client, elect that his remuneration shall be in "accordance with Schedule II hereto; but if no such election "shall be made, his remuneration shall be according to the scales "prescribed by this order." A perusal of the last four or five paragraphs of the affidavit had led me to suppose, I must confess, that the plaintiff was saying that in judging the defendant's case made for an inquiry into the reasonableness of the plaintiff's charges, one must bear in mind this is a case in which he had elected to charge under the Second Schedule in accordance with the work done, which may notoriously give a higher rate of charge than the scale charges. But it was conceded by Mr. Lyell, and it is quite plain, that the plaintiff failed to comply with paragraph 6 of the Solicitors' Remuneration Order, 1883 (as amended by the order of 1953), and, therefore, is unable to charge in accordance with Schedule II except in those cases which are not covered by Schedule I; and was unable so to do when the agreement was made for the 150 guineas lump sum. I am not saying that there was any deliberate attempt to deceive either the defendant, still less the court, on the part of the plaintiff; but it is an unfortunate fact that in this respect he made an error, and I am bound to say in the circumstances of this case I think it was rather a grievous error.

I will go at once to the letter which on January 14, 1957, the plaintiff or his firm wrote to the defendant as a result of which the agreement was made. The letter reads as follows: "Our charges "have been arrived at on the basis of a reasonable amount for the

"actual work done, under Schedule II of the Solicitors' "Remuneration Order; therefore, the amount of the considera- "tion payable by you or whether the property is registered or not, "does not enter into the matter. Mr. Rutter told you long ago "that our charges would be based on work actually done by us "and not on the basis of any consideration. The leasehold "interest which is being granted to you is not registered at H.M. "Land Registry but it will have to be registered immediately the "lease is granted.

"It will take a considerable time to prepare a detailed bill in "this matter and if you insist, and we would point out that you "are entitled to one if you so desire, then we will prepare such a "bill, but would point out that it may come to a greater amount "than what has been intimated to you in our recent letter, in "which case we would naturally look to you for full payment. "We assure you that our suggested charges are reasonable, "particularly in view of the extremely voluminous and compli- "cated correspondence and other work which was necessary by "virtue of the action taken," and then they refer to the pro- ceedings, "and we do respectfully suggest that you should call "and inspect our file which will be made available to you, so that "you can satisfy yourself as to the reasonableness of our "suggested charges and thus save a lot of trouble in preparing "a bill."

On the strength of that the defendant did attend the plaintiff's offices and, as a consequence, he did make and sign the agreement that there should be this lump sum payment of £150. On January 30 he sent a letter saying: "I hand you my cheque "for" the sum of the disbursements "which, together with the "sum of £157 10s. retained by you in respect of your profit costs "in regard to this matter makes a total of" so much "which "sum I agree is in full settlement of your agreed costs and dis- "bursements in the above matter (as set out in your letter to "me of even date)." The misfortune from the plaintiff's point of view is that the main argument he appears to have been using in his letter of January 14, namely that he was entitled in this case not to charge for a great deal of the work under Schedule I but under Schedule II, was ill-founded, as is now conceded. It is of course quite true to say that the defendant went up and saw all the figures, and, although it has been suggested by his counsel that he is somewhat young and "green," I am not persuaded that he was not ordinarily capable of looking after himself. Neverthless he would not in the natural course of events by expected to be well informed about solicitors' charges and the schedules and such matters. The plain fact is that one of the matters, at any rate, which led to the making of this agreement

C. A.
1958
Rutter
v.
Sheridan-Young.
Lord Evershed M.R.

was the plaintiff's mistaken statement, representation if you like, that he was entitled to charge on the higher Schedule II basis. No question is raised here of setting aside the agreement altogether on the ground of an innocent misrepresentation or anything of that kind. Had such a claim been made, it might or might not have been a matter for consideration under the general terms of subsection (4) of section 57. But in face of the facts and bearing in mind the general public good that solicitors' charges should not only be right but manifestly shown to be right, I do think here that there should be a bill delivered. This unfortunate error does produce the result that the agreement was made or induced—I am of course using the words without any offensive connotation—by the assertion of a right to charge which was not well founded. Prima facie I would have thought that would not only justify but require the court in a case of this kind to say: "We will look into it and then it will be seen if "there is anything anybody could say is unreasonable." Of course if on examination of the figures it is clear, even if the plaintiff is limited to his Schedule I charges for those items to which Schedule I applies, that 150 guineas is reasonable, that will be the answer. Mr. Lyell has put forward, to say the least, a strong case for saying that even on that basis 150 guineas is certainly not unreasonable. Much turns upon what might have been put in a bill or should have been put in a bill in respect of negotiations for a mortgage which went right up to completion but which was never in fact completed. I am far from saying that when the matter is looked into, it will be found that the defendant was charged anything unreasonable; but I am not satisfied that there is not shown to be something which in the very special circumstances of this case the court ought not on the whole to look into.

I think, therefore, for those reasons that the view taken by the judge ought to be sustained.

I have wondered whether it necessarily follows that the defendant should have the benefit of a total stay of the proceedings. If this was the only matter being investigated I might well have thought there was no ground for a complete stay. But I do not forget that the contentious matter, the charge in respect of which was £500, is also now the subject of an order and it is of course possible, though I am not suggesting it is necessarily likely, that the defendant may reduce the plaintiff's charges by an amount which exceeds what he is asked to pay in this action. Events will show hereafter; I have no facts to justify my forming any opinion. But without saying that the charge under the agreement was unreasonable or unfair (and certainly not the latter), I think that in the special circumstances, which I have stated, it would not be right to say that the order for delivery of a bill for taxation which the judge made should be set

aside. I think that that matter should be looked into and I would, therefore, on those grounds, dismiss the appeal.

PARKER L.J. I entirely agree with all that my Lord has said and there is nothing which I desire to add.

SELLERS L.J. I agree and for the same reasons.

Appeal dismissed.

Solicitors: *S. Rutter & Co.; Mrs. Helen Evans.*

B. A. B.

[PROBATE, ETC., DIVISION.]

* IN THE ESTATE OF COLMAN, DECD.

1957 *Dec.* 11.
1958 *March* 17.
Karminski J.

Will—Soldier's will—"In actual military service"—Occupation force—Infant—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 11—*Wills (Soldiers and Sailors) Act,* 1918 (7 *&* 8 *Geo.* 5, *c.* 58), *ss.* 1 *and* 3. *Military Law—"Active service."*

In May, 1954, an infant testator, who was, at that date, on leave in England from the British Army of the Rhine, purported to execute a will which was prepared on the advice of a solicitor and properly executed according to section 9 of the Wills Act, 1837.

According to information supplied by the War Office, Her Majesty's forces were, in May, 1954, in military occupation of certain areas of Germany by virtue of the unconditional surrender of 1945, and the position, status and function of those forces were that of an army in occupation of a foreign country by force of arms.

On an application by the executors of the will for a grant of probate:—

Held, that, since the testator was on military service and that service, despite the lapse of almost nine years since the unconditional surrender, was directly concerned with a war which had been in progress, he was "in actual military service" in May, 1954, within section 11 of the Act of 1837; the will was a valid will by virtue of section 1 of the Wills Act, 1918, and the grant, as sought, should be made.

In re Wingham, decd. [1949] P. 187; 64 T.L.R. 594; [1948] 2 All E.R. 908 applied.

In the Estate of Grey [1922] P. 140; 38 T.L.R. 401 distinguished.

PROBATE MOTION.

The testator died at the age of 22, domiciled and resident in England and a bachelor, on July 3, 1956. He purported to execute a will on May 3, 1954, in accordance with the provisions of section 9 of the Wills Act, 1837. He was at that time 19 years of age, but he was serving as an officer in the 1st Battalion of the King's Royal Rifle Corps, then stationed in Germany. He had joined his

1958

In the Estate of Colman, decd.

battalion in Germany on August 23, 1953, and he remained there until his demobilization in September of 1954.

At the time of the purported execution of the will the testator was on leave in England, the period of his leave lasting from April 20, 1954, until May 6, 1954. The will was prepared on the advice of a solicitor and there was no suggestion that the testator was under any sort of disability save that he had not attained the age of 21 years. He died as the result of an accident on July 3, 1956.

On December 11, 1957, the application of the executors for a grant of probate of the will of May 3, 1954, came before Karminski J. It was submitted on behalf of the executors that the testator was "in actual military service" on May 4, 1954, and that the will was, therefore, valid by virtue of the provisions of the Wills Act, 1837, and the Wills (Soldiers and Sailors) Act, 1918.[1] Karminski J., requiring further information as to the position in fact and in law of Her Majesty's forces in Germany in May, 1954, adjourned the matter for the appropriate inquiries to be made.

As a result of those inquiries it was clear from a letter from the War Office dated February 5, 1958, that the testator in May, 1954, was a member of Her Majesty's forces in Germany and was on active service, within the meaning of section 189 (1) of the Army Act of 1881, that being the Army Act then in force, and that Her Majesty's forces were in military occupation of the British Zone in Germany and the British Sector of Berlin by virtue of the unconditional surrender of Germany in 1945, and that, therefore, the testator was on active service for the reasons given.

It was not, according to the War Office, contemplated in May, 1954, that hostilities with any foreign power were imminent. Lastly, the position, status and function of Her Majesty's forces in Germany in May, 1954, were that of an army in occupation of a foreign country by force of arms.

A. H. Ormerod for the executors.

C. R. Beddington for the next-of-kin.

The cases and statute cited in argument are referred to in the judgment.

[1] Wills Act, 1837, s. 11: "Provided always, that any soldier being "in actual military service, or any "mariner or seaman being at sea, "may dispose of his personal estate "as he might have done before the "making of this Act."

Wills (Soldiers and Sailors) Act, 1918, s. 1: " . . . it is hereby "declared and enacted that section 11 "of [the Wills Act, 1837] authorises "and always has authorised any "soldier being in actual military "service, . . . to dispose of his per-"sonal estate as he might have done "before the passing of that Act, "though under the age of 21 years."

S. 3 of the Act of 1918 extended the provisions of s. 11 of the Act of 1837 to testamentary dispositions of real estate.

KARMINSKI J. referred to the facts, to the War Office letter, and to section 189 (1) of the Army Act of 1881,[1] and continued: Accepting the statement of facts given by the War Office, I am bound to hold, as I do, that Her Majesty's forces in Germany in May, 1954, were there in military occupation of a foreign country, and it must therefore follow that the deceased was on active service within the provisions of the Army Act, 1881.

The term "active service" appears to have derived from the Mutiny Act, 1867, where it was used, as I understand it, to define amongst other things a state of affairs in which a soldier might be flogged. Subsequently it came to have a less fearsome meaning, but it still leaves a state of affairs in which certain special disciplinary precautions might be applied.

I have to decide whether or not this young man was in May, 1954, on "actual military service" within the provisions of the Wills Act, 1837, and the Wills (Soldiers and Sailors) Act, 1918. It is, of course, clear from the line of authorities that "actual "military service" could be said to exist if at the time the will was made hostilities were said to be imminent. That cannot be said in this case, because no hostilities were imminent; but I have to consider the position as it was in 1954; the British forces were there in military occupation of Germany following the surrender of Germany.

The tests sufficient to allow a privileged will have been much canvassed as a result of two world wars; and there was, at any rate at one time, some doubt as to the meaning of the words "in actual military service"; some confusion possibly had arisen due to the attempt to apply the privilege of the Roman legionary to the somewhat different conditions of modern warfare, but the difficulties have now been resolved by the decision of the Court of Appeal in November, 1948, in *In re Wingham, decd.*[2]

The facts of that case were widely different from the present, since they concerned an informal, unattested will by a young airman who was about to go to Canada for training in operational flying duties. While he was there in 1943 he died in hospital following a flying accident. The circumstances were, therefore, different from those in the present case. First, in *In re Wingham, decd.*,[2] there was a world war in progress in which this country was involved; secondly, at the time of his death the testator was not engaged in operational duties but was training young airmen to fly.

The matter came to the Court of Appeal on appeal from Pilcher J., who had dismissed the motion on the ground that the

[1] Army Act, 1881, s. 189 (1): "In this Act, if not inconsistent with "the context, the expression 'on "'active service' as applied to a per-"son subject to military law means "whenever he is attached to or forms "part of a force which is engaged in "operations against the enemy or is "engaged in military operations in a "country or place wholly or partly "occupied by an enemy, or is in "military occupation of any foreign "country."

[2] [1949] P. 187; 64 T.L.R. 594; [1948] 2 All E.R. 908.

1958

In the Estate of Colman, decd.

Karminski J.

testator was not engaged upon a campaign, nor proceeding in readiness to join a campaign, nor serving in a beleaguered fortress, nor in a war base from which active offensive or defensive operations were being conducted.

The Court of Appeal dealt with the general position as to the meaning of "actual military service." Bucknill L.J. said[3]: "If the presence of danger arising from enemy activity is not "essential in order that a man may be properly described as "being on active military service, what is the test of such "service? In my opinion the tests are: (a) was the testator 'on "'military service'? (b) was such service, 'active'? In my "opinion the adjective 'active' in this connexion confines "military service to such service as is directly concerned with "operations in a war which is or has been in progress or is "imminent. If I apply these tests, then, in my opinion, the "deceased was so engaged."

I pause there for a moment to apply the test laid down by Bucknill L.J. To the question "Was the testator 'on military "'service'?" the answer must, of course, be "Yes." To the second question "Was such service 'active'?" I have to consider whether the service on which he was then engaged, namely, as a member of the occupying forces in Germany, was or was not "directly concerned with operations in a war which "is or has been in progress or is imminent." To the question whether the war was "in progress or is imminent" the answer must, of course, be "No"; but, in my view, the service on which the testator was engaged was "directly concerned with operations "in a war" which had been "in progress."

It is true, as Mr. Beddington rightly pointed out, that the end of hostilities with Germany had come in May, 1945, and that this will was said to have been executed almost precisely nine years later; but the fact remains that in 1954 Her Majesty's forces were there in direct consequence of the surrender of Germany in May, 1945, and were still there nine years after such surrender as an occupying force.

Mr. Beddington called my attention to the decision in *In the Estate of Grey*.[4] There Hill J., I think with some regret, was unable to accept that a will made by an officer about to enter hospital was a valid soldier's will. But the facts there were a good deal different, because the testator had served in the 1914–1918 war, had been a prisoner in Germany, and had subsequently rejoined his regiment. Though his regiment was liable for service abroad and under orders to proceed to Ireland, he was in no immediate danger of going on "actual military service." It is to be observed that in that case he was serving in London; he wrote out a will at his club just before he went into hospital and was not expecting to go abroad at that time; in fact he died in hospital a very few days after he had signed his will. Hill J. said[5]: " . . .

[3] [1949] P. 187, 192.
[4] [1922] P. 140; 38 T.L.R. 401.
[5] [1922] P. 140, 143.

" (1) for a soldier to be in actual military service it is not sufficient " that there should be a state of war . . . and (2) ' actual military " ' service ' refers to a state of fact, not to a date artificially fixed " by Act of Parliament or Order in Council."

I return for a moment to the judgment of Denning L.J. in *In re Wingham, decd.*[6] After discussing the origin of privileged wills for soldiers and sailors, he concluded his judgment[7]: " It " also includes those members of the Forces who, under stress of " war, both work at their jobs and man the defences, such as the " Home Guard." After saying[8] that it included, not only fighting men, but also the non-combatant members of the forces like doctors, nurses, chaplains and Wrens, he added[9]: " It includes " them not only in time of war but also when war is imminent. " After hostilities are ended, it may still include them, as, for " instance, when they garrison the countries which we occupy, " or when they are engaged in military operations overseas. In all " these cases they are plainly ' in actual military service.' "

In this case the testator was part of a force garrisoning a country occupied by our forces. I appreciate, as Mr. Beddington rightly emphasized, that when the testator purported to execute this will he was in fact in England and was not in ops concilii because he had the advantage of a solicitor to guide him in his testamentary dispositions; but he was only on a fortnight's leave, and he knew that he was returning to his duties as a member of an occupying force. He did, in fact, so return and remained there for a few more months until he was demobilised.

This, so far as I know, is the first time in which this particular point has arisen; namely, whether or not a member of the British forces in Germany is entitled to make a privileged will. I desire to make it perfectly plain that I am dealing with this case on the facts as they were in May, 1954. Nothing which I have said concerns any changes subsequent to that time. I have come to the conclusion that this was a privileged will.

It is right to say that this will has not, as I understand it, been the subject of any family dispute; the matter had to come before the court in the circumstances of the case. I am much obliged both to Mr. Beddington, who appeared for the next-of-kin, and to Mr. Ormerod, for the applicants, for their careful arguments on the law. The motion succeeds, and I make the order in the terms of the motion, namely, that probate should be granted to the executors of the will of the testator dated May 3, 1954. This is a proper case for the costs of the next-of-kin, in opposing the application, to be paid out of the estate.

Order accordingly.

Solicitors: *Field, Roscoe & Co.*

E. J.

[6] [1949] P. 187, 194.
[7] Ibid. 196.
[8] Ibid.
[9] Ibid.

[PROBATE, ETC., DIVISION.]

1958
March 19.

Sachs J.

* In the Estate of DENNING, decd.

Will—Attestation—Proof—Signatures on back of will—Omnia praesumuntur rite esse acta.

Omnia praesumuntur rite esse acta.

On an application for a grant of letters of administration with the will annexed the purported will consisted of a small single sheet of writing paper covered by the date, the dispositive words and the signature of the testatrix. On the reverse side of the sheet upside down were written, each in different handwriting from the other and from that on the face of the paper, the names of two persons whom it had proved impossible to trace.

During her lifetime the testatrix had told the plaintiff that she had made a will in favour of himself and his sister, and this was, in fact, the effect of the purported will. No other testamentary document had been found:—

Held, that, in the special circumstances of the case, and since there was no practical explanation of the two names on the back of the document save that they were there for the purpose of attesting a will, the maxim omnia praesumuntur rite esse acta should be applied, the document was a valid will and a grant should be made as sought.

In the Goods of Peverett [1902] P. 205 considered.

Probate action.

The beneficiaries under a purported will dated September 3, 1939, applied for a grant of letters of administration with the will annexed. The document which it was sought to establish as the last will consisted of a small single sheet of writing paper, the whole of the face of which was taken up by the date "Sept. 3rd. Year "of our Lord 1939" followed by five lines which consisted of the words "I give all I possess to my cousins Mary Jane and John "Harnett in Parish of St. Feock, County of Cornwall" and lastly a word intended to read "signed" followed by the signature "Alice Mary Denning, Spinster." On the reverse side, turning the sheet upside down, were the names written in two different hands "Edith Freeman" and "Dorothy Edwards," one below the other. The handwriting on the back did not coincide with that on the face of the document. Save for a single letter which was crossed out there was nothing else whatsoever on the back of the document. In spite of considerable searches no persons of the name of either "Edith Freeman" or "Dorothy Edwards" had been traced.

During her lifetime the testatrix had told John Harnett, the plaintiff in the action, that she had made a will and that he was one of the beneficiaries and his sister the other. The document in respect of which the grant was sought was found after the death of the deceased and no other testamentary document had been discovered.

James Comyn for the plaintiff.

SACHS J. referred to the facts and continued: In these circumstances the real issue for the court is whether the maxim omnia praesumuntur rite esse acta can be applied. In *In the Goods of Peverett*,[1] Sir Francis Jeune P., dealt with a case in which, following the signature of the testatrix, appeared those of two ladies on the face of the document, one of them with the words: "Mary Ann Brand, Sep. 14, 1893, sine these wishes" and said [2]: "Two things may be laid down as general principles. The "first is, that the court is always extremely anxious to give effect "to the wishes of persons if satisfied that they really are their "testamentary wishes; and, secondly, the court will not allow a "matter of form to stand in the way if the essential elements of "execution have been fulfilled." The President goes on to say [3]: "Those are principles which I can act upon, although I am con-"scious that in this case, where there is no attestation clause at "all, I am going to the furthest limit."

That was a case in which, as I have said, the words: "Mary "Ann Brand, sine these wishes" appeared on the face of the document. If I make a grant of letters of administration in this case it seems to me that I am going a step further than that which was regarded in 1902 as the furthest limit, in that here there is no indication of why the names were on the back of the document upside down. Having taken into account all the factors, I think it proper to take that step further because it seems to me that there is no other practical reason why those names should be on the back of the document unless it was for the purpose of attesting the will.

I find that the document of September 3, 1939, was a duly executed will. In these circumstances it is proper to grant the plaintiff letters of administration with the will annexed.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co. for Sitwell, Harvey & Money, Truro.*

E. J.

[1] [1902] P. 205.
[2] Ibid. 206–207.
[3] Ibid. 207.

[BIRMINGHAM ASSIZES.]

* CLUEIT *v.* CLUEIT.

1957
Dec. 5, 19.

Davies J.

[1956 D. No. 956.]

Husband and Wife—Practice—Amendment to allege adultery—Discretion statement—Amendment of petition at trial to add charge of adultery based on facts disclosed in discretion statement.

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

1957

Clubit
v.
Clubit.

The wife having petitioned on the ground of desertion, the husband by his answer denied his wife's allegation and cross-prayed for relief on the ground of the wife's alleged desertion. The husband's answer also prayed the exercise of the court's discretion in his favour notwithstanding his own adultery, of which the wife had, until the filing of the answer, been ignorant. Upon the discretion statement being put in as evidence at the conclusion of the husband's evidence, counsel for the wife applied for leave to amend the petition in order to include an allegation of adultery by the husband with the woman named in his discretion statement:—

Held, that leave to amend should be granted in order that the issue of adultery might be dealt with in this suit to avoid the possibility of further expense which would be occasioned if the wife brought a separate petition on the ground of adultery.

Burford v. *Burford* [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664 considered.

Petition by a wife for divorce on the grounds of desertion and cruelty.

The parties were married on March 3, 1951, and lived at first in the home of the wife's parents. Five weeks after the marriage, the husband left the wife and went to live with his mother. A child was born in May, 1951; and subsequently, in August, 1951, the parties met and had a holiday together and intercourse took place with the result that a second child was born in May, 1952. Shortly after the birth of the second child, the husband recommenced living with the wife at her parents' home, but finally left that address when told to do so by the wife's father in April, 1953, the wife knowing and approving of her father's action. In October, 1954, upon the wife's complaint, a summons alleging desertion was issued against the husband but was adjourned. On January 26, 1955, the husband obtained the key of a house at which he requested the wife to resume cohabitation with him. The wife, having refused the husband's request, withdrew her summons against him on January 27, 1955, and instead obtained an order by consent under the Guardianship of Infants Acts, 1886 and 1925. On that occasion the wife said that she would not live with the husband.

The wife presented her petition on October 16, 1956, on the ground of desertion from April, 1953, and cruelty, but the latter allegation was not strongly relied on. The husband in his answer filed on April 30, 1957, denied both allegations and cross-prayed on the ground of desertion from April, 1953. The husband further prayed the exercise of the court's discretion in his favour notwithstanding his adultery with a named woman during 1956, particulars of which appeared in his discretion statement dated September 18, 1957. Apart from the prayer of the answer and the facts disclosed when the discretion statement was put in evidence, the wife was ignorant of the husband's adultery.

The discretion statement was put in evidence at the conclusion of the husband's evidence, after his cross-examination, and counsel for the wife then applied for leave to amend the petition in order to include an allegation of adultery based on the facts

admitted in the discretion statement. This report is only concerned with the judge's ruling upon this application.

P. J. Cox, for the wife, in support of his application referred to *Burford* v. *Burford* [1] and submitted that, where the only reason for the application not having been made earlier was the wife's ignorance of the facts, she should not be precluded even at so late a stage from alleging adultery.

F. Blennerhassett, for the husband, objected to the application on the ground that compulsory disclosure of adultery under the operation of the Matrimonial Causes Rules, 1957, r. 28 (1) should not be permitted to form the basis of a subsequent charge against the party making the disclosure. He conceded that in the event of neither party obtaining a decree on the ground of desertion, nothing would preclude the wife from presenting a fresh petition charging the adultery admitted in the discretion statement, but submitted that the court should do nothing to assist the wife to use the information gleaned from the discretion statement, because (i) if it were found that the wife had deserted the husband, the adultery would not have affected her attitude, she being ignorant of it; (ii) where one party is compelled to disclose adultery the other will necessarily be enabled to obtain a decree, and (iii) may by that method put herself in a much stronger position to obtain maintenance than the merits of her case would otherwise warrant.

DAVIES J. This is a very interesting little point. There is no reason to give a full judgment about it. Right at the end of the evidence of the respondent husband, and after he had been cross-examined, Mr. Blennerhassett, under pressure from the wife's counsel, put in the husband's discretion statement. In it he admits having committed adultery in 1956, some three years after the parties finally separated, and says that the woman named in his discretion statement was expecting a baby in September, 1957. Mr. Cox, for the wife, has asked leave—this being a case of cross-allegations of desertion—to amend the petition to include an allegation of adultery, namely, the adultery admitted in the discretion statement; and counsel cited *Burford* v. *Burford*.[1]

The course proposed is a course which, to my own personal knowledge, has been taken in a number of cases. I think I can recollect cases where it happened when I was at the Bar; and it has certainly happened while I have been on the Bench.

Mr. Blennerhassett has taken what I must say is an extremely attractive point in asking me to refuse leave to amend. The disclosure by the husband of his own adultery was a compulsory disclosure under the rules and practice of the court. It is argued that it is a principle of our law—which is exemplified in a number

[1] [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664.

[1] [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664.

1957

Cluett
v.
Cluett.

Davies J.

of other branches of law—that if a man is compelled to make a disclosure or admission, that disclosure or admission must not be used against him to his prejudice thereafter. I think it is an attractive argument, but it seems to me to break down from the practical point of view. As I have said, this is a case of cross-allegations of desertion. Supposing I were to come to the view—I have not heard the concluding speeches of counsel yet, and I have not come to any decided view about this case—that neither party should have a decree, since neither party was in desertion of the other. Then there would, as I think and as Mr. Blennerhassett admits, be nothing in the world to prevent another petition from being filed by the wife immediately, alleging adultery on the admission contained in the discretion statement. If the wife could not prove her case in any other way, she would be able, at the hearing of the supposed new petition to bespeak the file in the present suit and prove her husband's adultery by identifying his signature to his discretion statement. So that, in the ultimate result, the principle put forward by Mr. Blennerhassett in opposition to this application could not operate to protect the husband from being prejudiced by his admission. That being so, it seems to me that it is right and proper to give the wife leave to amend now; for obviously it is a great saving of expense for this application to be made and granted in the present suit rather than to go to the expense of bringing a separate petition.

It is suggested that the real point of this application is that the wife wishes to strengthen her hand on an application for maintenance. I am not sure I agree with that. As I ventured to say in the course of the argument, whatever happens in the result of this case, in any application for maintenance the whole of her conduct will be investigated and will be taken into account by the registrar.

I think, in all the circumstances, that it is right and proper for me to grant the wife leave to amend. That necessarily involves that the amended petition will have to be re-served. I could dispense with re-service on the respondent, but it must, of course, be served on the woman to be named. What line she will take, one does not know; but perhaps one can hazard a guess.

There will be leave to amend the petition, service on the husband to be dispensed with and service on the woman named by 6 p.m. tomorrow. The case will be stayed pending renewal of the certificate and is to be restored for hearing before the end of this assize. No doubt you will be able to give the appropriate notice, if, as seems very probable, the woman named will be admitting—at any rate not denying—the adultery to be alleged against her, as soon as she acknowledges service. Then the case can come on again.

Application granted.

1957

CLUEIT v. CLUEIT.

Dec. 19. The suit again came before Davies J., the woman named having acknowledged service of the amended petition but taken no further step. Davies J. found that the husband had not deserted the wife but that the wife had deserted the husband from January, 1955, but not from April, 1953, or any date prior to April 30, 1954, and therefore three years desertion by the wife prior to the filing of the answer was not proved. In the exercise of the court's discretion with regard to her desertion from January, 1955, onwards, a decree nisi was pronounced in favour of the wife on the ground of the husband's adultery. The judge made an order for the wife's costs up to the amount in court as security, which was £10.

Solicitors: *H. B. Keight & Co., Birmingham; Philip Baker & Co., Birmingham.*

[COURT OF APPEAL.]

* CLEAR v. CLEAR.

C. A.

1958
Feb. 26, 27.

Hodson, Morris and Pearce L.JJ.

Husband and Wife—Practice—Pleading—Amendment to allege adultery—Discretion statement—Petition by wife for decree on ground of cruelty—Answer by husband denying cruelty and alleging cruelty by wife—Discretion statement by wife admitting adultery—Application by husband during trial of petition to amend answer by alleging adultery by wife and to serve notice on alleged co-respondent.

Husband and Wife—Maintenance—Divorce—Relevance of who obtained decree—Whole conduct of parties.

A wife, who petitioned for divorce on the ground of cruelty, filed a discretion statement admitting adultery. The husband answered the petition by denying cruelty and alleging that the wife had herself been guilty of cruelty. He knew nothing of her adultery except that she was going to ask for the discretion of the court. The contents of the wife's discretion statement were disclosed by counsel for the wife in opening, when it was stated, not only that she had committed adultery with a named man known to the husband, but that she had given birth to a child shortly before the trial. The husband accordingly applied to amend his answer by alleging adultery by the wife and to serve notice on the alleged co-respondent while he was still within the jurisdiction. The application was refused by the commissioner having regard to the delay it would entail. He ultimately dismissed the husband's plea of cruelty and, exercising his discretion in favour of the wife, granted her a decree on the ground of cruelty. The husband appealed:—

Held, that, although the fact that delay would be caused was not of itself a sufficient ground for not granting an adjournment, the exercise by the commissioner of his discretion should stand since the husband knew that the wife had committed adultery and could in the circumstances have made inquiries, but had taken no steps to obtain proof of the adultery. Although in most civil actions leave to amend would generally be granted where injustice would not thereby be done, in the present action there was a discretion to be exercised judicially and, where a party had merely waited for the evidence to be presented at the trial, leave to amend should not

C. A.

1958

Clear
v.
Clear.

necessarily be given. It was not in every case, where the parties came to trial, one knowing nothing of the circumstances in which the other side was asking for discretion, and finding the evidence for the first time at the hearing, that leave to amend must be given ex debito justitiae, but if the husband wanted to raise the issue of adultery it was, prima facie, incumbent on him to take steps to obtain proof.

Per Hodson L.J. To say that because the wife has obtained a decree she is automatically in a stronger position as regards maintenance than if the husband had obtained a decree, where matrimonial offences are proved on both sides, seems to be wrong. In any application for maintenance the whole of the conduct of the parties would be investigated and determined by the registrar.

Dictum of Davies J. in *Clueit* v. *Clueit*, ante p. 463; [1958] 1 All E.R. 417 approved.

Burford v. *Burford* [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664 and *B.* v. *B. and G.* [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254 considered.

Appeal from Mr. Commissioner Blanco White.

The wife, Doreen Betty Cynthia Clear, by her petition sought a decree of divorce on the ground of cruelty by her husband, John Frederick Clear, and prayed for the exercise of the discretion of the court notwithstanding her adultery during the marriage. The husband answered by denying cruelty and alleging that the wife had herself been guilty of cruelty to him. The wife filed a discretion statement in which she admitted adultery with an Iraki army officer stationed in this country.

The husband, who was deceived by his wife throughout as to her infidelity, did not know anything of the adultery (except that she was going to ask for the discretion of the court) until he actually entered the court and then learnt for the first time, when counsel was opening the case against him, that his wife had not only committed adultery with an Iraki officer (one Captain Tikriti, whom she named) who was stationed in this country and who turned out to be known to the husband, but she also had, very shortly before the trial, given birth to a child, a child who must have been conceived in or about August, 1956, before the parties had actually separated.

The husband accordingly applied to the commissioner for leave to amend his answer by alleging adultery on the part of the wife, and also to enable him to serve a notice on the alleged co-respondent before he left the jurisdiction. The commissioner refused the application and ultimately dismissed the husband's cross plea of cruelty, granted the wife a decree on the ground of cruelty and exercised his discretion in her favour. The husband appealed on the grounds first, that, in the circumstances, the wife should have been found to have been guilty in the matrimonial sense of cruelty towards her husband; secondly, that even assuming that the husband had been guilty of cruelty, the evidence showed that it had been condoned and, thirdly, that the husband should have been given leave to amend his answer.

The case is reported solely on the issue of leave to amend.

K. Bruce Campbell and *Elaine Jones* for the husband.

Ifor Lloyd Q.C., *Victor Russell* and *C. H. Beaumont* for the wife.

The cases cited in argument relevant to the above issue are referred to in the judgments.

HODSON L.J., having stated the facts and referred to the other grounds of appeal, continued: The third question under appeal is whether the husband ought to have been granted an adjournment in order that justice should be done between the parties, the position being that the pleadings disclose that the wife was going to say in the witness-box that she had committed adultery, but the allegations related only to cruelty.

The application for an adjournment was made by the husband's counsel after the opening statement had been made on the other side, and before evidence had been given on this matter, in anticipation of that evidence being given, in order that he might have time before the Iraki disappeared from this country to serve him, if need be, and give him an opportunity of defending the case. The application was refused. Mr. Campbell made it plain that he was anticipating the proper moment when the application should be made, and I do not think it ought to be taken against him that he did not repeat the application at the proper moment, namely, when the wife gave evidence (which she subsequently did) of her adultery, because it was obviously convenient, he having the material in paper form at any rate in his hand, that he should get the amendment in train as soon as possible. He explained to the commissioner that he was making the application then because he would have to act quickly in serving the man. He said: "My information is that at this moment he may be in "this country but we think it more likely that he is in Iraq. As "this case is expected to go on for the rest of the week it is "just possible that service may be effected upon him during that "time and thus avoid delay at the end." The commissioner, realizing the practical difficulties involved, said, and I respectfully agree with him, that if the amendment were granted the man would have to be served because he was entitled to hear the allegation against him. The allegation made is not like *Sage* v. *Sage; Stockbridge* v. *Stockbridge*,[1] before Willmer J., to which we were referred, an admission made by a wife outside the court implicating another man, but a sworn statement not yet made but later made in the case, implicating that man as the adulterer. The commissioner refused to consider any device by which the regular practice laid down by statute of instituting service on the co-respondent could be avoided, and he eventually expressed his opinion in these words: "I see no advantage in acceding to the "application. I do not even know that this Captain Tikriti is in "this country, and if he is not in this country a lot of delay would

[1] [1947] P. 71; 63 T.L.R. 252; [1947] 1 All E.R. 492.

C. A.
1958
Clear
v.
Clear.
Hodson L.J.

"be caused by serving him." It was pointed out by the wife's counsel, after the commissioner had expressed this opinion, which was, I think, not necessarily a final decision in the matter, that if such a charge were made it would be at least open to the wife to plead conduct conducing in answer to the charge. The application was never renewed, and I am treating this case as if it has been made at the proper time.

The mere fact that delay would be caused by serving him is not of itself, in my judgment, a sufficient ground for not granting an adjournment in order that an amendment may be made and the necessary steps taken. On the other hand, I am not prepared to say that in every case where the parties come to trial, one knowing nothing of the circumstances in which the other side is asking for discretion, and finding the evidence for the first time at the hearing, leave to amend must be given ex debito justitiae. It is quite true the courts have gone a long way in civil actions in saying that leave to amend will always be granted where injustice will not thereby be done, and where any injustice which is temporarily done can be remedied by costs, but it must always be remembered that there is a discretion to be exercised judicially in this case, and in this matrimonial jurisdiction very often the exercise of the discretion is peculiarly difficult. It would, I think, be wrong to say that, where a party had merely lain by and waited so to speak for the evidence to fall into his or her lap at the trial, the amendment must necessarily be given.

This situation was dealt with recently by Davies J. at Birmingham Assizes in *Clueit* v. *Clueit*.[2] I agree with the judge's observations in which he said that on the facts of the case before him it was right that leave to amend should be given to enable one of the parties before him to make an allegation of adultery on the facts in the admission made by the other side in asking for discretion. He had in mind what was said by this court in *Burford* v. *Burford*,[3] a case to which we have also been referred, where this court in considering that situation by no means sought to lay down that in all such cases must leave to amend be given. I agree with Davies J. in so far as he implied that it was very often the right thing to do, so that justice could be done between the parties appearing before the court.

One has to remember that the parties are not entirely helpless in these matters. They are told, when the petition is served on them by the other side, that discretion is being asked for notwithstanding the adultery committed. If they want to raise the issue of adultery as a live issue and fight it, and not merely accept the finding of adultery which they are reasonably sure they will get against the other side at the hearing, if they want proof of it themselves it is, prima facie, incumbent on them to take steps so to obtain proof.

[2] Ante, p. 463; [1958] 1 All E.R. 417.

[3] [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664.

The husband was not without the means by which he could have taken steps to inquire whether his wife was then associating with this or any other man. He knew she had committed adultery before the presentation of the petition, but he did not know she was pregnant. If he had found out that she was pregnant that would have put him on inquiry because, whatever the physical relationship between him and his wife had been at the time of the conception, if she did not disclose her pregnancy to him, it would at least tend to show that she was doubtful whether he in truth was the father. He could have made inquiries at Bath, for he knew at least as soon as February, 1957, three months after the parting in November, 1956, that she was there. There was nothing in the world to prevent his solicitors making inquiry of the opposite party and saying: "We see your "client is asking for the discretion of the court notwithstanding "her adultery. Are you prepared to give us any information "which may save expense in proving our case?" No step at all was taken, and it was left in this way, that the husband came to trial without on his side any allegation of adultery made against his wife.

The commissioner refused him leave to amend. Although I am not upholding the particular reason, namely, delay, for refusing leave to amend, and substituting (if that be the right way of dealing with the matter) our discretion for his, I do not think that leave ought to be given to amend in this case so as to enable the husband, at this late hour, to make a positive charge of adultery against his wife.

We were referred in passing to a decision, which has stood for many years, of Langton J. in *B.* v. *B. and G.*,[4] which was a case of an attempt by the respondent wife to frame a charge of adultery in answer to a petition, upon the language of the prayer, which in that case did not refer to adultery, but merely asked for discretion, which the court took as inferring that discretion would be asked for in respect of adultery. Langton J. came to the conclusion that a pleading of that kind, in answer to the petition, would not stand, and I agree with him, notwithstanding the distinction which emerges in the present case that the prayer does contain a reference to the matrimonial offence of adultery.

I refer to the language of Maugham L.J., when he was dealing with the admissibility of evidence in *Bevis* v. *Bevis*.[5] He said[6]: "It may be observed that the petitioner, the husband, in the "previous proceedings, according to the usual practice, stated in "his petition that he would ask for the exercise of the discretion "of the court in his favour, which was notice that he had been "guilty of adultery and was notice to the wife that, complying "with the direction, he had filed or lodged with the application "for the registrar's certificate a statement of the matters in "respect whereof the exercise of the discretion was prayed."

[4] [1937] P. 1; 52 T.L.R. 719; [1936] 2 All E.R. 1254.

[5] [1935] P. 86; 51 T.L.R. 291.

[6] [1935] P. 86, 97.

C. A.
1958
Clear
v.
Clear.
Hodson L.J.

The present position is that the statement which is lodged with the court is not open to inspection by the opposite party until it is put in, and all that has happened in the present case is that the husband has had notice by the wife that at some future date she was going to make an admission which she has not yet made. I do not think it could be said that in those circumstances there was material upon which the husband could have put in an answer of alleged adultery by reason merely of the existence of that prayer. However, he did have an opportunity to take his own steps to establish that charge if he thought it right so to do, and he did not avail himself of it.

We have been pressed with the argument that leave to amend in any case is futile because it is merely a question of amour propre. Once adultery is established against the wife, so far as maintenance is concerned, it does not in the least matter in whose favour the decree is pronounced. So far as that is concerned I do not think it can be quite so lightly dismissed. Although it is common nowadays for the discretion to be exercised, and indeed it is not easy to say in every case that the blame rests on the party who has been unsuccessful in the suit rather than the one who has been successful, nevertheless proceedings in these courts are still proceedings for remedies for injuries suffered. If a husband has in fact been injured by a matrimonial offence committed by the other spouse he is entitled at any rate to be heard to say that he wishes to have a judgment which embodies the declaration that he has suffered such an injury. I do not treat this application casually, as if it was a matter of mere triviality.

So far as maintenance is concerned it is, to my mind, quite clear, as Davies J. pointed out in *Clueit* v. *Clueit*,[7] that whatever happens in the result of this case, in any application for maintenance the whole of the wife's conduct will be investigated and will be determined by the registrar. I entirely agree with that. My recollection is that observations to that effect have been made in this court from time to time.

We were referred to a decision of this court in *Sydenham* v. *Sydenham and Illingworth*,[8] where Denning L.J. said, as I should have thought, sufficiently clearly[9]: "There is nothing in "the statute to say that a wife against whom a decree has been "made cannot be awarded maintenance, and there is nothing in "it about discretion being exercised 'in favour of' one side or "the other or about a 'compassionate allowance.' All it says "is that on a decree of divorce the court may award maintenance "to the wife. This includes a guilty wife as well as an innocent "one, but in awarding maintenance the court must have regard, "of course, to the conduct of the parties . . . the registrar must "do the best he can, not merely from the form of the decree but "also from the shorthand note of the judgment."

[7] Ante, p. 463.
[8] 65 T.L.R. 489; [1949] 2 All E.R. 196.
[9] [1949] 2 All E.R. 196, 198.

The record of the court, as it stands now, shows that the wife has committed adultery. It shows that she has by that action at any rate forfeited her common law right to be maintained, because her adultery was not condoned or connived at, and that she could not get any maintenance in a court of summary jurisdiction. It is only by virtue of divorce legislation that she is enabled to get maintenance at all, and in such cases the court will consider whether she ought to have maintenance. It could hardly be said here that she is entitled to nothing because she has to make a home for the child of the marriage, of whom she has the custody, and it would not presumably be right to leave her without provision, if she has to make a home for this child. To say that, because she is in fact the petitioner and because she has obtained a decree, therefore she is automatically in a stronger position than if the decree had been pronounced the other way round, where matrimonial offences are proved on both sides, seems to be wrong.

It is for the court, in practice in the first place the registrar, to consider the conduct of the parties. It is quite true that he may be limited in his investigation to facts which have been proved, matters which have been established in the court; and and in many cases it may not be open—this does not arise in this case, I think—to one party to raise matters which he had the opportunity of raising at the trial. In regard to a claim for maintenance, to say that the wife or the husband start with a handicap in the registry because of the form of decree seems to me to be wrong. The vital thing is to consider what the facts are, and it is not, I think, right to say that a court in exercising its discretion in favour of the wife must necessarily be saying that her adultery, in the ordinary sense of the word, is excusable. Discretion is exercised nowadays for a variety of reasons, and does not, I think, necessarily involve a palliation of the offence which has been committed, and in respect of which discretion is sought. I have said what I have said because of the plea which was addressed to this court by counsel to the effect that, if the husband did not get a decree in his favour, it might be a handicap in subsequent proceedings for maintenance.

One other argument was put forward by counsel for the husband. He said justice demanded that he should have a decree, which he was entitled to because the commissioner had said at the end of the case in effect that, if only the pleadings had been in order and the charge of adultery had been before him, he would have pronounced a decree to both sides. On reading the interlocutory observations of the commissioner I do not think what he said in that respect can be treated without qualification. He said, finally, that he would have to consider in pronouncing a decree who was to blame, that he would not necessarily have pronounced a decree in favour of the husband in the exercise of discretion. The matter was, therefore, left at large.

On all points the appeal fails and ought to be dismissed.

C. A.
1958
Clear
v.
Clear.

Morris L.J. I agree. When the learned commissioner had the application before him for leave to amend the answer I think he had quite a difficult decision to make. The situation then was not the same as in a civil action when a defendant asks for leave to amend so as to present a cross-claim. In a civil action such a cross-claim can in all probability be presented at some later date. Nor, I think, is it enough to say that the circumstance that the wife has had to acknowledge her misconduct and to seek to obtain the discretion of the court will form part of the matters that can be considered on a claim for maintenance and can be referred to when the conduct of the parties is borne in mind. Nor is it sufficient answer to the application to say that the circumstance that the wife has to make her admission can be considered on any question as to costs. The point of view of the husband cannot be dismissed as being a manifestation of amour propre. He may feel that he desires to have on the record his complaint in regard to what he considers to have been grievous matrimonial misconduct on the part of his spouse. However, making allowance for all those considerations, I am not prepared to say that in this case the commissioner came to a wrong conclusion, and that he ought to have exercised his discretion in a different way.

I agree that the appeal fails.

Pearce L.J. I also agree.

Appeal dismissed.

Solicitors: *Marcy & Co.; Shield & Son.*

A. W. G.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1958
Mar. 10, 24; *April* 1.

Lord Goddard C.J., Streatfeild, Slade, Donovan and Havers JJ.

* REGINA *v.* MATHESON.

Criminal Law—Murder—Diminished responsibility—Standard of proof—Medical evidence as to state of mind—Unchallenged medical evidence that abnormality such as substantially to impair mental responsibility—No evidence to contrary—Verdict of murder—Whether in accordance with evidence—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

Criminal Law—Murder—Diminished responsibility—Practice—Plea of guilty to manslaughter not to be accepted—Practice to be followed when defence ask for verdict of manslaughter on ground of diminished responsibility and some other ground.

The appellant, a confirmed practising sodomite, killed a boy, cut the body in half, disembowelled it packing the intestines in a suitcase, hid the remains, sent anonymous postcards to the boy's mother indicative of a desire to torture her, and gave himself up to the police.

At the trial of the appellant for capital murder, the defence of diminished responsibility under section 2 (1) of the Homicide Act.

1957,[1] was raised. Three doctors who gave evidence on behalf of the appellant were of the unanimous opinion that he was suffering from such an abnormality of mind (due to arrested or retarded development) as substantially to impair his mental responsibility; the prosecution did not challenge that opinion or call evidence in rebuttal; nevertheless the jury convicted of capital murder. On appeal against conviction on the ground, inter alia, that the verdict, in not giving effect to the defence of diminished responsibility, was unreasonable and not supported by the evidence:—

Held, that as there was unchallenged evidence that the appellant was within the provisions of section 2 of the Act, and no evidence that he was not, the verdict was not supported by the evidence, and must be set aside and a verdict of manslaughter substituted.

Although there was evidence of premeditation, an abnormal mind is as capable of forming an intention and desire to kill as one that is normal. Nor was the view of the doctors displaced by the postcards—a desire to torture the mother was a sign of abnormality, as was the revolting nature of the crime.

Per curiam. A plea of guilty to manslaughter on the ground of diminished responsibility should not be accepted; the issue must be left to the jury as it must be if the defence is one of insanity. If, on an indictment for murder, the defence ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation, and the jury return a verdict of manslaughter, the judge may, and generally should, then ask them whether their verdict is based on diminished responsibility or on the other ground or on both.

APPEAL against conviction.

The appellant, Albert Edward Matheson, was convicted at Durham Assizes before Finnemore J. of the capital murder of Gordon Lockhart, a boy aged 15. The case for the prosecution was that the appellant killed the boy by hitting him on the head with a bottle filled with water and then with a claw hammer, and that the crime was committed in the course or furtherance of theft. The facts are fully stated in the judgment.

At the trial, the defences put forward were: (1) that the appellant was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957, and (2) that the murder was not in the course or furtherance of theft, so that, if the defence of diminished responsibility was not accepted, it was not capital murder.

The appellant appealed against his conviction on the grounds, inter alia, that the verdict of the jury could not be supported by the evidence either on the issue of diminished responsibility or on the issue whether the killing was committed in the course of furtherance of theft. On the issue of diminished responsibility (which was the only point considered on the appeal) it was submitted that the only evidence put forward was that of three

[1] Homicide Act, 1957, s. 2: "(1) "Where a person kills or is a party "to the killing of another, he shall "not be convicted of murder if he "was suffering from such abnormality "of mind (whether arising from a "condition of arrested or retarded "development of mind or any in-"herent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his "acts and omissions in doing or "being a party to the killing."

C. C. A.
1958
Regina
v.
Matheson.

doctors, all of whom were agreed in the appellant's favour that he was suffering from such abnormality of mind (arising from a condition of arrested or retarded development of mind) as substantially impaired his mental responsibility for his acts in doing the killing; that all three doctors, the senior medical officer at H.M. Prison, Durham, and two consultant psychiatrists, agreed that the appellant was a psychopathic personality and was feeble-minded with a mental age of less than 10 years; and that there was no evidence to the contrary.

The appeal was first heard on March 10 before Streatfeild, Slade and Havers JJ., but at the conclusion of the argument on the issue of diminished responsibility it was adjourned for hearing by a court of five judges. At the rehearing on March 24, a court of five judges, at the conclusion of the argument on diminished responsibility, allowed the appeal, substituted a verdict of manslaughter for that of murder and a sentence of 20 years' imprisonment for the capital sentence. The court reserved the reasons for its decision.

George Waller Q.C. and *Peter Taylor* for the appellant.
P. Stanley-Price Q.C. and *R. R. Rawden-Smith* for the Crown.

The following cases were cited in argument: *Rex* v. *Rivett* [2]; *Reg.* v. *Spriggs*.[3]

Cur. adv. vult.

April 1. Lord Goddard C.J. read the following judgment of the court: The appellant was convicted at the last Durham Assizes before Finnemore J. of the capital murder of a boy aged 15 named Gordon Lockhart. The defence was (1) that in killing the boy the appellant was suffering from diminished responsibility as defined by section 2 of the Homicide Act, 1957, and was accordingly guilty not of murder but of manslaughter; (2) that the murder was not in the course or furtherance of theft so that, if the defence of diminished responsibility was not accepted, the murder was not capital. The court at the close of the argument allowed the appeal on the first ground, and substituted a verdict of manslaughter for that of murder. The second ground, therefore, need not be considered, and the court gives no decision upon it. We now proceed to give our reasons for allowing the appeal on the first ground.

The murder was of the most horrible description, so revolting as to be almost beyond belief. The appellant, who is 52 years of age, was a confirmed practising sodomite, and there was evidence of some association before the murder between him and the boy. The appellant worked as a handyman at St. James' Boxing Hall in Newcastle, and on November 18, 1957, the boy went to a new job at a cinema, which he left about 4.30 p.m.,

[2] (1950) 34 Cr.App.R. 87.

[3] [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300.

having previously collected wages due to him from a previous employer. He did not arrive home and was not again seen alive. Two days later his mother received an anonymous postcard saying the boy had gone to London as a woman was after him for money. A second postcard was received by her the next day saying that Gordon was living in London with prostitutes, making money like them, and on November 22 a third was received saying "Gordon is dead." All these three cards were written by the appellant. On the evening of November 22 the police went to the boxing hall and found the boy's body cut in half and stowed in a sump under the hall; it had been disembowelled and the intestines packed into a suitcase. The appellant also wrote anonymously to the Chief Constable of Newcastle saying the body was in the Tyne in sacks, and accusing the boy of sodomy. The same day that this letter was received the appellant gave himself up to the police in Glasgow and described how he had killed the boy. All that need be said with regard to his confession is that he described how he had killed the boy by smashing his head, first with a glass bottle which he had filled with water to make it heavier, and then beating it with a claw hammer. This was confirmed by the post-mortem. His other statements alleged that the boy was demanding £2 from him as the price of buggery and as he, the appellant, was only willing to pay £1 he killed him. There is, of course, only the appellant's word for this accusation. He described how the bottle broke and that he threw the pieces to a place where the police found them, and they found the broken bottle with newspaper packed round the neck so that, if it broke, it would not cut the hand that was holding it. He afterwards made further statements saying that he knew the boy would have his week's pay on him, and that was why he killed him, but we need not consider this part of the confession as it would only be material if the court had to consider whether the murder was to be regarded as one in furtherance or in course of theft.

The only issue dealt with on the appeal was that of diminished responsibility; none of the facts were disputed by the appellant. Three medical men were called by the defence, Dr. Pickering, the Senior Medical Officer of Durham Gaol; Dr. Orton, Consultant Psychiatrist at the Newcastle General Hospital, and Dr. Cuthbert, Physician Superintendent at St. Luke's Hospital, Newcastle; all three of experience in matters relating to mental health. Cross-examination was directed only to the elucidation of some points in their evidence, but the prosecution did not challenge the opinions they had formed and all three had personally examined the appellant. They all agreed that he was not insane within the M'Naghten Rules. Both Dr. Pickering and Dr. Cuthbert said that his mental development was that of a boy of 10. Dr. Orton considered he was certifiable under the Mental Deficiency Acts, 1913–38, though not under the Lunacy and Mental Treatment Acts, 1890–1930. They were all satisfied that his mind was so

C. C. A.
1958
Regina
v.
Matheson.

abnormal as substantially to impair his mental responsibility. They did not merely repeat the words of the section but gave the reasons which led them to form this opinion. Thus, Dr. Pickering said the appellant's intelligence, measured by certain tests recognized for this purpose was not more than 73, while that of a normal or average man would be 100, and that his mental condition was due to arrested or retarded development. Dr. Orton called attention to the records which showed the man had on many occasions swallowed razor blades and inserted nails in his urethra and, as we have said, was prepared to certify him under the Mental Deficiency Act. Dr. Cuthbert agreed that his mental development was rather less than what one expects in a child of 10 and that he suffered from retarded development. It is unnecessary to set out their evidence in any greater detail. It was clearly enough to shift the burden of proof thrown on the defence by the section yet no medical evidence was given by the prosecution in rebuttal.

What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasized, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be "a true verdict in accordance with the evidence." Here it is said there was evidence of premeditation and undoubtedly there was, but an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do. A desire to kill is quite common in cases of insanity. We cannot see that the anonymous letters displace the view that the man's mind was abnormal, or that his responsibility was substantially impaired. They would appear indicative rather of a desire to torture the mother, again a sign of abnormality. The attempts at self-mutilation in a most painful manner are surely acts of a man on the border of insanity and not of a rational person. The revolting nature of the crime itself would cause most people to say it was the work of a maniac resembling, as it did, the murders of some 70 years ago which terrorised the East End of London and were known as the Ripper murders. We can well understand that a jury, faced with such an appalling crime committed by a sodomite, whether from jealousy or because his victim would no longer pander to his vice, would think, as would many, that such a creature ought not to live, and that consequently a verdict involving the capital sentence was the only one appropriate. But we have to bear in mind that Parliament has altered the law and decreed that if a killing is committed by a

person whose abnormal mind has seriously diminished his responsibility the verdict is to be manslaughter and not murder. If, then, there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility, and no facts or circumstances appear that can displace or throw doubt on that evidence, it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence. We prefer to rely on those words of the Criminal Appeal Act, 1907, rather than on the word "unreasonable." The Act directs the court to allow an appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. Having regard to what we think must have affected the jury or any body of ordinary minded citizens, we should not care to say their verdict was unreasonable, though we feel bound to say it was not supported by the evidence. The fact is there was unchallenged evidence that this man was within the provisions of section 2 of the Homicide Act, 1957, and no evidence that he was not. This decision, therefore, in no way departs from what has been said in other cases, that the decision is for the jury and not for the doctors; it only emphasizes that a verdict must be supported by evidence. If there is evidence and a proper direction, this court will not usurp the function of the jury, unless, indeed, there is evidence so overwhelming that the court comes to the conclusion that though it might be said there was some evidence the other way, the verdict would amount to a miscarriage of justice. We base our decision on the ground that the evidence in this particular case did not support the conviction. But we recognize that there may be cases where, on the issue under section 2 of the Homicide Act, 1957, evidence of the conduct of the accused before, at the time of, and after the killing, may be relevant considerations for the jury in determining whether the accused has discharged the onus of proving such abnormality of mind as substantially to impair his mental responsibility for his acts.

Before parting with the case, this is a convenient opportunity for laying down a rule of practice in cases where a defence of diminished responsibility is raised. The judges of this court have resolved that a plea of Guilty to manslaughter on this ground should not be accepted, though it seems it may be in Scotland—*Kirkwood* v. *Lord Advocate*.[1] This issue must be left to the jury, just as the issue must be if the defence is insanity. It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If

[1] 1939 S.C.(J.) 36.

C. C. A.
1958
Regina
v.
Matheson.

the jury return a verdict of manslaughter the judge may, and generally should, then ask them whether their verdict is based on diminished responsibility or on the other ground or on both.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

[PROBATE, ETC., DIVISION.]

1958
Feb. 24, 25, 26; *Mar.* 10.
Sachs J.

* BURCH *v.* BURCH.

Husband and Wife—Condonation—"Knowledge" of adultery—Ingrained suspicion—Wrong man suspected of adultery—Continuance of conjugal cohabitation—Whether with requisite knowledge of all material facts.

From, at the latest, March, 1950, a husband, without being aware of any facts on which a reasonable husband could found a belief in his wife's adultery, nourished a convinced belief that the wife had committed adultery in or about March, 1945, with a United States soldier with whom she had associated, and that a child which, in fact, had been conceived prior to that association, was the result of the suspected adultery. The husband continued to live with the wife in all respects as husband and wife except that in 1952 sexual intercourse between the parties ceased. The wife confessed that she had committed one act of adultery in or about January, 1945, with a Canadian airman. The husband consulted a solicitor and pursued inquiries as to the wife's confession, and in August, 1956, he left the matrimonial home, filing a petition seeking a divorce on the ground of the wife's admitted adultery. The wife alleged that the adultery had been condoned:—

Held, (1) that, as the case was clearly not one in which the husband had continued in full matrimonial cohabitation with the wife not caring whether his suspicions as to her adultery were true or false, it was essential to consider whether, at the relevant period, he had the knowledge of the wife's offence requisite to render such cohabitation condonation of the offence.

Keats v. *Keats and Montezuma* (1859) 1 Sw. & Tr. 334 considered.

(2) That, unless a husband's belief in his wife's adultery was founded on a reasonable deduction from ascertained facts it did not constitute that knowledge of the offence which was a prerequisite of condonation.

D'Aguilar v. *D'Aguilar* (1794) 1 Hag.Ecc. 773 and *Allen* v. *Allen* [1951] W.N. 322; [1951] 1 All E.R. 724 applied.

(3) That the husband's convinced belief that the wife had committed adultery with a United States soldier had been based on mere suspicion and had, therefore, been unreasonable.

(4) That facts which a wife knew would affect her husband's mind on the question of forgiveness and which were not disclosed to him were material to the knowledge required for condonation.

Accordingly, the fact that the wife was associating with the Canadian airman as well as with the United States soldier, and that this was not known to the husband, provided a further reason for holding that the husband had not the knowledge requisite to condone her offence.

DEFENDED PETITION.

The marriage between the parties was a very happy one from the time it took place in 1938 until January, 1945, there being at that time one child, a little girl. Early that month the husband, then a regular serving soldier, sailed for Burma, having previously had an embarkation leave which officially commenced on December 22, 1944, and ended on January 4, 1945. He left his home either about that date or soon afterwards. Very shortly after that date the wife committed one act of adultery with a Canadian airman.

By February, 1945, the wife was aware that she was pregnant, having, however, first had, after the husband was last at home, a period of which she told him, but which was a false period as she also informed him. Of the many letters written by the wife to her husband in the first three months of 1945, the first that survived was a letter dated March 22, 1945, which reached the husband in Burma. In it she referred both to her pregnancy, of which she had already written in February, and to her having been in association with a United States soldier during the days immediately preceding the writing of the letter.

In tenor the letter was that of a wife having a baby by a husband whom she loved, and her evidence at the hearing of the divorce suit that at that time she had no doubts but that the child was his was accepted by the court, as also was so much of the husband's evidence as stated that, at the moment of receipt of the letter, he, too, although a bit surprised at the unintended pregnancy, accepted the baby as being his. The first child of the marriage was also the result of an unintended pregnancy. The husband, however, was distressed by the fact that the wife had been going about with a United States soldier, for they were anathema to him; he was doubly distressed as he thought that advantage of the wife's condition of pregnancy might have been taken by that soldier to have sexual intercourse with her, using the phrase in his evidence: "a woman cannot become "pregnant twice."

After receiving that letter the husband wrote a bitter reply and, though the later correspondence appears to show that matters before long got onto an even keel, yet some bitterness remained in his heart. In his view his wife had let him down by having thus associated with a United States soldier; this fact he seemed never to get over. Later, by confused and erroneous thinking, including some wholly unfounded idea that the child was born considerably later than the wife had originally wished him to believe probable, he began to question matters which he had previously and rightly accepted as true and to wonder if the

1958

Burch
v.
Burch.

pregnancy was not due to his wife's association with the United States soldier. In fact the child, a son, was born on October 12, 1945, somewhere between 278 and 283 days after the end of the husband's last leave. The child weighed 10 lbs. at birth, was certainly not premature, and arrived perhaps a week after its due date. The husband, at the trial, expressly disclaimed any intention of ever seeking to try and bastardize the child.

In February, 1946, the husband returned to England. He resumed married life, including sexual intercourse with his wife, without making any reference to the doubts that had crossed his mind. He was, however, of a suspicious nature and indeed already before 1945 had from time to time wrongly felt jealous of other men. In 1947, and again in 1949, unfounded suspicions of his wife on account of matters nothing to do with the birth of the child stirred his mind. That in turn revived his clouded thoughts about the child's birth. At some stage this husband, whose thoughts had, apparently, never fully recovered from the effects of the letter of March 22, 1945—in the sense that the ideas engendered by it returned intermittently to his mind—managed to convince himself that the child was not his own son. He reached this conviction despite having no facts emanating either from his wife or from any other source on which he could reasonably found that belief, and without ever having heard of the Canadian airman or of having any cause for complaint of his wife's conduct in January, 1944. The date at which he reached that state of mind could not be precisely fixed, but the court found that it was probably reached in 1947 or 1948 and at very latest by March, 1950. Having reached that state of mind he from time to time—not frequently—threw out remarks to his wife such as "I am certain the child is not mine." Later he made other remarks which were intended to convey the same impression to his wife. Sexual intercourse, however, continued, but with lessening frequency, and it continued until at any rate 1952. Between the date of the cessation of sexual intercourse and April, 1956, the wife continued, in all other respects, in her position in the matrimonial home.

About April, 1956, the wife discovered that the husband had formed an undue association, which, however, was not adulterous, with a girl whom he met in the course of serving in the Royal Auxiliary Air Force, which he had then joined. In fact the association had started about 1953. She tackled her husband about this and embarked on a conversation with a view to trying to keep the marriage together. In the course of this conversation she on her side came to confess her adultery with the Canadian airman 11 years before. The husband, still in undue association with the other girl, went immediately to a solicitor with a view to seeking a divorce. The husband and wife remained together in the same house until August, 1956, when the husband, who had been making further inquiries in order to check the confession made by the wife, left. By his petition dated August 21, 1956,

he sought a decree of divorce on the ground of the wife's adultery in January, 1945. The wife, by her answer, admitted the adultery but alleged that it had been condoned by the husband.

The matter came on for hearing in July, 1957, at Winchester Assizes, when Sachs J., holding that the wife's evidence was to be preferred to that of the husband, found the adultery proved and adjourned the matter for further argument by the Queen's Proctor on the question of condonation.

Guy Willett for the husband.
Robert Hughes for the wife.
Roger Ormrod for the Queen's Proctor.

The following cases were cited in argument in addition to those referred to in the judgment: *Wells* v. *Wells* [1]; *Roberts* v. *Roberts and Temple* [2]; *Marczuk* v. *Marczuk* [3]; *Fearn* v. *Fearn* [4]; *Peacock* v. *Peacock* [5]; *Beeby* v. *Beeby* [6]; *Elwes* v. *Elwes* [7]; *Collins* v. *Collins* [8]; *Wilmot* v. *Wilmot and Martin* [9]; *Cook* v. *Cook* [10]; *Baguley* v. *Baguley* [11]; *Everitt* v. *Everitt* [12]; *Forbes* v. *Forbes* [13]; *Beer* v. *Beer* [14]; *Hartley* v. *Hartley* [15]; *Elliott* v. *Elliott* [16]; *Crewe* v. *Crewe* [17]; *Preston-Jones* v. *Preston-Jones*.[18]

Cur. adv. vult.

SACHS J., reading his judgment, said that the case raised in an acute form some questions on the issue of condonation, and, referring to the facts material to that issue and to the wife's confession as to the isolated, unpremeditated and unfortunate incident of adultery, continued: It was in this fashion that the husband became aware of this single lapse many years earlier of one who had both before and since been a good and loving wife and who, at all times, had been a good mother to both children. Whatever one may think of a man for seeking a decree against the above background, he is entitled to it unless the court either finds that he condoned the adultery or is not satisfied that he did not condone it.

[1] [1954] 1 W.L.R. 1390; [1954] 3 All E.R. 491.
[2] (1917) 33 T.L.R. 333.
[3] [1956] P. 217; [1956] 2 W.L.R. 849; [1956] 1 All E.R. 657, C.A.; reversing [1956] 2 W.L.R. 1; [1955] 3 All E.R. 158.
[4] [1948] P. 241; 64 T.L.R. 218; [1948] 1 All E.R. 459.
[5] (1858) 1 Sw. & Tr. 183.
[6] (1799) 1 Hag.Ecc. 789.
[7] (1794) 1 Hag.Con. 269.
[8] (1884) 9 App.Cas. 205.
[9] (1948) 64 T.L.R. 460; [1948] 2 All E.R. 123.
[10] (1949) 65 T.L.R. 175; [1949] 1 All E.R. 384.
[11] The Times, Oct. 10, 1957.
[12] [1949] P. 374; [1949] 1 All E.R. 908.
[13] [1954] 1 W.L.R. 1526; [1954] 3 All E.R. 461.
[14] [1948] P. 10; 63 T.L.R. 606; [1947] 2 All E.R. 711.
[15] [1955] 1 W.L.R. 384; [1955] 1 All E.R. 625.
[16] [1956] P. 160; [1956] 1 All E.R. 122.
[17] (1800) 3 Hag.Ecc. 123.
[18] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

1958

Burch
v.
Burch.

Sachs J.

As regards condonation, the first period to be dealt with is that between February, 1946, and the date of the confession. Having regard to the arguments adduced on this issue, it is now convenient to summarize certain conclusions of fact, or in some instances, mixed fact and law, reached on the evidence before me.

During the above period: 1. The husband had no evidence upon which he could reasonably institute proceedings for divorce. 2. The husband had no reasonable grounds deriving from the wife's conduct for believing his wife had committed adultery—if the tests to be applied are the same as in the *Glenister* v. *Glenister* [1] line of cases. (In parenthesis it is to be noted that in *Wood* v. *Wood* [2] it was held that a 346 day gestation did not, of itself, afford such a ground, and in *Jones* v. *Jones* [3] emphasis was laid on the degree of proof needed to establish such a belief.) 3. The husband had no reasonable grounds for such a belief derived from any other source. 4. On no view of the facts (not even if the husband's evidence were accepted), could any proceedings ever have been reasonably instituted with a view to establishing that the child was not legitimate. (This view was accepted by all counsel concerned.) 5. The husband's suspicions, which gradually crystallized into convinced belief, related to the United States soldier and not to the Canadian airman. 6. He never forgave his wife (in the conversational meaning of "forgiveness") for her association with that soldier. Having assessed the husband as best I could after watching him in the witness-box, my finding is that upon and after convincing himself of his wife's guilt his attitude was in effect: "As I have no real "evidence, there is nothing I can do: I must carry on as if she "was not guilty." 7. Upon and at all times after convincing himself, he would, in all probability, have sought a divorce if he had secured evidence of his wife's guilt, and the wife probably feared that such was the case. 8. The husband never asked the wife a direct question as to her guilt; the wife never told a direct lie about it. Her replies to any remarks about the child took shapes such as: "If you know so much and suspect so much, "why did you come back?" (It is to be noted as regards all material times, i.e., before and immediately after the husband reached his convinced belief, the wife on being asked "Did you "commit adultery with that United States soldier?" or "Is "the child our son?" would in answering "No" and "Yes" respectively have stated what she believed to be true.)

Mr. Hughes, supported in this by Mr. Ormrod, submitted that in that state of affairs the husband had condoned the wife's guilty act. Their main submissions were that sexual intercourse with the wife, after being convinced of her guilt, constituted condonation with knowledge of that guilt; that the husband's state

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95.

[3] [1953] 1 W.L.R. 867; [1953] 2 All E.R. 345.

of mind in relation to foreigners was thus immaterial; and that because his concern related to the conception of the child it did not matter that the adultery was with a man different from the one he had in mind. Mr. Willett contended that there was no condonation, submitting, inter alia, that, in the absence of forgiveness in the conversational sense, there can be no condonation unless there is knowledge founded on appropriate evidence, and that in any event it did matter that the adultery was with someone other than the United States soldier.

Mr. Ormrod helpfully cited a considerable number of authorities bearing on the problems raised by the above conclusions. Save in one set of circumstances, to which I will later refer, "knowledge" of the wife's offence is stated in every case to be essential before a husband can condone. The phrases used as to the extent of the requisite knowledge vary a little. To take the more modern authorities, one finds "with full knowledge of "all the circumstances of the particular offence forgiven," *Bernstein* v. *Bernstein, per* Lopes L.J.[4]; "substantially aware "of the matrimonial sin committed," *Cramp* v. *Cramp and Freeman, per* McCardie J.[5]; "knowledge of the wife's offence," *Henderson* v. *Henderson and Crellin, per* Viscount Simon L.C.[6]; "full knowledge of all material facts," *Tilley* v. *Tilley*, Denning L.J.[7]; but the necessity of such knowledge is emphasized.

The exception where no "knowledge" is required is that set out in the charge to the jury in the first case in which condonation was discussed after the passing of the Matrimonial Causes Act, 1857. In *Keats* v. *Keats and Montezuma*[8] the Judge Ordinary stated[9]: ". . . a man may condone whether he knows of the "offence or not, in this way: he may say, 'I have heard stories "'about my wife. A and B have told me she has committed "'adultery. I can hardly believe it. I am in doubt about it; "'but whether guilty or not, I will take her back; she shall be "'restored to my bed.' That would be a condonation without "actual knowledge; and I think if after this he took her to his "bed again, he could not afterwards, on acquiring more certain "knowledge, revive the charge, as to which he had himself said, "'I care not whether it is true or false; I do not know whether "'it is true or not; but be it one or be it the other, I would "'equally take her back to my bed.'" The above passage, so far as counsel before me were aware, has never been criticized, and indeed in *Lowther* v. *Lowther*[10] it was expressly approved.

It follows in the present case that if condonation is to be affirmatively established it must be shown either that the husband had "knowledge" of the wife's offence before the date of the confession or, alternatively, that the husband's attitude was

[4] [1893] P. 292, 303; 9 T.L.R. 639.
[5] [1920] P. 158, 163; 36 T.L.R. 333.
[6] [1944] A.C. 49, 52; 60 T.L.R. 113; [1944] 1 All E.R. 44.
[7] [1949] P. 240, 261; 65 T.L.R. 211; [1948] 2 All E.R. 1113.
[8] (1859) 1 Sw. & Tr. 334.
[9] Ibid. 346.
[10] Unreported, Feb. 5, 1945.

1958

Burch
v.
Burch.

Sachs J.

that referred to in the above-cited passage of the charge to the jury in *Keats'* case.[11] In the former event the fact that there was sexual intercourse at material times renders unnecessary any investigation into, or findings as to, the husband's state of mind or as to what he said: the fact that there was sexual intercourse amounts to "clear proof that the husband has carried forgiveness "into effect" (*Henderson* v. *Henderson and Crellin*[12]), and the husband is precluded from denying that there was forgiveness in the special meaning (see *Cramp* v. *Cramp and Freeman*[13]) of that word in relation to condonation. In the second event questions arise as to the husband's words and state of mind at the material time.

Accordingly, the first question is whether this husband had at any time before the wife's confession the requisite knowledge of her offence. That phrase seems in the above-cited authorities to have been used compendiously to cover a number of constituent elements. It is necessary in each case to consider upon what foundation rests the alleged knowledge, whether the spouse believes (or must be taken to believe) that which is alleged to be known, and what are the material facts which must be shown to be known.

As regards the foundation needed for the knowledge, it has been argued on behalf of the wife that a firm conclusion reached in the absence of what a reasonable man regards as evidence constitutes knowledge within the meaning of the authorities. For the husband it was asserted that the possession of credible evidence, whether coming from the wife or from third parties, is an essential element of such knowledge.

As a matter of first impression it seems to me that a conclusion based on intuition, delusion, jealous obsession, or any other method than reasonable deduction from ascertained facts, does not constitute knowledge. Ingrained suspicion does not become knowledge merely because the man who holds it becomes convinced of its truth without proper supporting evidence.

I turn next to the special problems that arise in relation to the word "knowledge" in connexion with condonation, to see if there is any reason for that first impression to be displaced. In *Glenister* v. *Glenister* Lord Merriman P. draws attention[14] to the risks which a husband might incur if he was not entitled for the time being to leave his wife when once he had reasonable grounds for believing she had committed adultery. Here one has the converse case and must take into account the risks and difficulties which a husband might incurr if, at a time when he has no reasonable grounds for such a belief, he were held to be bound either to leave his wife or forfeit for ever his right to relief.

In relation to the problems arising in the *Glenister* v. *Glenister*[15] line of cases Lord Evershed M.R. in *Allen* v. *Allen*

[11] (1859) 1 Sw. & Tr. 334, 346.
[12] [1944] A.C. 49, 52.
[13] [1920] P. 158, 169.
[14] [1945] P. 30, 38.
[15] Ibid. 30.

said [16] that if a man alleges that he bona fide and reasonably believes his wife to be an adulteress, he must (save perhaps in exceptional cases) be regarded as stating: "I say and allege that "the evidence and materials in my possession are such that on "them a court should and would find that adultery has been "committed." The same approach was made to the parallel problems that arise in respect of condonation by no less an authority than Sir William Scott (Lord Stowell) in *D'Aguilar* v. *D'Aguilar*,[17] where he said [18] "it is not shown that she knew it "so that she could legally prove it." There thus seems nothing to displace and much to confirm the above impression.

Condonation being an absolute bar to a husband's right on securing evidence to be granted relief, it is of course obvious that a court would not lightly hold the bar to have been applied at a moment when from a practical angle, having regard to the absence of evidence, he neither has that right nor has any wish to forgo it. It is not, however, in the present case, necessary to decide whether, in order to impute knowledge to a spouse, it must of necessity always be shown that he or she had evidence fit to be laid before a court. Here the husband was not aware of any facts on which a reasonable husband could ground a belief in his wife's adultery, and it seems to me that whilst belief is generally an essential ingredient in the knowledge required for condonation (*Ellis* v. *Ellis and Smith* [19]), belief of itself does not constitute such knowledge. Mere suspicion that grows to conviction is no different from suspicion that does not lead to that result. For these reasons the husband cannot be held to have had knowledge of his wife's adultery before the confession.

There is a further reason why this husband cannot be held to have had the requisite knowledge. The facts which he believed did not constitute all the material facts. What facts are material —or what are the facts of which the spouse must be "substan- "tially aware"—must necessarily depend on the circumstances of the particular case and are not always easy to determine. Prima facie, any fact is material which would be so taken by a reasonable man. In addition any fact is material which the offending party knows would be so regarded by the innocent spouse.

At one stage of the argument I was attracted to Mr. Ormrod's submission that the only thing that this husband was really concerned with was that there had been adultery at a time when the conception of the child might have been affected; that his belief thus related to the essence of the offence; that, accordingly, it was immaterial that the adultery was with a Canadian airman and not the United States soldier; and that in this way there could be overcome the obvious difficulty—well exemplified in terms of pleading—of asserting that mistaken awareness of adultery with A can constitute condonation of adultery with B.

[16] [1951] 1 All E.R. 724, 731.
[17] (1794) 1 Hag.Ecc. 773.
[18] Ibid. 786.
[19] (1865) 4 Sw. & Tr. 154.

1958

Burch
v.
Burch.

Sachs J.

On further consideration, however, I have been persuaded by the argument of Mr. Willett, whose submissions on the issue of condonation were consistently compact and helpful, that for this husband there would, as his wife well knew, have been a considerably added distress in finding that there had been two men in her life at that period—and not merely the one of whom she had told him. This added distress would undoubtedly have weighed in the scales with him, even if he could at the vital moment have approached the matter on the footing that the association with the United States soldier was innocent. Accordingly, I hold the identity of the adulterer was material, and would only add that I very much doubt whether the obvious difficulty to which I have above referred is overcome by Mr. Ormrod's argument, attractive though it may have been.

It is proper to record that in the course of argument at the Bar various submissions were made as to what the husband and wife respectively should have done as regards asking for and giving information in the period before the husband became convinced of his wife's adultery. Mr. Ormrod, in particular, founded much upon moves which he argued the husband should have made. Matrimonial life, however, is not a game of chess; it is an infinitely variable compound of human relations. I for one feel neither competent to formulate nor desirous of formulating rules as to how spouses should conduct themselves in circumstances such as those which here arose. The difficulties in such situations are always great and here the interests of the child were an important factor which could never be left out of account. Some of the difficulties that can arise are mentioned in the judgment of Richards J. in *Donnithorne* v. *Donnithorne*.[20] There he refers [21] to the risks which are run by a husband, who suspects his wife, of "insulting a perfectly innocent wife by a "question which she might take as implying an accusation or of "making surreptitious inquiries, the very fact of making which "might well embitter his mind, with the probable result of per-"manent unhappiness." Those were not perhaps the particular difficulties which faced the husband in this case, but that merely serves to illustrate the hazards of attempting to formulate rules.

It being thus established that before the wife's confession the husband had no knowledge of her guilt, she cannot assert that there was condonation before that date unless it can be shown that this was one of those cases in which in effect the husband said: "I care not whether it is true or false; I do not know "whether it is true or not; but be it one or be it the other, I "would equally take her back to my bed."

Once, however, I had indicated the probability that my findings as to the husband's state of mind would be those mentioned earlier in this judgment, the contention that the present

[20] (1930) S.A.S.R. 182. [21] Ibid. 185.

case could be brought within the above passage in the Judge Ordinary's charge [22] was only faintly pressed.

One important respect in which the position of a husband who has knowledge of his wife's offence differs from that of one who has suspicion short of such knowledge is as follows. The former upon having sexual intercourse with his wife must be held, and upon otherwise reinstating her will normally be held, to be precluded from denying that he has forgiven her within the meaning of that word earlier indicated. In the case of the latter he cannot be held to have thus forgiven her unless the evidence of what he said or what he led his wife to believe warrants such a conclusion. (It may also be that proof of his intention aliunde would suffice—but that does not arise here.)

Suffice it accordingly to say that the husband neither stated nor felt that he "did not care": the wife was never led to believe he did not care—indeed she knew that he did care: and there was thus no express or implied foregiveness—either in the conversational sense or within the special meaning of that word. There was thus no condonation of the type under consideration.

There next falls to be considered the period between the confession and the time the husband left the matrimonial home. It was neither pleaded nor argued at Winchester that there had been such condonation, but Mr. Ormrod properly called attention to this question.

Where the parties remain, without having sexual intercourse, in the same matrimonial home after the husband has gained knowledge of his wife's guilt, the question whether condonation is to be inferred from continuance under the same roof is in essence a question of fact (cf. *Mackrell* v. *Mackrell* [23]): and cases were cited which fell on either side of the line on their particular circumstances. Immediately a husband learns the truth from his wife she is notionally deposed from her matrimonial position. There then follows that which, for lack of a better name, may be called a suspense period. During that period the husband has time to consider the position. That period may be terminated in favour of the wife either by some explicit words or conduct of his which constitutes condonation, or by his letting things run on so long that the day comes when the court infers that the wife has been reinstated. Alternatively if the husband leaves home before either of the above events, the court may be satisfied that there was no condonation.

Having regard to the strained relations that existed between this husband and his wife at the material times, to the fact that during the period he went to solicitors and made certain inquiries before he left, and to the other factors which emerged in evidence, I am satisfied that there was no condonation after the confession.

It follows that, as it has been affirmatively shown that the husband did not condone his wife's adultery either before or after the confession, his petition must succeed.

[22] (1859) 1 Sw. & Tr. 334, 346. [23] [1948] 2 All E.R. 858.

1958

Burch
v.
Burch.

Sachs J.

If the upshot of the present case reflects somewhat starkly the aphorism of McCardie J. that: "By the matrimonial law of "this country the offence of every married person is recorded on "tablets which do not perish" (*Cramp* v. *Cramp and Freeman* [24]) the remedy might lie in the legislature allowing some discretion as to whether those rare petitioners, who come to the courts on discovering after so many years an old offence, shall be granted a decree.

There remains to be mentioned the supplemental petition. This was filed at the end of October, 1957, just at the time when there would normally have been heard the argument for which this cause was adjourned from the Winchester Assizes. The matters in it have nothing to do with the issues I have so far referred to and rest on events alleged to have occurred after the evidence at Winchester was concluded. Neither the application to file this supplemental petition nor the order giving leave for it to be filed was brought to my notice till recently, when I caused a summons for further directions to be issued. It then appeared that it was not as universally known, as one would have thought, that once, at assizes, a judge has been seized of a cause to the extent of hearing evidence, every application affecting the pleadings or the conduct of the trial ought, save in really exceptional circumstances, to be made to or referred to that judge: and for this reason I mention the matter. Had the application come before me I would have rejected it: as it was the trial of the issues raised by the supplemental petition were ordered to be deferred until those raised by the original petition had been disposed of.

In the circumstances as they now exist it seems that the order, subject to any further argument as to its form, should be, first, that a decree nisi is granted on the original petition, and secondly, that the supplemental petition be either permanently stayed or alternatively dismissed—the order to dismiss not to be drawn up for three months; each party to have liberty to apply in that period.

Decree nisi.

Solicitors: *Blundell, Baker & Co. for Clement J. Collard, Bournemouth; Batchelor, Fry, Coulson & Burder for F. J. M. Gale & Co., Bournemouth; The Queen's Proctor.*

E. J.

[24] [1920] P. 158, 161.

[HOUSE OF LORDS.]

* TAYLOR	APPELLANT;	H. L. (E.)†
AND		1958
JOHN SUMMERS & SONS LTD. . . .	RESPONDENT.	*April* 15.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Taylor* v. *John Summers & Sons Ltd.*[1]

The APPEAL COMMITTEE dismissed the petition.

---

* QUALCAST (WOLVERHAMPTON) LTD. .	APPELLANT;
AND	
HAYNES	RESPONDENT.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Haynes* v. *Qualcast (Wolverhampton) Ltd.*[2]

The APPEAL COMMITTEE allowed the petition.

---

* R. E. GLANVILLE & SONS (BOVEY TRACY) LTD.	APPELLANT;
AND	
RUTHERFORD	RESPONDENT.

PETITION for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Rutherford* v. *R. E. Glanville & Sons (Bovey Tracy) Ltd.*[3]

The APPEAL COMMITTEE allowed the petition.

---

† *Present*: LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

[1] [1957] 1 W.L.R. 1182; [1957] 3 All E.R. 541.

[2] [1958] 1 W.L.R. 225; [1958] 1 All E.R. 441.

[3] [1958] 1 W.L.R. 415; [1958] 1 All E.R. 532.

1958
March 24.

* PRACTICE NOTE.
(FEES FOR INTERLOCUTORY WORK IN MATRIMONIAL CAUSES.)

Husband and Wife—Practice—Costs—Counsel's fee for interlocutory work.
Barrister—Fees—Matrimonial causes—Interlocutory work.

Statement on the Application of the Joint Statement by the Law Society and Bar Council on Junior Counsel's Fees for Interlocutory Work in Matrimonial Causes.[1]

In view of the diversity of the interlocutory work in matrimonial causes, the following notes for guidance are issued by the registrar of the divorce registry as representing a statement of the policy which will in future be adopted by the taxing authorities in applying the Joint Statement to matrimonial causes.

1. A substantial amount of the interlocutory work in matrimonial causes will fall into the category which justifies the allowance on taxation of an increase in fees of only 50 per cent. rather than 100 per cent., for example—

(*a*) Settling simple petitions, except where cruelty, or constructive desertion, or two or more different matrimonial offences together are alleged, where a higher fee will be allowed.

(*b*) Short and simple Advices on Evidence in undefended causes which will always be allowed.

(*c*) Short Conferences or Opinions on a short point.

(*d*) Formal Answers or Replies.

2. Higher fees, however, will be allowed in such superficially simple work if it can be shown that in a particular case counsel has had to put more than the usual amount of time into it.

3. It is intended that in all other classes of work fees allowed shall ordinarily be raised by 100 per cent. and in proper cases by a greater percentage, so that in the aggregate, taking into account brief fees in ancillary matters, counsel's fees allowed for interlocutory work shall be increased by something approximating to 100 per cent. It is not proposed that the conference fee allowed on an interlocutory or ancillary brief should be increased.

B. LONG,
Senior Registrar.

March 24, 1958.

[1] The Joint Statement is contained in the April, 1958, issue of the Law Society's Gazette (see also 102 S.J. 268).

[COURT OF APPEAL.]

* HICKS v. BRITISH TRANSPORT COMMISSION.

C. A.

1958
March 3, 5, 10, 11, 12.

Lord Evershed M.R., Parker and Sellers L.JJ.

[1956 H. No. 2580.]

Railway—Negligence—Shunter injured by points lever—Practice tolerated by employers of riding on locomotive steps—Siting of lever—Foreseeability of risk—Failure to consider safety precautions.

Railway — Statutory duty — Points — Lever — Lever "parallel to the "adjacent lines"—Meaning of "parallel"—Meaning of "adja-"cent"—Prevention of Accidents Rules, 1902 (*S.R. & O.,* 1902, *No.* 616), *para.* 5.

Negligence — Contributory negligence — Inadvertence of workman — Shunter riding on locomotive steps—Duty of care enhanced—Knowledge of special risks—Failure to see lever—Inexcusable inadvertence amounting to negligence.

A shunter employed by the defendant commission was riding on the bottom step of a locomotive travelling between a station and a nearby signal box when, apparently, he came into contact with a vertical points lever and fell off the locomotive. No one saw the man fall. The train went over his legs and he was seriously injured. The lever, which it was conceded that he struck, was about 3 feet high. It had been placed between the up line and a spur line leading to sidings about one month before the accident happened. It was slightly closer to the up line than the spur and the clearance between the steps of a passing locomotive and the lever was not more than 8 inches. The lever was painted white and the accident happened on a clear day about midday. It moved in a plane parallel to the up line, and operated to switch trains by a switch line from the up line to the down line. It was notorious that shunters doing the sort of job that the injured plaintiff did habitually rode on the steps of the locomotives and the practice was tolerated by the defendants with few exceptions where the circumstances were unusually dangerous. The line where the accident happened was used by only one train each day from Monday to Friday. The plaintiff had made the journey on a number of occasions since the lever was installed. He knew the risks of riding on the step past the lever but it was found that on that particular day he did not see the lever.

In proceedings brought against the defendants the plaintiff claimed that they were in breach of the statutory duty imposed by paragraph 5 of the Prevention of Accidents Rules, 1902,[1] and also that they were guilty of common law negligence:—

Held, (1) that "in a position parallel to" in paragraph 5 of the rules meant "in a position so that the lever moves in a plane "parallel to"; that, although the lever was not parallel in this

[1] Prevention of Accidents Rules, 1902, para. 5: "Where point rods "and signal wires are in such "position as to be a source of danger "to persons employed on a railway "whilst in the execution of their "duty, such point rods and signal "wires must, within two years from "the coming into operation of these "rules, be sufficiently covered or "otherwise guarded.

"Within the same period ground "levers working points must be so "placed that men when working "them are clear of adjacent lines, "and shall be placed in a position "parallel to the adjacent lines, or in "such other position and be of such "form, as to cause as little obstruc-"tion as possible to persons employed "on the railway whilst in the execu-"tion of their duty."

C. A.

1958

Hicks
v.
British
Transport
Commission.

sense to the spur line, the relevant "adjacent lines" were the up lines, because the lever served the points for switching trains from the up to the down line; that, accordingly, the lever was placed in a position parallel to the adjacent lines; that that sufficed to satisfy the statutory duty imposed on the defendants towards the plaintiff, who was not a person engaged in working that lever; and that on the construction of paragraph 5 of the rules the requirement that the siting should be such as to minimize obstruction to railway employees was alternative to the first requirement and did not, therefore, have to be considered.

(2) That there was evidence to support the finding of the judge that on a reasonable balance of probabilities the defendants were negligent for, as prudent employers, they should have foreseen the danger to a shunter riding on the step of a locomotive and should have considered safety precautions.

(3) That the plaintiff's duty to take reasonable care of himself was enhanced by his knowledge of the risks involved in riding on the step because of the unusual siting of the lever, and that his inadvertence in the peaceful conditions of work prevailing and the absence of distraction amounted to negligence on his part which had contributed equally to the causation of the accident with the negligence of his employers.

Caswell v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722; *Staveley Iron and Chemical Co. Ltd.* v. *Jones* [1956] A.C. 627; [1956] 2 W.L.R. 479; [1956] 1 All E.R. 403, and *Hutchinson* v. *London and North Eastern Railway Co.* [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330 distinguished.

Decision of Havers J. varied.

Appeal from Havers J.

On February 1, 1955, at 1.30 p.m. John Thomas Hicks, a shunter employed by the British Transport Commission, fell from the step of a locomotive drawing goods wagons along a line close to a station and connecting Muswell Hill with Highgate. The station was known as Cranley Gardens station. The shunter was seriously injured and lost both feet. He brought an action against the commission, basing his claim both on common law negligence and also on breach of statutory duty. The commission denied liability and said that the plaintiff was the author of his own misfortune, or, alternatively, that it had been contributed to by his negligence. In addition to failing to keep a proper look out, it was said that the plaintiff had not heeded warnings given to him by the commission's servants, or the injunction contained in a booklet entitled "Your Personal Safety" given to him before the accident, which forbade the practice of travelling on steps, and had further ignored rule 118 of the British Railways' Rules for Observance by Employees, January 1, 1950, which required employees to take special care when travelling on engines to ensure that there was a sufficient clearance for safety.

At the time of the accident Cranley Gardens station had been closed to passengers for about six months and the line on which it stood was being used from Monday to Friday inclusive only once a day by one train which brought coal and other goods to various points including Cranley Gardens station. A short distance west

of the disused station was a switch line enabling trains on the west-going up line to be carried over to the down line and to be returned whence they had come.

At a distance further west from the points operating that switch line there was a bridge, and by the bridge there was a "ground lever" whereby it was possible to divert trains on the up line to spurs or shunting lines. There were three such lines, called "front road," "coal road" and "back road," and their purpose was that wagons which were to be left at Cranley Gardens station would be pushed by the train on to one or other of those three lines and left there, the train continuing either further westward or going back again to Muswell Hill. The train would also be able to pick up from one or other of these three lines, "front road," "coal road" or "back road," empty wagons which had been left there on previous occasions. In the more active days of this length of railway line there had been a signal box to the west of the station from which the points or other mechanical devices were worked which switched trains from the up line to the down line, and to and from the three spurs. When the use of the line became restricted, it was thought to be no longer economic and sensible to keep the signal box in use, and it was closed. The means of switching trains from the up to the down lines or from the up line to the spurs thereafter was done by vertical hand-operated point levers; and that had been the state of affairs for some four of five weeks before the accident happened.

One of the levers was situated in front of the disused signal box and the other in the space between the up line and a spur. This latter lever controlled the points for the cross-over between the up and down lines. The lever was between 3 feet and 3 feet 1½ inches high and was worked by a spring, so that if a man pulled the lever correctly the tie rod to which it was connected made the tongue of the points come over into the position required to switch the trains. The lever was made of iron and when erected had been painted white on both flat sides and edges. It moved in a plane parallel to the up line.

At the point at which the switch lever was sited, the distance between the outside of the southern pair of the up lines and the spur metals was 5 feet 8½ inches, which was 3½ inches less than the ordinary distance between two parallel sets of metals on an operating section of the railway. The ordinary distance was 6 feet and was normally spoken of as "the six-foot." The lever was placed not midway between the southern rail of the up line and the spur but was closer to the up line. It was 2 feet 6¾ inches from the up line and 3 feet 1¾ inches from the spur and, as a locomotive passed the switch lever, the steps and the floor level of the engine cab would be not more than 8 inches from the lever. Further, at the material part of the railway there was a slight curve, the southern of the up lines being on the inside of the curve, so that there was a tendency for the trains coming round

C. A.
1958
Hicks
v.
British
Transport
Commission.

the curve to lean very slightly southerly from the strictly horizontal. In these circumstances a man riding on the step of an engine past the switch lever would pass extremely close to it.

The plaintiff was an experienced shunter. His job was to come with the train from Muswell Hill. The train paused at the up platform at Cranley Gardens station and it was the plaintiff's function then to leave the train and to go and acquaint himself with the situation on the "front road," "coal road" and "back road"—to see what empty wagons were to be picked up and so forth; he then rejoined the train, which moved forward to the bridge, from which point it would go backwards into the shunting area.

The evidence proved clearly that it was notorious that shunters engaged in that sort of operation, during the short space of time which would elapse between the train moving forward to be shunted and the actual shunting, would not get into the cab of the engine or into the guard's van, but would stand on the steps, or one of the steps, of the locomotive itself. On the particular locomotive there were two steps. The bottom step was wider than the upper step, and a man standing on either step necessarily protruded somewhat away from the engine. The day of the accident was a clear winter day. The plaintiff got on to one or other of the steps of the locomotive to go to a point somewhere close to the bridge, and fell from the locomotive in such a way that his legs were crushed by the train. Although there was a guard on the train and an engine driver, and presumably a fireman too, nobody saw the actual fall or could describe what exactly caused it. The plaintiff had no recollection of the exact impact. The case was fought on the assumption that he had been knocked by the switch lever off his perch but it was not known whether his heels, his feet, or some other part of his anatomy or his clothes came into contact with the lever.

Havers J. found that there had been a breach of the statutory duty imposed on the commission by paragraph 5 of the Prevention of Accidents Rules, 1902, because the lever was not in "such "other position and . . . of such form, as to cause as little "obstruction as possible to persons employed on the railway "whilst in the execution of their duty." He further found that on a balance of probabilities the commission had been guilty of negligence for they should have foreseen the risk of serious injury to a shunter riding on the engine and the evidence showed that they had not considered the safety question at all. He found that the plaintiff had not seen the points lever on the day of the accident but, nevertheless, that he was not guilty of contributory negligence. Accordingly, he gave judgment for the plaintiff and awarded him £10,898 damages (£10,500 general damages).

The commission appealed, and on the appeal the additional ground of defence was taken, with leave of the Court of Appeal, that the commission were not in breach of paragraph 5 of the Prevention of Accidents Rules, 1902, because the lever was sited

parallel to the adjacent lines and on the true construction of that rule it was sufficient for the commission to show that they had satisfied one of the alternative requirements there set out. The commission did not dispute the decision as to the quantum of damages which should be awarded if liability were established.

Marven Everett Q.C. and *H. Tudor Evans* for the commission.

N. R. Fox-Andrews Q.C., *W. G. Wingate* and *Norman Irvine* for the plaintiff.

In addition to the cases referred to in the judgments the following were cited in argument: *Latimer* v. *A. E. C.*[2]; *Benmax* v. *Austin Motor Co. Ltd.*[3]

LORD EVERSHED M.R. stated the facts set out above, commenting that a persistent difficulty had been the imprecise nature of the assumption on which the case had proceeded from the outset, namely that the plaintiff had been knocked off his "perch" by the lever. That, said his Lordship, had particular significance on the issue of contributory negligence. Dealing first with the questions of statutory liability, his Lordship continued:

The liability is alleged to arise under the Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900. By section 1 of that Act power was conferred upon the Board of Trade to "make such rules as they think fit with respect to any of "the subjects mentioned in the schedule to this Act, with the "object of reducing or removing the dangers and risks incidental "to railway service." In subsection (3) the rule-making power was expressed to comprehend a power to require the use of certain plant or alternatively to require the disuse of certain plant. The schedule to which reference is made in subsection (1) included, among other things, the following: "Protection of point rods "and signal wires, and position of ground levers working points." It is not, I should say, in doubt that the thing that I have called the switch lever is a ground lever working point.

The relevant paragraph of the Prevention of Accidents Rules is paragraph 5, and it must be confessed that, looking at it now with the added wisdom given by time after the event, it is not a happily drawn paragraph. It begins as follows: "Where point "rods and signal wires are in such position as to be a source of "danger to persons employed on a railway whilst in the execution "of their duty, such point rods and signal wires must, within two "years from the coming into operation of these rules, be suffi-"ciently covered or otherwise guarded."

I have read that paragraph because of the reference to "two "years from the coming into operation of these rules"; for the second part of the paragraph inauspiciously opens with the phrase

[2] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[3] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

C. A.
1958
Hicks v. British Transport Commission.
Lord Evershed M.R.

"within the same period"—which presumably, as a matter of construction of the language, means "within two years from the "coming into operation of these rules." It will be seen that that opening phrase creates at once a difficulty in this case, since the rules came into operation in 1902, whereas this point lever was installed over half a century later. No point, however, has been made by Mr. Everett upon those words; he has not sought to say that, in the circumstances, the whole of the second part of the regulation is rendered wholly futile and inoperative now; and so I will continue with my reading "Within the same period "ground levers working points must be so placed that men when "working them are clear of adjacent lines, and shall be placed "in a position parallel to the adjacent lines, or in such other "position and be of such form, as to cause as little obstruction "as possible to persons employed on the railway whilst in the "execution of their duty." It will be seen that that paragraph contains more than one distinct obligation. The first is in the opening phrase—"points must be so placed that men when "working them are clear of adjacent lines." The question in this case arises on that part of the paragraph, which relates only to the men who actually work the points; but, as a distinct obligation, the paragraph goes on: "and shall be placed in a position "parallel to the adjacent lines. . . ." [His Lordship referred to a plan which showed the direction in which the lever moved when it was operated. He continued:] That, from the ordinary practical common sense point of view, is beyond a peradventure in a plane "parallel to" the up line or up lines. That being so, the words I have read would appear to be satisfied; the points were placed in a position parallel to the adjacent line, for I conceive that when dealing with points, that phrase "in a position "parallel to" means "in a position so that the lever moves in "a plane parallel to." If that is right, then prima facie the alternative which follows has no application. I will come back in a moment to deal with it; but Mr. Fox-Andrews had a point of some mathematical ingenuity, but (I hope he will forgive me for saying) not of any apparent appeal to common sense. He said that it does so happen that here the lever is placed at a point where what I call the spur is shortly to the west going to join the up line—in other words, the up line and the spur line are converging; and although it is plain that this handle may be "parallel to" the up line, it cannot be parallel at the same time with the other line, because the two lines themselves are not parallel to each other. Therefore Mr. Fox-Andrews' point is that where one has got converging lines, mathematically it is absolutely impossible to comply with the first part of this alternative. I cannot accept that view of the meaning of this paragraph. As Parker L.J. pointed out, carried to its proper logical conclusion, it would be fatal in the present case that the lines here are on a slight curve, for the plane of the movement of the lever does not and could not follow the curve of the lines. But, construing the

relevant words according to what I have called, and I hope justifiably, the common sense of them, it seems to me that the position of this lever was such that its plane of operation was parallel to the relevant adjacent line. It was in fact nearer to the up line than the spur line, but I do not rely on that. I think the relevant line was the up line, because it was the points for switching trains from the up line to the down line that this mechanism was erected to serve.

It seems to me, therefore, that the first part of this obligation covered by the words "and shall be placed in a position parallel "to . . . " are satisfied. But that is not quite the end of the matter, because the words which follow are: "or in such other "position and be of such form as to cause . . ." In the court below it was conceded that although the parallel position may suffice to exclude the words "or in such other position," it does not exclude the obligation to be extracted from the next five words "and be of such form." That view of the matter is given some emphasis first by the use of the conjunction "and," and, more, by the insertion here of the verb "be." It does not read "and in such other position and of such form," but "or in such "other position *and be* of such form"; and, so it was said, awkward as the language is, one should read these words as follows: "or in such other position and (in either alternative) "shall be of such form as to cause . . ." making the words "as "to cause as little obstruction" do a double duty applying to "the other position," in cases where that phrase operated, and to the words "and be of such form" in all cases.

It is a little tempting to think that such might have been the intention of the draftsman. But I have come to the conclusion that, as a matter of English (if this paragraph deserves such an appellation) it is not really possible so to construe the words. One great difficulty is the use of the commas which I emphasized in reading. The words "or in such other position and be of such "form" are preceded and followed by commas; and after the second comma come the words "as to cause as little obstruc-"tion. . . ." It seems to me, therefore, that the inevitable meaning of this collocation of words is that the whole formula "or in such "other position and be of such form" is intended as alternative and only alternative to the preceding part of the obligation "shall "be placed in a position parallel . . . "; so that the provision that the lever must be in such other position and of such form as to cause as little obstruction, etc., only has to be considered in cases where the lever is not in a parallel position.

There are, to my mind, two circumstances which lend a little support to that view. The first is that if the handle is parallel to the lines, then I should be disposed to think that the general nature of these things described as "ground levers working points" being well known, they would answer automatically any question as to form. It is only when one gets these things in an unusual position that their form as well as their position may have to be

C. A.
1958
Hicks v. British Transport Commission.
Lord Evershed M.R.

considered. Second, as was pointed out during the course of the argument, the schedule to the Act in terms limited the rule-making power to "the position of" the ground levers without any reference to their form.

I, therefore, conclude in Mr. Marven Everett's favour that the position of this lever is such that there was no breach of the paragraph. The point which I have decided in his favour was not in fact taken below. It was taken in this court by our leave (though I think it was open to Mr. Everett in any case); and, therefore, there is nothing in the judge's judgment to which I need allude.

There was another point on the paragraph of the regulation upon which Mr. Marven Everett sought to rely, if he were wrong on that with which I have tried to deal. He said that at the very end of the paragraph, the words "as to cause as little obstruction "as possible to persons employed on the railway whilst in the "execution of their duty" did not cover this case because the plaintiff, when riding as he was riding on the step of the locomotive, could not be said to be acting in the execution of his duty. In the circumstances it is not, of course, necessary to deal with that point; but my present inclination is to say that on that point the judge rightly held that the plaintiff was acting in the execution of his duty; in other words, if it were necessary, as at present advised I should be disposed to determine that point adversely to Mr. Marven Everett.

What I have so far said removes from the scene, so to speak, the claim raised for breach of statutory duties. I now come to that which has been the main burden of the case, namely, the question of common law negligence, and linked with it, the question of contributory negligence. I have already said that it is a feature of the case which is of real significance that the actual accident was observed by no one and there is no evidence as to its exact nature; but I apprehend that in cases of this kind, since it is conceded that the plaintiff did strike the lever, the problem for the judge was one of determining as a matter of fact to what end on that assumption the probabilities of the case pointed; and I observe that he cited the well-known passage from *Paris* v. *Stepney Borough Council*,[1] and in so doing it seems to me that no one could say that he had not properly directed himself as to the task in hand.

If I may usefully anticipate my conclusion, it is in my judgment of this nature: here was a section of the railway which had become disused save for the single purpose of acting as a place from which a few shunting operations daily took place, the object being to deliver certain goods to one or other of the spur lines and thence to remove the empty wagons. It was, therefore, of the essence of the case that the shunters employed would adopt habits and customs that shunters notoriously do adopt, and it has not been in dispute that, notwithstanding anything in the book of

[1] [1951] A.C. 367, 384; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

rules of 1950, shunters doing the sort of job that the plaintiff was employed to do, travel from the station (the point where the train first stops) to the point where they operate the shunting levers by standing on the steps of the locomotive. That such a practice in certain circumstances may be dangerous is undoubtedly the fact, and the evidence was that in some cases the responsible officers of the British Transport Commission or the British Railway Executive take steps to prevent, as far as they can, men exposing themselves to that sort of risk; but, apart from that limited class of case we must proceed, I think beyond any doubt, on the view that the riding on the steps of engines on the part of shunters was a practice recognized and accepted by the responsible officers of the railway undertaking. It follows, therefore, as I think, that the duty of the commission must be one related to the fact that someone riding on the steps of the engine would be put at peril if some obstruction were placed in a position in which it would be likely to hit him. So I think the really vital factor in this case is that the siting of this switch lever was such that it left between the plantiff and the up lines a space which was described by the adjective "meagre." In the context in which that phrase was used I am myself left in no doubt that the witnesses meant thereby to say that in this case there was unusually little room between the lever and the passing locomotive; and that is, I think, another way of saying that the margin of safety was extremely and unusually slight.

[His Lordship referred to the judge's findings that the margin of safety was very small and that in siting the lever the responsible officials had paid no regard to the safety of shunters riding on the engine steps, on which he had concluded that the commission fell short of their duty as prudent employers knowing what their employees were likely to be doing. After reviewing the judgment and the evidence (which indicated that the lever could have been sited differently and in a place which might have made all the difference from the point of view of the safety of shunters, and that a different type of lever could have been used, and was in fact used after the accident) his Lordship concluded that the conclusion of fact reached by the judge was justified and ought not to be disturbed. His Lordship continued:] There remains the problem of contributory negligence. The installation of this points lever took place at the very beginning of 1955, so that when the accident occurred the plaintiff had on quite a number of occasions taken this journey, and taken it, as I assume, in the same way as he travelled on February 1. It further will be borne in mind that this was not a busy shunting line with men working at pressure and against a background of noise and movement. The quiet of Cranley Gardens station was broken only once a day by the arrival of this coal train. There was no particular urgency: the whole of the rest of the day was available to complete the not very intricate operation of taking on the empty wagon, a wagon left before, and leaving behind the

C. A.
1958
Hicks
v.
British Transport Commission.
Lord Evershed M.R.

full wagon or a wagon which the train had brought. This accident happened on February 1, 1955, but there had been the possibility of it happening on any of the days during the preceding five weeks. It is, therefore, not surprising that the judge concluded that it must have been something which the plaintiff himself omitted to do on February 1 which had produced this unhappy result. After referring to a passage from *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ltd.*,[2] the judge said: "I bear these "principles in mind when I apply myself to the question which "I have to decide, whether or not the defendants have "satisfied me that the plaintiff was, in the circumstances of this "case, guilty of contributory negligence. I think it is an "inescapable conclusion that, for some reason or other, at the "critical time the plaintiff did not see this lever. I think it "follows also that his failure to see the lever was a contributory "cause of this accident; but, using the language of Lord Greene "M.R., in the case to which I have referred, the question I have "to consider is: Have the defendants proved that in all the "circumstances, whatever they may have been, the failure to see "the lever was negligence? On the one hand, as I have said, "the lever was 3 feet 6 inches high. It had been painted white "on the sides and edges. The handle and the bottom had not "been painted. No doubt there was, during the four to five "weeks which had elapsed, some discoloration of that white "from the ordinary incidence of the English climate in winter "time; but this was about 1.30 p.m. on February 1, when the "visibility was good, and I do not think that there was anything "in the background to make it more difficult to see this lever. "I find, therefore, it was clearly visible and could have been seen "by the plaintiff. Also, there can be no doubt that, though it had "not been there very long, between four and five weeks, its "position was well known to the plaintiff. He had been shunting "there during that period and, of course, he had had many "opportunities of seeing it. In addition, the plaintiff told me "that he had had a conversation with Mr. Smith—he says a few "months before the accident, but it cannot have been as long as "that; some time before the accident—in which he said, after "[the lever] had been erected, it was a bit dangerous and some-"body would catch it one of these days. Mr. Smith did not "remember this. Also, of course, I have to bear in mind rule "118, to which I have already referred, which says that staff riding "on engines or vehicles, or when on the ground alongside vehicles, "at converging points in sidings must take special care; also, the "general duty to take care imposed by rule 11 (*a*) of the rules "and, of course, the duty at common law which rests upon a "workman to take reasonable care for his own safety in all the "circumstances of the case. As Mr. Marven Everett has pointed

[2] [1936] A.C. 206.

"out, this accident did not take place in a factory, with all its "distraction of noise, confusion, moving machinery and men "moving about, and perhaps in a somewhat narrow space. This "man was engaged on a comparatively simple operation of "helping shunting, an operation with which he was familiar. It "was suggested by Mr. Marven Everett that while he was "riding on this step of the engine he had nothing in the world to "do except to look after his own safety. On the other hand, "Mr. Stanley, the station master, gave the plaintiff a very good "character. He said he was a good, sensible, hard-working chap, "and he said he would say that he was a careful workman. Mr. "Fox-Andrews on his behalf has contended that it is not con-"tributory negligence because on one occasion he did not see this "lever, and he argued that a momentary period of inattention "does not in itself constitute negligence on the part of the "workman." And then Mr. Fox-Andrews is quoted as having suggested that there might have been here some distraction of the plaintiff's attention.

I have read that passage at some length because upon this very difficult matter I well appreciate that it is said that the court should no more disturb the judge's conclusion of fact upon the question of contributory negligence than it should in the case of negligence on the part of the commission. But the two questions are not, I think, quite parallel. The judge has drawn the inference of fact that to a substantial extent, to say no more, a contributory cause of the accident was the plaintiff's own inattention, but he has gone on to conclude on the whole that the commission have failed to prove that the inattention, the inadvertence, amounted to negligence.

I cannot help feeling that perhaps there has been an undue significance attached to the word "inadvertence," as though inadvertence was something necessarily distinct from negligence. The fact, of course, is that inadvertence may itself amount to negligence or it may not. But, as Mr. Fox-Andrews himself pointed out, the question upon contributory negligence is, in essentials, the same as that upon negligence by the commission: in the circumstances of this case to what end does the reasonable balance of probabilities point? I have given my grounds for thinking that the reasonable balance of probabilities points to negligence on the part of the commission, or, at least, to the view that we should not disturb the finding of the judge to that effect. But on the whole I have been unable to follow the judge in his conclusion in the passage which I have read acquitting the plaintiff of contributory negligence; for, in my judgment, the conclusion is not in truth consistent with the premises which precede it. It is the fact here—the inescapable fact—that the plaintiff, riding as he was upon the engine, knew perfectly well what the risks of such conduct were; and although I fully agree with Mr. Fox-Andrews that the rules of 1950 which enshrine the

C. A.
1958
Hicks
v.
British
Transport
Commission.
Lord Evershed
M.R.

two injunctions to which the judge referred,[3] cannot be regarded as part of the contract of employment, still it is sufficiently made clear (and, indeed, the plaintiff himself conceded the point) that if one rides on the step of an engine, there are risks involved, and in this case the risks were perfectly well known to the plaintiff, since for four to five weeks he had done this journey. Not only that, but he knew, because he said he told Mr. Smith the very thing, that there was here very little clearance; and if, contrary to the advice, though not contrary to the contract, he chose to ride on the step, he plainly had, I should have said, an enhanced duty to look after himself; and I agree also with the point to which the judge refers, that, in the absence of any evidence of distraction, the plaintiff had—and I use his own phrase—nothing in the world to do except to look out for himself. It may well be that something did distract him. Possibly some twinge of cramp upset his equilibrium. But those risks the plaintiff thought it right to undertake when he rode on the step at all; and I have felt forced in the end to the conclusion that, knowing the risks, knowing the special risk here involved because of the unusual siting of the lever, the assumed circumstances of the accident point as clearly to contributory negligence on the plaintiff's part as they point to negligence on the part of the commission.

I am not at all losing sight of the relevant circumstance that according to the station master the plaintiff was a careful, conscientious, hard-working chap, not a day-dreaming scatterbrained type at all; but it is unfortunately in accordance with ordinary human experience that sometimes, to our surprise, the most careful people do make mistakes.

At any rate, I think, in all the circumstances, including the rules and the knowledge which the plaintiff as an experienced man had of the position of the lever, he had a strong obligation to look after himself. I think the finding that the accident was due to the circumstance that the plaintiff on this occasion did not see the lever—an inescapable conclusion on the assumption made—leads to the view that the balance of probabilities must be that for some reason the plaintiff on this occasion departed from the proper standard of care which he owed to himself, and, if you will, through himself, to his employers.

There only remains, if I am right, the question of apportionment. Once more, but finally, I revert to the fact that the exact circumstances of the accident are not known but assumed. Against that background I feel that no conclusion can be really satisfactory, but that the least unsatisfactory conclusion must be

[3] British Railways. Rules for Observance by Employees. January 1, 1950: Rule 11 (*a*): "No employee "shall expose himself to danger, and "he must prevent as far as possible "such exposure on the part of other "employees, and spare no opportunity of warning those who neglect "to take proper care."

R. 118: "Staff riding on engines "or vehicles, or on the ground alongside vehicles, at converging points "in sidings must take special care "that there is sufficient clearance for "their safety."

one of equal liability. No one will, for a moment, fail to feel sympathy with the plaintiff, a conscientious worker who has suffered a most calamitous and grievous accident. But I have come to the conclusion that as to 50 per cent. he was the author of his own calamity and that, therefore, the damages he may recover must be reduced by 50 per cent. To that extent I would allow the appeal.

PARKER L.J. I agree, and I can state my reasons very shortly. As regards the claim based on the alleged breach of statutory duty, namely, a breach of rule 5 of the Prevention of Accidents Rules, 1902, the judge said: "I hold that this lever was not in such "other position and of such form as to cause as little obstruction "as possible to persons employed on the railway whilst in the "execution of their duty." I entirely agree with that, assuming that one ever gets as far as those words in rule 5. For the reasons given by my Lord it seems to me that in this case one never comes to consider those words, which are an alternative to what has gone before, and I think clearly the provisions that have gone before have been fully complied with.

I come, therefore, to the question of a breach of the duty at common law. To quote the words of Lord Herschell in *Smith* v. *Charles Baker & Sons*[4]: "It is quite clear that the contract "between employer and employed involves on the part of the "former the duty of taking reasonable care to provide proper "appliances, and to maintain them in a proper condition, and "so to carry on his operations as not to subject those employed "by him to unnecessary risk." Whether the risk is such that a prudent employer exercising reasonable care should take steps to guard against it, depends on a number of considerations—certainly on three: first, whether such an employer could reasonably foresee the risk of accident to an employee; secondly, if so, the degree of injury likely to result; and, thirdly, the nature of the precautions necessary to guard against that risk. If no precautions can guard against the risk, then it cannot be said to be an unnecessary risk. Equally, if the precautions involve great expense, then that is a matter to be put into the scale and weighed with the other considerations.

To take those matters in order, I think it is clear (from photographs and a plan put in) that an 8-inch clearance between the vertical lever and the steps of the locomotive is such that any prudent employer must foresee the risk of injury to a person riding on the locomotive. Here it is proved beyond a shadow of doubt that it was the common practice of shunters to ride on the steps of locomotives. It was only if they were exposing themselves to some extreme danger that any steps were taken to reprimand them. It was a practice which, as my Lord has said, was tolerated by the commission. Bearing in mind the position in which a man would have to stand if he was to hold the rails

[4] [1891] A.C. 325, 362.

C. A.
1958
Hicks
v.
British
Transport
Commission.
Parker L.J.

at the side of the entrance to the locomotive cab, and bearing in mind the fact that he might be wearing an overcoat, there was clearly, I should have thought, a risk of injury. But the matter does not end there, because the witnesses for the commission said perfectly clearly that in shunting yards the danger to men riding on the steps of locomotives was something to which they did pay regard. It seems to me that merely because there was only one train a day on this line, and not a great many locomotives and a great many shunters riding on them, the employers are not excused from considering the risk.

As regards the second consideration, it does not require any hind-sight in this case to see that if an accident did occur, very serious injuries might result. In regard to the precautions, it is to be observed that the commission are in this difficulty: nobody of those responsible, so far as the evidence was concerned, ever considered the question of safety at all.

[His Lordship referred to the evidence and the findings summarized above, and continued:] I cannot see any ground for interfering with the judge's finding that the commission were in breach of their duty; and, bearing in mind that it is conceded that this man was struck by the lever, that that breach of duty was a cause of this accident.

Finally there remains the question of contributory negligence. The judge found that this lever was visible and could have been seen by the plaintiff; that it was in a position well known to him; that he had passed it on a number of occasions during the preceding five weeks; that he realized that it was a bit dangerous and had said that somebody would catch it one of these days; that he also had in mind the commission's rules, and in particular rule 118 and rule 11 (*a*); and that the work on which he was engaged was a simple operation, there was no rush, and, of course, none of the atmosphere of a factory.

Pausing there, one would think that that was leading up to a finding of contributory negligence; but the judge went on to say that he had had evidence that this man was of very good character and was a careful man. One cannot say that such a consideration is irrelevant, but for my part comparatively little weight ought to be given to it because unfortunately the most careful men are guilty of inattention at times. And finally he went on to point out that all the facts of the case were not known, and in effect that for all one knows this man may have been guilty of momentary inattention or inadvertence. Now, for my part I quite agree that all the facts are not known in this case. Indeed, they very seldom are in any case. But just as the commission's negligence must be judged on the probabilities of the case, so must questions of contributory negligence. As regards inadvertence, of course it is a matter of degree. It is not every act of inadvertence which amounts to negligence. Equally, in certain circumstances inadvertence may well amount to negligence. It must depend upon all the facts of the case.

The judge, I think, was clearly influenced by the well-known passages in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*,[5] and he took the view that this might well have been a matter of momentary inadvertence not amounting to negligence. *Caswell's* case,[5] however, was a case of breach of statutory duty occurring in all the noise and bustle of a factory, and, as was pointed out by the House of Lords recently in *Staveley Iron & Chemical Co. Ltd.* v. *Jones*[6] different considerations may arise where there is no statute designed to protect a workman against himself and where the operation is divorced from the bustle, the noise and the repetition that occurs in a factory. Again I think the judge was influenced by passages in *Hutchinson* v. *London and North Eastern Ry. Co.*[7] That again was a claim based on a breach of statutory duty—indeed on rule 9 of the Prevention of Accidents Rules which have been referred to in this case. But, quite apart from that, the facts there were wholly different; that was a case of gangers working on the main line between Newcastle and York with express trains passing every eight or ten minutes. They were engaged on raising the rails and putting ballast underneath—an operation on which they would be concentrating and not thinking or having the opportunity to think very much of their own safety. That seems to me to be a wholly different case from this. Here was a man riding for his own convenience on the step of a locomotive, having nothing to do at that particular moment other than keep a look-out for his own safety, assisted, as my Lord has said, by the added injunction in the commission's rules. For my part, I feel that it is an irresistible conclusion that on the balance of probabilities this man was guilty of contributory negligence.

Finally, Mr. Fox-Andrews referred to *Cummings* v. *Richard Thomas & Baldwins Ltd.*[8] and *Stimpson* v. *Standard Telephones and Cables Ltd.*,[9] showing that this court is loath to interfere with an inference drawn by a trial judge who has seen and heard the witnesses. With that, of course, I entirely agree; but, at the same time, if this court is satisfied that the inference drawn is the wrong inference, then not only has it the power but it is its duty to substitute its own inference for that found by the judge. I have reluctantly come to the conclusion that this unfortunate man was guilty of contributory negligence, and, like my Lord, I would hold him 50 per cent. to blame.

SELLERS L.J. I agree. Although we are differing from the judge who tried this case on the question of contributory negligence, I hope it will not be thought to be in any way disrespectful

[5] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[6] [1956] A.C. 627; [1956] 2 W.L.R. 479; [1956] 1 All E.R. 403.

[7] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[8] [1953] 2 Q.B. 95; [1953] 2 All E.R. 43; (reversed in House of Lords [1955] A.C. 321; [1955] 1 All E.R. 285).

[9] [1940] 1 K.B. 342; 55 T.L.R. 90; [1939] 4 All E.R. 225.

C. A.
1958
Hicks v. British Transport Commission.

to him and to his careful and reasoned judgment if I say that my views so much accord with those of both my Lords that I feel that I ought not to take time expressing them in my own words.

Appeal allowed on issues as to breach of statutory duty and contributory negligence.

Solicitors: *M. H. B. Gilmour; Pattinson & Brewer.*

E. D.

[PROBATE, ETC., DIVISION.]

1958
Feb. 4, 5.
Lord Merriman P. and Wrangham J.

* BOWEN *v.* BOWEN.

Husband and Wife—Maintenance—Justices—Jurisdiction—Application to vary order—Order revoked without complaint to revoke being made—No jurisdiction to revoke.

Husband and Wife—Maintenance—Justices—Revocation of order—Possibility of reviver.

A man against whom a court of summary jurisdiction had made an order at £2 a week on the ground of wilful neglect to provide reasonable maintenance for his wife applied, after the marriage had been dissolved, for a variation of that order by having the amount reduced. Upon that complaint the justices revoked the order stating, inter alia, in their reasons that "if the wife's circumstances "altered and deteriorated, she could then apply again to the court":—

Held, (1) that the justices had no jurisdiction, upon an application on complaint to have an order varied, to revoke it.

Trathan v. *Trathan* [1955] 1 W.L.R. 805; [1955] 2 All E.R. 701 applied.

(2) That having regard to the respective means of the parties as found by the justices, the order should be varied to one of a nominal amount.

Per curiam. There are cases where reviver may be proper, as, for instance, where an order of the justices has "ceased to have "effect" because the parties temporarily resumed cohabitation.

Quaere whether a woman may apply (upon fresh evidence) for an order to be revived after it has been "discharged" or "revoked" (between which words there is no distinction).

Pratt v. *Pratt* (1927) 137 L.T. 491; 43 T.L.R. 523; *Markham* v. *Markham* [1947] W.N. 27; 63 T.L.R. 91; [1946] 2 All E.R. 737 considered.

Appeal by wife from the revocation by the justices for the Hereford petty sessional division of Hereford of an order of the justices for her maintenance upon cross-applications, initiated by the husband, to vary the order.

The parties were married in 1950. In May, 1952, the justices for the Hereford petty sessional division of Hereford granted the wife an order for £2 a week on the ground of wilful neglect to

provide her with reasonable maintenance. On May 28, 1957, the marriage was dissolved by decree absolute on the ground of the husband's adultery; but the wife continued to rely upon the justices' order for maintenance. A summons was issued on October 3, 1957, upon the complaint of the husband made on September 27, 1957, whereby he asked that the order be varied by a reduction in the amount payable upon the grounds that his means were reduced and that the wife's means were sufficient "without the weekly sum of £2 or a large part thereof," and that the marriage had been dissolved. The wife replied by asking for the order to be increased. On October 12, 1957, the justices rejected the wife's complaint and upon the husband's complaint for variation made an order that the order of May, 1952, be revoked.

The justices in their reasons stated: "This was a matrimonial "case in which the magistrates were asked to reduce the main-"tenance of £2 per week made by the husband on their own "order of 1952, while the wife asked for it to be increased. "Some unusual features had to be taken into account. (1) There "were no children of this marriage to be considered. (2) The "parties were separated after some 18 months of marriage "(September, 1950, to February, 1952). (3) No divorce proceed-"ings were instituted for some 5 years. (4) Each party was "earning a good wage at work. The husband some £12 3s. and "the wife some £7 5s. per week. Out of these amounts the "husband had to pay the monies as set out in the clerk's notes "of evidence. He had also to pay off the costs of divorce "proceedings.

"The wife worked for the same firm as before her marriage "and lived at home. After paying her parents £3 for board and "lodging she was left with £2 5s. 6d. rather more than her "husband.

"The magistrates therefore had to bear in mind that (a) "There were no children. (b) The parties were divorced and "now again two ordinary young members of the community both "earning good money. (c) That the wife had more money to "spend on herself after paying essential outgoings than the "husband. (d) To assess what—if anything—the wife had lost "by this short and most unsatisfactory marriage. (e) Whether "any money should at this stage be paid by the husband to add to "the wife's expenditure income as in no circumstances could she "be described 'as in want.'

"The magistrates decided that as this childless couple were "divorced and each in receipt of good wages and in no want "whatsoever, it would be inequitable to take money from the "husband (and possibly thus from his aged mother) and give "it to the former wife and considered that this couple should be "treated as two individuals who had made an unfortunate matri-"monial attempt, but were now again just two members of the "public in good employ and bore in mind many cases of a similar

1958

Bowen
v.
Bowen.

"nature when they had to order allocations out of an income of "£7 to £8 per week to maintain 3 or more children.

"The magistrates bore in mind that if the wife's circum-"stances altered and deteriorated, she could then apply again "to the court. But that at present no order was justified or at "the most a token allotment, which they felt was not justified "for the above reasons."

A. T. Hoolahan for the wife appellant.

P. E. Underwood for the husband respondent.

Dodd v. *Dodd* * was cited in argument in addition to the cases cited in the judgment.

Lord Merriman P. This is a wife's appeal against the decision of the justices for the Hereford petty sessional division of Hereford, sitting at Hereford on October 12, 1957, whereby an order made by the same court on May 3, 1952, for £2 a week on the ground of wilful neglect to maintain was revoked. Having regard to the fact that I am of opinion that their order requires variation in what may or may not be an important particular as a matter of substance, but does raise, as I think, an important question as a matter of principle, I propose to say quite shortly what we are dealing with and what we are not dealing with.

The first thing to look at in this case is the complaint. I may say at once that I do not, as at present advised, withdraw one word of what I am reported as having said about the importance of the complaint as the foundation of justices' jurisdiction in *Trathan* v. *Trathan*.[1] In that respect the important part of my judgment, with which Davies J. agreed, runs from where I developed my use of the word "cardinal"[2] to show that this court regarded the form of the complaint as a vital matter, because it is upon that and that alone that justices are empowered to exercise their jurisdiction.

In this case the complaint was made on September 27, 1957, and the summons was issued thereon, reciting the order that I have already mentioned, £2 a week. [His Lordship referred to the nature of the complaint set out above and continued:] It is perfectly clear that this complaint, stating those two grounds, came under the head of a complaint to vary by reducing. I am fully aware, and it has been mentioned in this argument, that under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, the same petty sessional division may, "on the appli-"cation of the married woman or of her husband, and upon cause "being shown"—I leave out for the moment the words "upon

* [1906] P. 189; 22 T.L.R. 484.

[1] [1955] 1 W.L.R. 805; [1955] 2 All E.R. 701. In that case the order had been discharged without prior complaint by the husband, upon the husband's application made for the first time during the hearing of the wife's complaint for an increase in the order.

[2] [1955] 1 W.L.R. 805, 807.

"fresh evidence"—"to the satisfaction of the court at any time, "alter, vary, or discharge any such order."

I must say something about the words "alter, vary, "or discharge." I do not make any distinction whatever between "discharge" and "revoke," for they have been used interchangeably both in judgments and in the Act of Parliament, to which I do not think it is necessary to refer specifically, though both have been contrasted—and this may be of importance in considering one authority—with a mere cessation "to have "effect." That contrast occurs, as will be recognized, in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, to the details of which I do not think it necessary to refer specifically; it is a resumption of cohabitation which brings about the "cessation" of effect[3] just as the fact that they are living together at the time when the order is made prevents the order from coming into effect.[4] With regard to that combination of words, if I may quote myself for the purposes of brevity, in *Trathan* v. *Trathan*,[5] after the lapse of five pages from the passage to which I referred just now, I came to this conclusion: "However, I do not think that I need pursue that topic any "further"—that is, the fresh evidence topic, for I had pointed out that there was a distinction between "alter" and "vary," quoad amount, and "discharge," which almost certainly requires fresh evidence, whereas variation of amount does not, by reason of a subsequent enactment[6] which is now embodied in the Magistrates' Courts Act, 1952, because, in my opinion, it is quite "plain on the face of section 7 itself that, though these things are "all put together in one sentence, they do, in fact, raise quite "separate issues, and there must be, in my opinion, under the "Magistrates' Courts Act, 1952, as there must have been under "the Summary Jurisdiction Act, a complaint which alleges that "there should be an alteration and upon what ground; or "that there should be a variation and upon what ground; or "that there should be a discharge, and again upon what "ground, though in that case at least"—(that is the case of discharge)—"the ground must be based upon 'fresh evidence.'"

Now, I stand by those words, and for the purposes of this case they are, as things stand, decisive, because there was before these justices no complaint for a discharge or a revocation but merely a complaint for a variation. The order is quite explicit, in my opinion. There are two orders, because there was a cross-summons by the wife to increase the amount. The order perfectly accurately recites the terms of the husband's complaint, and the adjudication is that "the complaint is true and cause "being shown upon fresh evidence to the satisfaction of the "court it is hereby ordered that the said first-mentioned order "be revoked." In my opinion, although "fresh evidence" was

[3] By s. 2 (2) of the Act.
[4] By s. 1 (4) of the Act.
[5] [1955] 1 W.L.R. 805, 812.
[6] The Money Payments (Justices Procedure) Act, 1935, s. 9.

1958

Bowen
v.
Bowen.

Lord
Merriman P.

not necessary to a pure question of amount, i.e., a less amount, it was necessary and appropriate to the ground which is recited in the order, that the marriage had been dissolved, for, of course, it goes without saying that the dissolution of a marriage after the making of an order comes within the well-known definition of "fresh evidence," as being, amongst other things, something which has manifestly occurred since the order was made.

At the same time it was adjudged that the wife's complaint for an increase was not true, and it was ordered that the first-mentioned order be revoked. I withhold any comment on the inclusion of that in reference to the wife's complaint; it does not matter, because the order is obviously made, in fact, on the husband's complaint. That is the formal order.

That brings me to what the justices said about it, what they really intended to do. If I may be allowed to say so, they went into a very careful and close examination of the figures, with the result that on the merits as disclosed by the figures they came to a conclusion, from which I am not prepared to dissent at all, for I do not think that the question of figures in this case is one which calls for any further examination on our part beyond accepting the very clear finding at which they themselves arrived. Their conclusion was that on the figures the wife was left with £2 5s. 6d., rather more than her husband was left with. I am not suggesting that that is a conclusive circumstance; far from it. They could ignore that if they chose, but they have chosen to act upon it and to revoke the order altogether. They go into the question of there being no children; they go into the question of the parties being divorced and being, as they put it, "now "again two ordinary young members of the community both "earning good money" and "that the wife had more money to "spend on herself after paying essential outgoings than the "husband." They then went into an attempt to assess what, if anything, the wife had lost by this short and most unsatisfactory marriage, and whether any money should at this stage be paid by the husband to add to the wife's expendable income, as in no circumstances could she be described as being in want. [His Lordship then read their conclusion as set out above, observing that the reference to cases of a similar nature was a somewhat irrelevant introduction, and continued:]

I have already dealt with the fact that the justices arrived at a revocation on a complaint which asked for no more than a variation, and there I think they were wrong. Again I think that they were wrong in their allusion to the divorce case, in this sense: it has been well settled for many years in this court by the decision in *Bragg* v. *Bragg*[7] which has been repeatedly followed here, and has been recently followed by the Court of Appeal in *Wood* v. *Wood*,[8] where it is well settled[9] that though

[7] [1925] P. 20; 41 T.L.R. 8.
[8] [1957] P. 254; [1957] 2 W.L.R. 826; [1957] 2 All E.R. 14.
[9] [1957] P. 254, 278.

there has been a divorce, it is a matter of discretion whether to allow an order nevertheless to stand or to discharge it. As all judges of this Division well know, and all practitioners well know, it is the commonest thing in the world in an undefended or a defended divorce case, for that matter, to allow a maintenance order to stand whether or not it also includes a custody order and maintenance in respect of children, none of which could be allowed if divorce per se was decisive to get rid of an order. As I say, it is frequently done by justices and frequently followed in this court that the original order is allowed to stand, and it is very convenient that it should be so, for it has the merit of saving costs in the Divorce Court. The mere fact that these parties had been divorced is nothing but a discretionary ground, and, no doubt, may be an important ground in connexion with the question of amount; but it certainly does not necessarily lead to the conclusion that there must be a revocation.

But it is said (and this is all I propose to say, quite shortly, about the complicated issue which appears to have been involved in this case) that the justices have not revoked the order at all; all that they have done is, as it were, to suspend the money payments, and to leave them, in spite of the use of the word "revocation," to be revived at any time under the terms of the Magistrates' Courts Act, 1952, s. 53, which reads as follows:—"Revocation, variation, etc., of orders for periodical payment. "Where a magistrates' court has made an order for the periodical "payment of money, the court may, by order on complaint, "revoke, revive or vary the order." Now, I have already indicated that there are many cases in which variation is proper, cases in which I think reviver is proper, for instance, the case which I have mentioned in passing where an order ceases to be of effect because the parties have temporarily resumed cohabitation; the order still remains, but it ceases to have the effect of enforceability as regards amount. As to revocation, which, as I have already said, I think would be equivalent to a total "discharge" of the order, which was the word used in the Act of 1895, I do not resile at all from what I said in the passage I quoted just now in *Trathan* v. *Trathan*[10] and I do not hesitate to add that in terms of the section which I have just read reviver, like the other two things, falls to be decided separately upon whatever are the grounds of the appropriate complaint. But I am not prepared, as at present advised, to assume that because of that section it is inapt to make an order for a nominal payment in order to keep an order alive, for which there is ample precedent in decisions of this court, reported or unreported. I can think of one which is reported, though it has nothing otherwise to do with this case than that we did make an order in that form in order to keep a wife's rights alive. It is the case of *Starkie* v. *Starkie* (*No.* 2),[11] but I do not propose to pursue that.

[10] [1955] 1 W.L.R. 805.

[11] [1954] 1 W.L.R. 98; [1953] 2 All E R. 1519.

1958

Bowen
v.
Bowen.

Lord
Merriman P.

In my opinion the whole of this argument turns on the decision in *Pratt* v. *Pratt*.[12] That was a very remarkable case, and the substance of it was this: the wife's order had been revoked, or discharged, under section 7, because it was found that she had committed adultery, and it will be remembered that under section 7 if she commits an act of adultery," such order "shall"—it is obligatory—"upon proof thereof be discharged." There was no appeal against that order—the discharge of her original order—but there was a divorce suit in which precisely the same issue of her alleged adultery came up for decision, and a judge of the High Court decided that she had not committed adultery. Thereupon, upon the fresh evidence made available by the decision of the High Court judge, there was a complaint to restore or revive the original order. The simplest course (which has been to my knowledge adopted either on common-sense grounds or in oblivion of this decision in *Pratt* v. *Pratt*[12]) would have been to extend the time to appeal against the revocation by the justices and to deal with the matter then and there on that basis. Instead of which this court treated this decision of the High Court as being fresh evidence, as, of course, it was, and thereupon, without more, restored the original order.

Upon that foundation it is said that however definitely a court may discharge or revoke an order, it is open under this section for the wife to come back at any time and say: "Now I want "that order revived," of course, upon fresh evidence to the satisfaction of the court. Well, when it is necessary to decide that as being the only way in which the case may be decided, one way or the other I shall have to face that issue.

I say in passing, however, that we did, with obvious reluctance, follow *Pratt* v. *Pratt*[12] in *Markham* v. *Markham*.[13] That was a case to which I have already alluded in passing, where the order ceased to have effect owing to a resumption of cohabitation, and with regard to that, at any rate, I feel no doubt that reviver is a proper term. However, we appear to have based our judgment on the authority of *Pratt* v. *Pratt*,[14] both cases are of respectable antiquity, and both were decided before the Magistrates' Courts Act of 1952, and the draftsmen, of course, as they always do, are taken to know all the law about everything which has ever arisen out of the fact that everything we do in this court and everything in a justices' court in a matrimonial case is treated as if it were an affiliation order. Further than that I do not want to go in elucidating that particular problem.

It is only right to say, however, that in *In re Dankbars (An Infant)*,[15] which was a guardianship of infants case in the Court of Appeal, the Master of the Rolls—(I am not going into detail about this)—expressly refrained, because they were not cases

[12] (1927) 137 L.T. 491; 43 T.L.R. 523.

[13] [1947] W.N. 27; 63 T.L.R. 91; [1946] 2 All E.R. 737.

[14] 43 T.L.R. 523.

[15] [1954] Ch. 98; [1953] 3 W.L.R. 957; sub nom. *D. (An Infant), Re* [1953] 2 All E.R. 1318.

under the Guardianship of Infants Act, from expressing any definite opinion about the validity of *Pratt* v. *Pratt* [16] or *Markham* v. *Markham*,[17] and I say no more about it than that there may come a time when some court or other will have to say what the law really is about this matter, whether it is really true that an order which has been revoked can be revived without more than a mere complaint saying "Now I want this order revived," when there has been no appeal against the revocation.

During the adjournment of this case at midday we discovered that *Pratt* v. *Pratt* [18] had been referred to incidentally in another judgment of the Court of Appeal in *Thompson* v. *Thompson*.[19] In his judgment Denning L.J. referred to *Pratt* v. *Pratt* [20] for the purpose only of basing the proposition [21] "but where the previous "proceedings were before the magistrates for maintenance, the "court usually thinks it right to inquire into the matter afresh," that is on the question of estoppel per rem judicatam—"in which "case it allows the accused party to defend himself for the second time: see *Pratt* v. *Pratt* [22] and *Hudson* v. *Hudson*.[23]" And there I leave it, because I am now coming back to where I began.

In spite of our criticism that the revocation was out of order because it was not based on a complaint, and in spite of the fact that the justices, I think, paid more attention than they should have done in the circumstances of this case to the fact that the parties had been divorced, and do not seem to have been referred by anybody to cases like *Bragg* v. *Bragg*,[24] which point out exactly how the matter stands to enable justices to deal at their own discretion with that particular circumstance, I come back to what I think should have happened, for we are entitled to draw any inference which the court below should have drawn, and it is particularly easy for us to do that in this case because it happens to be an order which has been welcomed, with moderate enthusiasm at any rate, by both sides, and also it happens in effect to be what the justices themselves really wanted, and that is to vary this order for £2 by reducing it, as the complaint invited them to do, not to nought by discharge or revocation but to a nominal order which will keep the matter alive. That is plainly what the justices thought that they were doing. I do not think that they achieved the purpose, but we can quite easily achieve that purpose by that particular variation of the original amount, and that is what I propose that we should do—allow the appeal to that extent, while accepting the justices' findings about the figures.

[16] 43 T.L.R. 523.
[17] 63 T.L.R. 91.
[18] 43 T.L.R. 523.
[19] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161.
[20] 43 T.L.R. 523.
[21] [1957] P. 19, 30.
[22] 43 T.L.R. 523.
[23] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.
[24] [1925] P. 20.

1958

Bowen
v.
Bowen.

Wrangham J. I agree. The case for the wife in this matter was put upon two grounds:—(1) that the justices had no jurisdiction to revoke their previous maintenance order because there was not in existence any complaint asking them to revoke it, and (2) because the reasons which the justices have given show that they misunderstood the law, in that they thought that if the wife's circumstances altered and deteriorated, she could then apply again to the court, despite the revocation of the order.

The question whether the justices were indeed in error in thinking that that was the law is, as my Lord has indicated, a very difficult question, upon which *Pratt* v. *Pratt*[25] is a directly relevant authority; and, as we are not deciding that question, I desire to say nothing whatever about it.

Upon the other argument presented on behalf of the wife, the matter seems to me to be as plain as it could be. It is clear, first of all, that it results from the law laid down in *Trathan* v. *Trathan*,[26] to which my Lord has referred, that an order revoking a previous maintenance order cannot be made unless there is a complaint applying for that revocation and not applying for something quite different; and, secondly, that the justices, despite the absence of such a complaint, did in fact revoke the order.

In those circumstances it seems to me that what the justices did was done without jurisdiction, and I agree, therefore, with the consequence which my Lord has indicated.

Lord Merriman P. The result will be that the appeal will be allowed by varying the order made by the justices by substituting for the revocation of the order an order that the original order be varied by the reduction from £2 a week to 1s. a month. So far, what we have dealt with is the order made in favour of the husband, that is, the revocation order. I think we have got to dismiss the wife's appeal against the dismissal of her complaint, and we will order that all the words after "it is hereby "adjudged the said complaint is not true" be struck out, and the words "and is hereby dismissed" be inserted.

Appeal against revocation allowed: nominal order substituted.

Solicitors: *Kinch & Richardson for T. A. Matthews & Co., Hereford; Corner & Wadsworth, Hereford.*

J. B. G.

[25] 43 T.L.R. 523.

[26] [1955] 1 W.L.R. 805.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* MEDICAL APPEAL TRIBUNAL FOR SOUTH WALES DISTRICT. *Ex parte* GRIFFITHS.

1958
April 16.

Lord Goddard C.J., Hilbery and Donovan JJ.

National Insurance — Industrial injuries benefit — "Paired organs" principle — Whether legs "paired organs" — National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5).

The applicant's left leg was injured during the First World War. In 1955, his right leg was injured in an accident at work, resulting in disablement within the meaning of the National Insurance (Industrial Injuries) Act, 1946. The medical appeal tribunal in assessing his disablement did not take into account the injury to the left leg. The applicant applied for an order of certiorari to quash the tribunal's decision on the ground that in assessing the disability to the right leg, they failed to make an assessment of the disability to the left leg as required by regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948. On the question whether legs were "paired organs," i.e., were "one of "two similar organs, the functions of which would be interchange- "able or complementary" within regulation 2 (5):—

Held, that legs were "paired organs" and, accordingly, in assessing the disablement to the right leg, in accordance with regulation 2 (5), the injury to the left leg had to be taken into account.

Reg. v. *Medical Appeal Tribunal at London, Ex parte Burpitt* [1957] 2 Q.B. 584; [1957] 3 W.L.R. 1447; [1957] 2 All E.R. 704 applied.

APPLICATION FOR CERTIORARI.

The applicant, Richard Griffiths, sustained injuries to his left leg as a result of a bullet wound incurred during the First World War. On April 19, 1955, the applicant, while working underground as a colliery repairer, was in an accident in which he sustained injuries to his right leg, resulting in disablement within the meaning of the National Insurance (Industrial Injuries) Act, 1946. In consequence of the accident the applicant claimed and received disablement benefit in accordance with the decisions of various medical boards. He appealed from the final decision of the board to the Medical Appeal Tribunal for South Wales who assessed the disablement in respect of his right leg at 1 per cent. for life. The applicant applied for an order of certiorari to bring up and quash the decision of the tribunal on the ground that the tribunal, while making the assessment of the disability of the right leg did not make any assessment of the disability of the left leg, which they were required by law to do under regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948.[1]

[1] National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 2 (5): "Where as a result of "the relevant accident a claimant has "suffered an injury to an organ of his "body which in a person whose "physical condition is normal would "be one of two similar organs, the "functions of which would be inter- "changeable or complementary, in "assessing the extent of the disable- "ment resulting from the relevant

1958

REGINA
v.
MEDICAL
APPEAL
TRIBUNAL
FOR SOUTH
WALES
DISTRICT.
Ex parte
GRIFFITHS.

G. G. Baker Q.C. and *Norman Francis* for the applicant.
Rodger Winn for the respondents.

The cases cited in argument are referred to in the judgment.

LORD GODDARD C.J. This is a motion for certiorari to bring up and quash a decision of the Medical Appeal Tribunal for South Wales dated March 21, 1957, on the ground that the tribunal were bound to make an assessment in respect of a man's left leg which had received injuries in the First World War but which had not been injured in the accident, the accident having only injured his right leg. It was claimed that a separate assessment must be made in respect of the left leg because of the provisions of paragraph (5) of regulation 2 of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, which provides: "Where as a result of the relevant accident a claimant has "suffered an injury to an organ of his body which in a person "whose physical condition is normal would be one of two similar "organs, the functions of which would be interchangeable or "complementary, in assessing the extent of the disablement "resulting from the relevant loss of faculty for any period during "which the claimant may be expected to be subject to any dis-"ability resulting from that injury—(*a*) any disability in respect "of the other organ to which the claimant would in any case "have been subject by reason of a congential defect, or an injury "or disease received or contracted before the relevant accident "and not attributable to any accident against which he was "insured under the Act, shall nevertheless be treated as having "been incurred as a result of the relevant loss of faculty; . . ." I have no doubt that miners and other workmen thoroughly understand that very clear regulation, and it is a great comfort to them.

It is said here that a leg is what is known as a "paired organ," so that, if an injury takes place to one leg, one has to consider whether the other leg is in a damaged condition even though the damage was not the result of the accident. The only question that is submitted to this court is whether legs are to be regarded as "paired organs," that is to say "one of two similar organs, the "functions of which would be interchangeable or complementary."

So far as this court is concerned, it seems to me that this case is entirely governed by *Reg.* v. *Medical Appeal Tribunal at London, ex parte Burpitt*,[1] in which this court held that hands were organs, and fingers of one hand which had been injured in

"loss of faculty for any period during "which the claimant may be expected "to be subject to any disability "resulting from that injury—(*a*) any "disability in respect of the other "organ to which the claimant would "in any case have been subject by "reason of a congenital defect, or an "injury or disease received or contracted before the relevant accident "and not attributable to any accident "against which he was insured under "the Act, shall nevertheless be "treated as having been incurred as "a result of the relevant loss of "faculty;"

[1] [1957] 2 Q.B. 584; [1957] 3 W.L.R. 447; [1957] 2 All E.R. 704.

an accident were similar organs within this regulation. We decided that the hand or finger was an organ, and we decided that having regard to the definitions of organs which are found in the Oxford English Dictionary. Having so found although one member of the court seemed to have some doubt whether a leg is an organ, it seems to me that it follows if a hand is an organ, a foot is an organ, if a hand is an organ an arm is an organ. If an arm is an organ, a leg is an organ because it comes within the words of the regulation, which are authoritative and which are what the legislative authority must have meant when they were dealing with the words "similar organs." In *Reg.* v. *Medical Appeal Tribunal, ex parte Gilmore*,[2] the Court of Appeal quite obviously thought, or at any rate Denning L.J., who gave the leading judgment, thought, that a leg was an organ. He said[3]: "That "regulation deals with an injury to one of two 'paired organs,' "as they are called, such as eyes, legs, and so forth."

For this reason I think that *Burpitt*[4] applies to the present case, and therefore the order of certiorari must go on the ground that legs are "paired organs," and therefore a separate assessment must be made in respect of the left leg as well as an assessment in respect of the right. For these reasons the order will go.

HILBERY J. I agree.

DONOVAN J. I agree.

Order of certiorari.

Solicitors: *Botterell & Roche for T. S. Edwards & Son, Newport, Monmouth; The Solicitor, Ministry of Pensions.*

C. J. E.

[2] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796.

[3] [1957] 1 Q.B. 574, 581.

[4] [1957] 2 Q.B. 584.

[CHANCERY DIVISION.]

* *In re* J. & P. SUSSMAN LTD.

1958
March 10.

Vaisey J.

[00127 of 1958.]

Company—Winding up—Petition—Incorrect spelling of company's name in petition, advertisement and winding-up order—Application for leave to amend—Jurisdiction.

In a creditor's action intended to be against J. & P. Sussmann Ltd. the company's name was incorrectly spelt "J. & P. Sussman "Ltd.," in the writ as it was also in the appearance entered by the

1958

J. & P. SUSSMAN LTD., *In re.*

company, and in a subsequent winding-up petition, the advertisement and the winding-up order. When, on the usual procedure to record the order on the register, the mistake was discovered and the order could not be recorded against J. & P. Sussmann Ltd. because of the mistake, the winding-up petition was again brought before the court on an application to amend it by correctly spelling the company's name: and another creditor who by then also had recovered judgment and was closely associated with the company asked leave to appear out of time and oppose the application.

Held, in refusing leave to appear, that the court could and, accordingly, would, allow amendments to rectify a trifling error of spelling and would make the winding-up order as at the date of this application.

In re L'Industrie Verrière Ltd. [1914] W.N. 222 followed.

PETITION to wind up.

In an action intended and purported to be brought against J. & P. Sussmann Ltd., a creditor of that company inadvertently spelt the name "J. & P. Sussman Ltd.," the mistake being repeated in the appearance entered by the company and in a subsequent winding-up petition, advertisement and winding-up order. That order was made on March 3, 1958, and the mistake was not discovered until, in due course, the usual steps were taken to record the order on the register. There was not a company called J. & P. Sussman Ltd. and the order could not be recorded against J. & P. Sussmann Ltd. Meanwhile, judgment had been obtained against J. & P. Sussmann Ltd. by yet another creditor who was closely associated with that company. When, on March 10, 1958, the petition was again before the court on an application so to amend it that the name of the company be correctly spelt, that other creditor sought leave to appear, out of time, in order to oppose the application.

Ian Edwards-Jones for the petitioning creditor.
Leonard Lewis for the creditor seeking leave to appear.

VAISEY J. This is a petition by Arthur Maiden Ltd. to wind up a company whose correct name is "J. & P. Sussmann Ltd." The petition originally was presented with the name of the company that was to be wound up misspelt and when the matter came before me on March 3, 1958, I made an order to wind up "J. & P. Sussman Ltd." (as misspelt). When the necessary steps were taken to record on the register the winding-up order, it was discovered that there was no company called "J. & P. "Sussman Ltd." The order which I made could not be recorded against the company which did exist, J. & P. Sussmann Ltd.

This petition was based on a judgment debt, and the judgment was for a sum which, with costs, amounted to £447 4s. 9d. The apparent origin of the mistake was undoubtedly the innocent fault of the petitioners, Arthur Maiden Ltd. because they brought their action against a company, the name of which was spelt "Suss-"man" in the action of Arthur Maiden Ltd. against J. & P. Sussman Ltd. If the defendant company J. & P. Sussmann Ltd.

wished to defend the action, as undoubtedly they did, they ought to have entered appearance for J. & P. Sussmann, Ltd. "sued "as J. & P. Sussman Ltd."

I have the duplicate appearance before me and they did not do that. They entered an appearance in the name of J. & P. Sussman Ltd. (as misspelt), not realizing the unfortunate consequences which would ensue from their having adopted the misspelt name.

Having got judgment in that form, Arthur Maiden Ltd. presented a petition based on that judgment to wind up the company which we now know to be J. & P. Sussmann Ltd. At the time this mistake was made another creditor had recovered judgment and the sheriff had gone into possession and various rights, described as vested rights, had been created.

To make the matter a little more complicated perhaps, that other creditor, who now asks me for leave to appear on this petition, is closely associated with J. & P. Sussmann Ltd. and he asks me to treat this petition as if it were a complete nullity, and objects, not improperly for his own purposes, to my permitting any kind of amendment which would give effect to the order which I made on the petition by correcting the name of the company.

I think that the real origin of the mistake was the conduct of this Sussmann company which chose to adopt as its name, and enter an appearance in, the misspelt name. I do not see how the company can be now heard to say that my order against "J. & P. Sussman Ltd." is not effective against J. & P. Sussmann Ltd. (with two "n's").

The decision of Astbury J. in *In re L'Industrie Verrière Ltd.*[1] seems to give me jurisdiction to make the amendment which would put this matter right. Astbury J. said: "that the rule on "which the court had long acted was that an error in the name "of the company in the advertisement rendered the advertisement "absolutely void." Here of course, there was Sussman (with one "n") in the advertisement as well as in the petition Astbury J. continued saying that: "It was important that this rule should "be strictly enforced, but where the mistake consisted of "a very trifling error in spelling, by which no one could possibly "be misled, and there was no other company of any similar name "on the register, his Lordship thought he had and ought to "exercise his discretion of waiving the formal defect under rule "217 [of the Companies (Winding up) Rules, 1909]. This view "was in accordance with *In re E. S. Snell & Sons Ltd.*,[2] "where the petition had been presented and advertised as 'In "re E. S. Snell & Son Limited,' and the title was corrected and "the order made without re-advertisement. In these circum-"stances the petition might be amended and the order stand "without any further advertisement."

In the case before Astbury J. the difference was not between "Sons" and "Son" but between "industrie," a French word,

[1] [1914] W.N. 222.

[2] "The Times," Dec. 20, 1911.

1958

J. & P. SUSSMAN LTD., *In re.*

Vaisey J.

and a non-existent word "industre" leaving out the last letter but one. That is very much the same sort of error as has crept into the proceedings on this occasion. It seems to me that I have jurisdiction to allow this petition to be properly amended.

The amendments in the petition which are required are not only to get the name "Sussmann" correctly spelt wherever it appears, but also to word the reference to the judgment as follows: "The company is indebted to your petitioner" in [the relevant amount] "the amount of a final judgment obtained by "your petitioner against the company in an action in the High "Court of Justice described as 'J. & P. Sussman Ltd.'" It will then state the judgment correctly, but it will indicate that it was obtained in the wrong name.

I think that I am entitled to allow the matter to be put in order in that way and a winding-up order to be made under the authority of *In re L'Industrie Verrière Ltd.*[3] and to treat the petition as amended. That case justifies me in making, as I do make, the original order for the winding up the company as of today.

The petition need not be re-advertised. I do not give the leave to appear which has been applied for.

Order accordingly.

Solicitors: *Pritchard, Englefield & Co., for Latin & Masheder, Liverpool; B. A. Woolf & Co.*

K. R. A. H.

[3] [1914] W.N. 222.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958 *April* 1, 21.

Lord Goddard C.J., Donovan and Havers JJ.

* REGINA *v.* ST. MARGARETS TRUST LTD.
REGINA *v.* OLIVER AUTOS LTD.
REGINA *v.* RICHARD.
REGINA *v.* HONE.

Criminal Law — Mens rea — Statutory prohibition — Hire-purchase — Finance company unaware that requirements not complied with— Whether guilty of an offence—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (*S.I.* 1956, *No.* 180), *art.* 1.

Hire-Purchase—Credit control.

Article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, provides: "A person shall not dispose of "any goods to which this Order applies in pursuance of a hire-"purchase or credit sale agreement . . . unless the requirements "specified in the second schedule hereto are or have been satisfied "in relation to that agreement." The Second Schedule requires, inter alia, that certain specified percentages of the cash price of the goods must be paid before the signing of the agreement. In the case of "mechanically propelled vehicles" 50 per cent. is specified.

A motor-car company accepted less than the required 50 per cent. deposit for the sale of a motor-car on hire-purchase terms. A falsely inflated cash price having been inserted in the agreement, a finance company advanced a higher sum than they would otherwise have done had they known the true cash price and the excess over the true price was used by the motor-car company to make up the deficiency between the deposit paid and the 50 per cent. of the true cash price. The finance company, who were unaware that 50 per cent. of the purchase price had not been paid by the purchaser, were charged with an offence in that they disposed of the motor-car, i.e., parted with the right to possession under circumstances which contravened article 1, and the motor-car company with aiding and abetting the offence:—

Held, that the prohibition in article 1 was absolute and mens rea was not an essential ingredient of the offence, and, accordingly, the finance company, even though acting innocently, were nevertheless guilty of an offence under article 1 and the motor-car company were guilty of aiding and abetting the offence.

Dicta of Kennedy L.J. in *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471, 483; 26 T.L.R. 557 applied.

APPEALS against convictions.

St. Margarets Trust Ltd., a company who engaged in the business of financing hire-purchase transactions, were charged on an indictment containing seven counts with disposing of goods in circumstances which contravened article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956.[1] Oliver Autos Ltd., a company engaged in buying and selling motor-cars, Victor Richard and Sydney John Hone, two of its officers, were charged with aiding and abetting the commission of the offences.

Oliver Autos, in order to obtain an advance of more than 50 per cent. for a motor-vehicle from the finance company, stated a false inflated cash price to the finance company, as a result of which they advanced more than they would have done had they known the true cash price. The motor-car company at the same time, falsely informed the finance company that the customer had already paid 50 per cent. of the inflated cash price, when he had in fact not even paid 50 per cent. of the true cash price. The excess received from the finance company was used to make up the deficiency between the deposit paid by the customer and the 50 per cent. of the true cash price. The finance company were convicted and fined a nominal fine of £5 on each count; the motor-car company were convicted of aiding and abetting the commission of the offences and were fined £50 on each count. Richard

[1] Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, art. 1: "A person shall not dispose "of any goods to which this order "applies in pursuance of a hire-"purchase or credit sale agreement "entered into after February 24, "1955, unless the requirements speci-"fied in the second schedule hereto "are or have been satisfied in rela-"tion to that agreement."

Sched. II: "3. Before the sign-"ing of the agreement actual pay-"ment was made in respect of . . . "goods comprised in the agreement of "not less than an amount equal to "the percentage specified in . . . the "first schedule [50 per cent. in "respect of 'mechanically propelled "'vehicles'] . . ."

C. C. A.
1958
REGINA
v.
ST.
MARGARETS
TRUST LTD.

and Hone were convicted of aiding and abetting, the former being fined £50 on each count and the latter £50 in all.

The finance company appealed on the ground that in the absence of mens rea they could not be convicted of an offence under article 1. The other appellants supported that ground of appeal for if the finance company had committed no offence they themselves had aided and abetted the commission of no offence.

The relevant facts are more fully set out in the judgment.

Gerald Gardiner Q.C. and *J. C. Lawrence* for the finance company.

S. C. Silkin for the other appellants.

F. H. Lawton Q.C. and *Neville Faulks* for the Crown.

Somerset v. *Wade*,[2] in addition to the cases referred to in the judgment, was cited in argument.

Cur. adv. vult.

April 21. DONOVAN J. reading the judgment of the court: On April 1, the court dismissed these appeals for reasons which we now proceed to give.

St. Margarets Trust Ltd., a company whose business comprises the financing of hire-purchase transactions, was convicted at the Central Criminal Court before Diplock J. on September 16, 1957, of seven offences of disposing of goods under circumstances which contravened article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956, hereinafter called "the Order." Oliver Autos Ltd., a company engaged in buying and selling motor-cars, and Richard and Hone, two of its officers, were convicted of aiding and abetting the commission of these offences. All the appellants were fined, the fine on St. Margarets Trust Ltd. being the nominal one of £5 for each offence.

The case arose out of what is popularly known as "the credit "squeeze." One aspect of this was a decision by the Government to restrict the amount of credit given in hire-purchase transactions; and to implement this decision the Order was made by the Board of Trade pursuant to its statutory powers in that behalf which the Order recites. Article 1 thereof enacts that "A person shall not dispose of any goods to which this order "applies in pursuance of a hire-purchase or credit sale agreement "entered into after February 24, 1955, unless the requirements "specified in the second schedule hereto are or have been satis-"fied in relation to that agreement."

The requirements contained in the Second Schedule include a requirement that a specified percentage of the cash price of the goods must be paid before the signing of the agreement. The percentage is laid down in the First Schedule to the Order and varies with the class of goods. In the case of "mechanically "propelled vehicles" it is 50 per cent. One effect of the Order

[2] [1894] 1 Q.B. 574; 10 T.L.R. 313.

is therefore this, that a purchaser of a motor-car on hire-purchase must pay a deposit of at least 50 per cent. of the cash price. Paragraph 3 of the Second Schedule allows the reasonable value of any car tendered in part exchange to be reckoned as part of the deposit.

The Order considerably restricted, as no doubt it was intended to do, the business of selling motor-cars on hire-purchase or credit terms, a business in which Oliver Autos Ltd. are engaged, and that company, together with Richard and Hone, set themselves out deliberately and dishonestly to break the law. To describe what they did it is unnecessary to go into figures. It is clear that if a customer must pay at least 50 per cent. deposit on a car he wishes to purchase, any hire-purchase finance company like St. Margarets Trust Ltd. can advance no more than the remaining 50 per cent. It follows that the higher the cash price the larger will be this advance. If therefore, the hire-purchase company is told and accepts that the cash price is a higher figure than it really is, the advance will be more than if the true cash price were revealed, and that the excess may be used by the car dealer or the customer to make up the customer's deposit of 50 per cent. of the true cash price, if the customer himself is unable to provide it all. That is what was done in the present case. A false inflated cash price was stated to St. Margarets Trust Ltd., who were thereby induced to advance more than they would had the truth been told to them. They were also informed untruthfully that the customer had already paid his 50 per cent. of this false cash price. In fact he had not even paid the full 50 per cent. of the true cash price, and part of the excessive advance from St. Margarets Trust Ltd. was used to supply the deficiency. In these circumstances since the transaction was carried out in a way which in law made St. Margarets Trust Ltd. the owner of the vehicle, and since the word "dispose" in article 1 of the Order by definition includes the disposal of the right to possession, it follows that St. Margarets Trust Ltd. executed a transaction which was forbidden by article 1, inasmuch as 50 per cent. of the true cash price was not paid before the signing of the hire-purchase agreement. St. Margarets Trust Ltd. admittedly acted, however, quite innocently throughout. The fraud by which they were induced to dispose of the vehicle, although an inadequate deposit had been paid, was the result of a conspiracy between Oliver Autos Ltd., Richard, Hone and the respective customers who wanted the cars.

In these circumstances, not surprisingly, St. Margarets Trust Ltd. argued before the trial judge that in the absence of mens rea on its part, it could not be convicted under article 1 of the Order. Oliver Autos Ltd. and Richard and Hone in turn submitted that as St. Margarets Trust Ltd. in the absence of mens rea on its part had committed no offence they themselves had aided and abetted the commission of no offence. None of the respective customers was charged, they being called instead as

C. C. A.
1958
REGINA
v.
ST.
MARGARETS
TRUST LTD.

witnesses for the Crown. The prosecution, while admitting the absence of mens rea in St. Margarets Trust Ltd., contended that this was irrelevant and that the prohibition contained in article 1 of the Order was absolute in the sense that if a prohibited transaction was entered into an offence was committed even if the person concerned did so innocently. Diplock J. upheld this view. He then granted a certificate of appeal on the ground that in the preceding session of the Central Criminal Court Barry J. had come to an opposite conclusion in a similar case. The present appellants, however, had at the time of Barry J.'s ruling already been committed for trial, so that the prosecution were able, when the matter came before Diplock J., to argue the point afresh.

The language of article 1 of the Order expressly prohibits what was done by St. Margarets Trust Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption. The matter was thus put by R. S. Wright J. in his well-known judgment in *Sherras* v. *De Rutzen* [1]: "There is a presumption that mens rea, an evil intention, or a "knowledge of the wrongfulness of the act, is an essential ingre-"dient in every offence; but that presumption is liable to be dis-"placed either by the words of the statute creating the offence "or by the subject-matter with which it deals, and both must be "considered."

A little nearer to the present day Kennedy L.J. put the matter in this way in *Hobbs* v. *Winchester Corporation* [2]: "I think that "there is a clear balance of authority that in construing a modern "statute this presumption as to mens rea does not exist. I think "with great respect to my brother Channell that he has applied to "the construction of this modern statute a maxim which is recog-"nized as applicable to offences at common law, and it may be, "as Stephen J. suggests in *Cundy* v. *Le Cocq*,[3] also to offences "under the earlier statutes which are to be treated on the same "basis as offences under the common law. To quote his words, "so far as they have not been quoted—and I accept the view "which Stephen J. there states [4]—'In old time, and as applicable "'to the common law or to earlier statutes, the maxim'—that is, "the maxim that in every criminal offence there must be a guilty "mind—'may have been of general application; but a difference "'has arisen owing to the greater precision of modern statutes. "'It is impossible now, as illustrated by the cases of *Reg.* v.

[1] [1895] 1 Q.B. 918, 921; 11 T.L.R. 369.
[2] [1910] 2 K.B. 471, 483; 26 T.L.R. 557.
[3] (1884) 13 Q.B.D. 207.
[4] Ibid. 207, 210.

" ' *Prince*[5] and *Reg.* v. *Bishop*,[6] to apply the maxim generally " ' to all statutes, and the substance of all the reported cases is " ' that it is necessary to look at the object of each Act that is " ' under consideration to see whether and how far knowledge is " ' of the essence of the offence created.' " What Kennedy L.J. is here saying, we think, is that modern statutes create offences where knowledge on the part of an offender is not essential, and that accordingly there is no universal prior presumption of mens rea. Each statute must be construed according to its terms and its object. If so construed mens rea is not expressly or by necessary implication excluded, it is then that it will be regarded as essential.

Other cases cited in the course of the argument included *Nichols* v. *Hall*,[7] *Reg.* v. *Tolson*,[8] *Brooks* v. *Mason*,[9] *Brend* v. *Wood*,[10] *Harding* v. *Price*,[11] *Reynolds* v. *G. H. Austin & Sons Ltd.*,[12] *Mousell Bros.* v. *London and North-Western Ry.*,[13] *Quality Dairies (York) Ltd.* v. *Pedley*.[14]

There is no difference for present purposes between a statute and a statutory instrument and the question for determination is therefore this: Do the words of article 1 of the Order considered together with the object of the Order make the prohibited act an offence, even though the doer of the act had no guilty mind and acted innocently?

The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margarets Trust Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures whch it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that article 1 of the Order should receive a literal construction, and that the ruling of Diplock J. was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty.

[5] (1875) L.R. 2 C.C.R. 154.
[6] (1880) 5 Q.B.D. 259.
[7] (1873) L.R. 8 C.P. 322.
[8] (1889) 23 Q.B.D. 168; 5 T.L.R. 464.
[9] [1902] 2 K.B. 743; 19 T.L.R. 4.
[10] (1946) 62 T.L.R. 462.
[11] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.
[12] [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606.
[13] [1917] 2 K.B. 836.
[14] [1952] 1 K.B. 275; [1952] 1 T.L.R. 376; [1952] 1 All E.R. 380.

C. C. A.
1958
REGINA
v.
ST.
MARGARETS
TRUST LTD.

We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases.

It may also be true that hire-purchase transactions, in order to avoid difficulties under the Bills of Sale Acts, are carried through in such a way that the finance companies concerned become easy victims of such a fraud as was here perpetrated on St. Margarets Trust Ltd., for they have no control over the car dealer or the customer. But if Parliament enacts that a certain thing shall not be done it is not necessarily an excuse to say: "I carry on "my business in such a way that I may do this thing unwittingly "and therefore should suffer no penalty if I transgress." The answer in some cases is that the importance of not doing what is prohibited is such that the method of business must be re-arranged so as to give the necessary knowledge. The present, we think, is such a case.

Stress was also laid during the course of the argument for the appellants on the language of article 3 of the Order which prohibits any person from causing or permitting goods owned by him to be in the possession of another by virtue of a hire-purchase agreement under certain circumstances. It is said that the words "cause or permit" involve that mens rea is essential to the commission of an offence under article 3, and it is not to be supposed that the same order requires mens rea for the commission of an offence under one article and not under another. The argument is obviously double-edged: for the prosecution might argue that the presence of the words "cause or permit" in article 3 shows that their omission in article 1 was deliberate and that, therefore, the inference regarding mens rea is the opposite to that contended for by the appellants. It is not, however, possible to deal adequately with the argument without knowing exactly the type of transaction envisaged by article 3, and this seems to be in doubt. It might be of such a type that in contradistinction to the transactions covered by article 1 it would be reasonable to imply that mens rea was a necessary ingredient of any transgression. But regarding the matter purely as one of construction we are not prepared to say that the presence of the words "cause or permit" in article 3 outweighs the considerations we have referred to as bearing on the construction of article 1.

It should not be inferred from what we have said that we are deciding that mens rea is required by the language of article 3. We leave that point entirely open, to be decided if and when the issue directly arises, which it does not do in the present case.

Appeals dismissed.

Solicitors: *Dennison, Horne & Co.; Lewis Silkin and Partners; The Solicitor, Board of Trade.*

C. J. E.

[COURT OF APPEAL.]

* BAYLIS BAXTER LTD. v. SABATH.

C. A.

1958
April 15, 16.

Jenkins, Parker and Pearce L.JJ.

[1955 B. No. 2448.]

Costs—Appeal—Jurisdiction—Judgment for plaintiffs at trial—Plaintiffs refused costs because of unsatisfactory witness—Appeal as to costs without leave of judge—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 31 (1), 50 (1)—*R.S.C., Ord.* 65, *r.* 1.

Costs—Set-off—Counterclaim or set-off—Counterclaim amounting to equitable set-off.

The plaintiff company brought an action against the defendant, a former employee, to recover £1,253, said to be a debt due on a running account. The defendant alleged that repayment of the debt was to be contingent on the receipt by him of a sum claimed in respect of certain expropriated assets abroad, and counterclaimed a sum of £1,083 said to be due to him as arrears of a salary of £500 a year.

At the trial the principal witness for the plaintiff company was one P. who controlled the company though he was not a director. McNair J. rejected much of the evidence given by P. but gave judgment for the plaintiff company on the claim and counterclaim on the ground that the defendant had not made out his case on either issue. McNair J. stated that he attached little weight or credibility to the evidence of either P. or the defendant; he refused to make any order as to costs in view of the impression he had formed of P.'s evidence, and refused leave to appeal on that issue. On an appeal by the plaintiff company:—

Held, that as the exercise of the judge's discretion had been based on matters connected with the case, the Court of Appeal was prohibited by section 31 (1) (*h*) of the Judicature Act, 1925,[1] from entertaining the appeal.

Observations of Lord Cave in *Donald Campbell and Co. Ltd.* v. *Pollak* [1927] A.C. 732, at p. 811; 43 T.L.R. 787 applied.

Hudsons Ltd. v. *De Halpert* (1913) 108 L.T. 416; 29 T.L.R. 257 overruled.

Hong v. *A. & R. Brown Ltd.* [1948] 1 K.B. 515; [1948] 1 All E.R. 185; sub nom. *Wong Kwok Hong* v. *Brown (A. & R.) Ltd. and Runcimans (London) Ltd.*, 64 T.L.R. 132 considered.

Per Jenkins L.J. In a case where it is sought to appeal, without leave, from an order relating solely to costs, such an application should not be entertained in view of the express terms of section 31 (1) (*h*) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect: "In this case the judge did not "in truth exercise his discretion at all" . . . That means that in order that an appeal may properly be entertained the case in question must be one of the type to which Lord Cave referred by way of illustration where the decision of the judge was based on some misconduct wholly unconnected with the cause of action or on some wholly irrelevant consideration.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31: "(1) "No appeal shall lie— . . . (*h*) without the leave of the court or judge "making the order, from an order of "the High Court or any judge thereof "made with the consent of the parties "or as to costs only which by law are "left to the discretion of the court."

C. A.

1958

Baylis Baxter Ltd. v. Sabath.

Per Parker L.J. In a case such as this, where the counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one in relation to costs.

Appeal from McNair J.

The statement of facts is taken substantially from the judgment of Jenkins L.J.

The plaintiffs, Baylis Baxter Ltd., appealed from a judgment of McNair J. dated June 14, 1957, the appeal relating only to the terms of that judgment in regard to costs. The action was commenced by specially indorsed writ for the sum of £1,253 10s., moneys claimed as due from the defendant to the plaintiff company on a running account kept with the company by the defendant. The defendant's defence was to the effect that his indebtedness on the running account had included loans totalling £2,500 which were made on terms that they were only to be repayable when a claim which the defendant had, or claimed that he had, against the Czech Foreign Compensation Commission in respect of the expropriation of his assets in Czechoslovakia, should have been paid in full. Secondly, the defendant alleged that he was employed by the plaintiff company at a salary of £500 a year, and he claimed £1,083 13s. 4d. as due to him in respect of arrears of that salary; and having paid £169 6s. 8d. to the plaintiff company after action brought he said that there was nothing due to them because the balance of £1,083 13s. 4d. represented the arrears of salary claimed by him to be due to himself from the plaintiff company, for which amount he entered a counterclaim.

At the conclusion of the hearing, the judge found for the plaintiff company both on the claim and on the counterclaim, and gave judgment in favour of the plaintiffs for the £1,083 13s. 4d., representing the balance due (according to the plaintiff company) after allowance had been made for the payment of the £169 6s. 8d. since action brought. But although the judge held the plaintiff company entitled to succeed, he held that no order should be made as to costs. It was contended for the plaintiff company that the judge erred in dealing with the costs in that way, and that there was no sufficient reason for departing from the ordinary rule that costs should follow the event.

The history of the matter involved two companies, namely, the plaintiff company itself and another company called British Overseas and Export Trading Co. Ltd. The businesses of these companies were associated, and the principal shareholder was one Otto Popper, who was not a director. The defendant was employed by one or other or both of these companies on terms which it was unnecessary to define with precision. The defendant apparently had a drawing account with both companies. It seemed that the £2,500 already referred to was originally advanced by the British Overseas and Export Trading Co. Ltd., which apparently also advanced to the defendant a further sum of £1,200. It appeared that these sums were subsequently transferred to the debit of the defendant's drawing account with

the plaintiff company by means of a payment in account by the plaintiff company to the British Overseas and Export Trading Co. Ltd. of the appropriate amount. The substantial issues in the case were: first, whether the loan of £2,500 was made on the condition mentioned, to the effect that it was only to be repayable on payment of the defendant's claim against the Foreign Compensation Commission; and secondly, whether, as the defendant claimed, he was employed by the plaintiff company at a salary of £500 a year, the allegation that he was so employed being the basis of his counterclaim for £1,083 13s. 4d. But the first issue was complicated by the fact that the plaintiffs alleged, and sought to prove, not merely that the loan was made without the condition relied on by the defendant, but that the loan was never in fact made at all; and the plaintiffs further alleged and sought to prove that there was no transfer of the amounts owing to the British Overseas and Export Trading Co. Ltd. from the defendant with the assent of either of the companies or of Popper.

The judge, on the issue as to the £2,500 loan, wholly rejected Popper's evidence to the effect that there was no loan at all; and he also wholly rejected Popper's evidence that there was no transfer of this indebtedness to the plaintiff company; but he found in favour of the plaintiff company on this issue on the ground that the bargain included nothing amounting to a legally binding condition to the effect that the liability to repay was only to arise when the defendant's claim against the Foreign Compensation Commission should have been met. On the other hand, the judge rejected the defendant's evidence in regard to his employment by the plaintiff company at the salary of £500 a year; and, in general, he attached little weight or credibility to the evidence of Popper, and likewise attached little weight or credibility to the evidence of the defendant.

In dealing with the question of costs McNair J. said: "As "regards costs, Mr. McDonnell, I have formed a view unfavour- "able to your clients"—that is, the plaintiff company—"as "regards the evidence of Mr. Popper, which I have expressed in "the course of my judgment, and I think that should be "reflected in the matter of costs. I have in mind to say that "there should be no costs either way. I propose to say judgment "to be entered for the sum indicated without costs in view of the "impression I have formed as to Mr. Popper's evidence." Then Mr. McDonnell said: "Might I address your Lordship on that? "Your Lordship has formed a no more favourable view of the "evidence of the defendant. In my respectful submission the "unfavourable view that your Lordship has formed of both Mr. "Popper and Mr. Sabath should cancel each other out. In my "submission the proper order would be the usual one that, as the "plaintiff has succeeded . . ."—and then the judge said: "The "plaintiffs have not succeeded by reason of any evidence they "have brought before me." Then Mr. McDonnell said: "They "have succeeded in this sense, with respect, my Lord, that a

C. A.
1958
BAYLIS BAXTER LTD. v. SABATH.

"dispute having arisen between the parties and unsatisfactory "evidence having been given on behalf of the plaintiffs and by "the defendant, the plaintiffs' claim is found to be well-founded, "and in these circumstances I would submit that you should not "differ from the usual result that costs should follow." Then McNair J. said: "That is the usual result when a claim is "supported by honest evidence." He refused leave to appeal.

D. L. McDonnell for the plaintiffs.
A. R. Barrowclough for the defendant.

Cases cited in argument, not referred to in the judgments: *Ottway* v. *Jones* [2]; *Evans* v. *Bartlam* [3]; *Metropolitan Asylum District* v. *Hill* [4]; *Huxley* v. *West London Extension Railway Co.* [5]; *Yelland* v. *Taylor* [6]; *Fane* v. *Fane.* [7]

JENKINS L.J., after stating the facts: That is how the matter was left by the judge. An application was made to him for leave to appeal, which was refused; and, in the circumstances I have stated, Mr. McDonnell, for the plaintiff company, now invites us to hold that we should entertain this appeal and should conclude that the judge was in error in making no order as to costs and should have given the plaintiff company their costs of the action and of the counterclaim.

Mr. McDonnell is met at the outset with certain statutory difficulties arising under the Judicature Act, 1925. I should first refer to section 50, which provides, in subsection (1): "Subject "to the provisions of this Act and to rules of court and to the "express provisions of any other Act, the costs of and incidental "to all proceedings in the Supreme Court . . . shall be in the "discretion of the court or judge, and the court or judge shall "have full power to determine by whom and to what extent the "costs are to be paid . . ."

The other section of the Act to which I should refer is section 31; but before doing that I should mention Order 65, r. 1 of the Rules of the Supreme Court. That rule provides: "Subject to "the provisions of the Act and these Rules, the costs of and "incident to all proceedings in the Supreme Court, . . . shall be "in the discretion of the court or judge . . ."

If the matter rested there, Mr. McDonnell would be faced with the difficulty usually attendant upon an appeal against a decision arrived at by a judge in exercise of some discretionary jurisdiction vested in him. But the matter does not rest there, for section 31 of the Act provides, by subsection (1), "No appeal "shall lie"—then there are a number of lettered sub-paragraphs, and, in particular, sub-paragraph (*h*), "without the leave of the

[2] [1955] 1 W.L.R. 706; [1955] 2 All E.R. 585.
[3] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.
[4] (1880) 5 App.Cas. 582.
[5] (1889) 14 App.Cas. 26; 5 T.L.R. 355.
[6] [1957] 1 W.L.R. 459; [1957] 1 All E.R. 627.
[7] (1879) 13 Ch.D. 228.

"court or judge making the order, from an order of the High "Court or any judge thereof made with the consent of the parties "or as to costs only which by law are left to the discretion of the "court." So, the position being that the judge had made an order as to costs which it was within his discretion to make, and having refused leave to appeal, according to the express terms of section 31 (1) (*h*), no appeal lies to this court.

Mr. McDonnell answers that in this way: he says that, on the authorities, notwithstanding the express language of section 31 (1) (*h*), it is open to an appellant who is dissatisfied with an order as to costs, to appeal without leave where he can show that the judge exercised his discretion wrongly, either because in exercising it he had regard to wholly irrelevant matters or because he exercised it without any material to support his exercise of it in the particular way. He invites us to hold that this is one of the exceptional cases in which an appeal should be entertained although leave to appeal has been refused by the judge. In support of this argument, Mr. McDonnell said that there were two witnesses whose credibility was in question: on the one side Popper and on the other side the defendant, Sabath; and he says that the judge found both these witnesses unreliable and Sabath no more reliable than Popper: accordingly, he says that the unreliability of the witnesses is a circumstance to be put in the scale on either side and that the shortcomings of the two witnesses in this competition, so to speak, cancel each other out, so that Popper's lack of credibility did not provide any material for an exercise by the judge of his discretion in any manner other than the usual one of directing that the costs should follow the event.

With respect to Mr. McDonnell, I am not impressed by that argument, for, as it seems to me, once it is conceded that the credibility of the witnesses and the conduct of the parties in regard to the case they allege and seek to prove is a relevant matter for a judge to take into account in dealing with the question of costs, any comparison to be made of the conduct or misconduct of the parties on each side is a matter for the judge, and he is entitled to weigh one against the other and if he finds that one party has behaved particularly badly, although in the end successful in his claim, that is a matter which he can take into account, even though the conduct of the other party might appear to be equally or almost equally culpable. The judge has seen and heard the witnesses and attended to the whole course of the proceedings, and he is obviously in the best position to decide whether one side has behaved so badly in the matter as to justify that party being deprived of costs.

Then Mr. McDonnell said—and he supported it by the authority of *Hudsons Ltd.* v. *De Halpert*[1]—that although Popper (as I understand it) admittedly controlled the plaintiff

[1] (1913) 108 L.T. 416; 29 T.L.R. 257.

C. A.
1958
BAYLIS BAXTER LTD. v. SABATH.
Jenkins L.J.

company, and although it was for him to decide what case the plaintiff company should allege and how it was to be proved, nevertheless the fact that he gave false evidence could not be held against the company in any way, inasmuch as the company was not Popper, and to penalize the company for Popper's misconduct would be to penalize one person for the fault of another. It is true that support for that proposition is to be found in the case of *Hudsons Ltd.* v. *De Halpert*[2]; but for my part I cannot accept the view of the Divisional Court in that case if it is intended to convey that in no case can a company be penalized in the matter of costs where those responsible for the conduct of its affairs present a false case and seek to support it by false evidence. That is a proposition which I cannot accept, with all respect to the Divisional Court, who appear to have held to the contrary in *Hudsons'* case.

Mr. McDonnell and Mr. Barrowclough, in full and careful arguments on each side, referred us to many of the authorities dealing with this or kindred topics. The case on which Mr. McDonnell mainly relied, apart from *Hudsons Ltd.* v. *De Halpert*, was *Hong* v. *A. & R. Brown Ltd.*[3] He cited that case for the general observations made by Lord Greene M.R. as to the effect of section 31 (1) (*h*) of the Judicature Act, 1925. I can confine my citation to Lord Greene's statement of the general principle. The passage to which I refer is at the opening of Lord Greene's judgment.[4] He said: "This is an appeal on "a matter of costs only. Such an appeal cannot be brought "without the leave of the court or judge by reason of section "31, subs. (1) (*h*) of the Judicature Act, 1925. The statement "that such an appeal cannot be brought 'without the leave of "'the judge' requires this qualification; that, in as much as the "costs are in the discretion of the judge, it is always possible to "attack his order if it can be shown that the discretion has never "really been exercised. In that expression I would include two "matters, each of which nullifies the purported exercise of a "judicial discretion. One matter is the failure to act as a judge "should act, that is to say a failure to act judicially; the other "is what is really a branch of the same thing, namely, the pur-"ported exercise of the discretion without any materials on which "a judge could exercise it."

Applying those general principles to the case now before the court, Mr. McDonnell said that in the present case the judge failed to act as a judge should act—that is to say, failed to act judicially—and further, purported to exercise his discretion without any materials on which his exercise of it could be based. Mr. McDonnell said, in effect, that the judge failed to act judicially in

[2] 108 L.T. 416.

[3] [1948] 1 K.B. 515; [1948] 1 All E.R. 185; sub nom. *Wong Kwok Hong* v. *Brown (A. & R.) Ltd. and Runcimans (London) Ltd.*, 64 T.L.R. 132.

[4] [1948] 1 K.B. 515, 517.

that he founded himself upon the conduct of Popper in giving his evidence, and that this was not a matter by reference to which the judge, acting judicially, could properly determine the question of costs adversely to the plaintiff company.

Then Mr. McDonnell says that there was no material on which the judge could exercise his discretion in the way he did as there was nothing on which he could found himself apart from the way in which the opposing witnesses gave their evidence, a consideration which, as I have already put it, cancelled itself out because both sides were equally culpable.

That is *Hong* v. *A. & R. Brown Ltd.*,[5] and that is the way in which Mr. McDonnell seeks to use it. But any discussion of this topic at this date must inevitably begin with a reference to the case in the House of Lords of *Donald Campbell & Company Ltd.* v. *Pollak*.[6] In that case the earlier decisions were reviewed, particularly by Lord Cave in a very full speech; and quite clearly the intention and effect of the decision was to curtail the latitude which in earlier cases had been held to exist in the matter of entertaining appeals on the question of costs notwithstanding the provisions of section 31 (1) (*h*) of the Judicature Act, 1925, or its precursors in earlier Acts. I think I need only read from Lord Cave's speech his summary of the position.[7] Lord Cave said this: "My Lords, it appears to me that the true view is substantially that taken by Lord Sterndale in the above quoted passage in his judgment in *Ritter* v. *Godfrey*,[8] although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realized—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a court of appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a court of appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it."

[5] [1948] 1 K.B. 515, 517.
[6] [1927] A.C. 732; 43 T.L.R. 787.
[7] [1927] A.C. 732, 811.
[8] [1920] 2 K.B. 47.

C. A.
1958
BAYLIS BAXTER LTD. v. SABATH.
Jenkins L.J.

Now the statement of principle contained in the judgment of Lord Greene in *Hong* v. *Brown*[9] is more shortly expressed than is the passage I have just read from Lord Cave's speech: it is less explicit and therefore might be capable of a wider interpretation: but for my part I cannot accept the view that Lord Greene intended to depart in any way from the conclusion expressed by Lord Cave in that passage. Accordingly, I regard that passage as providing the test to be applied in the present case and in other similar cases; and in so far as *Hudsons'* case[10] or any other of the earlier cases is inconsistent with *Donald Campbell & Co. Ltd.* v. *Pollak*,[11] then in my view such case cannot be regarded as authoritative.

Applying Lord Cave's test in the present case, it seems to me that the present appeal must fail. It cannot be said here that the judge's decision as to costs was not based on "some reason "connected with the case." It was based on the view, unfavourable to the plaintiff company, which the judge had formed as regards the evidence of Popper. That, I have no doubt, was a reason "connected with the case," and quite clearly not one of those entirely extraneous or irrelevant reasons to which Lord Cave referred. This too, I think, was a case in which the judge, "deliberately intending to exercise his discretionary powers, acted "on facts connected with or leading up to the litigation which "had been proved before him or which he had himself observed "during the progress of the case." I think that the judge here, during the progress of the case, observed the unsatisfactory character of Popper's evidence and considered that this was a matter proper to be taken into account in determining the incidence of costs. If that is right, then the consequence follows that this court is prohibited by the statute from entertaining an appeal from the judge's order, even though this court might regard his reasons as insufficient and might disagree with his conclusion.

I should add a reference to the case of "*The Young Sid*,"[12] in which Scrutton L.J. emphasized the restrictive character of the test laid down in *Donald Campbell & Company Ltd.* v. *Pollak*.[13]

I think that the matter as it now stands really comes to this, that in a case of this sort—that is to say, in a case in which it is sought to appeal, without leave, from an order relating solely to costs—such an application should not be entertained in view of the express terms of section 31 (1) (*h*) of the Judicature Act, 1925, unless the circumstances are such that this court can say, in effect, "In this case the judge did "not in truth exercise his discretion at all." I think it is only in a case of that kind that this court has jurisdiction to entertain such an appeal. That means that in order that an appeal may properly be entertained the case in question must be one

[9] [1948] 1 K.B. 515, 517.
[10] 108 L.T. 416.
[11] [1927] A.C. 732.
[12] [1929] P. 190, 194; 45 T.L.R. 389.
[13] [1927] A.C. 732, 811.

of the type to which Lord Cave referred by way of illustration where the decision of the judge was based on some misconduct wholly unconnected with the cause of action or on some wholly irrelevant consideration such as the colour of the parties' hair—in other words, one might say, cases in which the decision has been purely arbitrary as distinct from judicial, or has been based on considerations which are clearly wholly irrelevant to the determination of the question as to the incidence of costs. But to my mind it is a wrong method of approach to begin by criticizing the order made by the judge on the ground that it was not a proper exercise of the discretion, and, founding oneself on that, to go on to say that, because the mode in which discretion was exercised is open to criticism, therefore the case is one in which an appeal will lie without the leave of the judge notwithstanding the clear injunction to the contrary contained in the section.

It is only, in my judgment, in exceptional cases of the kind that I have endeavoured to describe that such an appeal can lie at all; and notwithstanding the clear and persuasive argument of Mr. McDonnell he has failed to convince me that the present case is a case of that exceptional character. What view this court might have formed of the manner in which the judge exercised his discretion if the matter was open to review it is entirely unnecessary and irrelevant to say. In my view this appeal should be dismissed, simply on the ground that it is not an appeal which can properly be entertained having regard to the terms of the statute. Accordingly, I would dismiss this appeal.

PARKER L.J. I agree; and I would only add a few words in deference to Mr. McDonnell's argument.

Section 31 (1) (*h*) of the Judicature Act, 1925, prohibits any appeal on costs only, in a case where costs are left to the discretion of the judge, unless leave is given by the judge himself. No provision is there made for leave being given by this court in a case where the judge has refused leave, and, that being so, the section prima facie imposes an absolute prohibition in such a case. This prohibition is a re-enactment of a similar prohibition which appeared in section 49 of the Act of 1873; and while this court thereafter, in order to mitigate the severity of the prohibition, opened the door rather wide to appeals, that door was firmly closed by the decision of the House of Lords in *Donald Campbell & Company Ltd.* v. *Pollak.*[14] As a result of that decision, the only cases where an appeal on costs only can be brought without leave are the extreme and, happily, rare cases where it can be said that the judge had no materials

[14] [1927] A.C. 732, 811.

C. A.
1958
BAYLIS BAXTER LTD. v. SABATH.
Parker L.J.

connected with the case on which he could exercise his discretion in the way he did. In the passage to which my Lord has referred,[15] Scrutton L.J., in his usual way, stated the matter emphatically and concisely. Mr. McDonnell, however, relied to a large extent on the words of Lord Greene M.R. (to which my Lord has also referred) in *Hong* v. *A. & R. Brown Ltd.*[16] For my part I think that, in referring to the word "judicially" and in saying that the discretion must be exercised judicially, he is using that word in contradistinction to "arbitrarily," in the sense of the illustrations given by Lord Cave in *Donald Campbell & Company Ltd.* v. *Pollak.*[17]

That being the position, it seems to me quite impossible in this case to say that there was nothing connected with the case which would enable the judge to deprive the plaintiffs of their costs. He clearly took a very unfavourable view of Popper and found that his evidence was unreliable. It is true that he also found that the defendant's evidence was unreliable. But that does not mean that the adverse view of Popper's evidence was, as it were, cancelled out. Indeed, it is clear that Popper in his evidence was charging the defendant with dishonesty, for which there was no justification whatsoever. Even so, Mr. McDonnell goes on to argue that the company and Popper were two separate legal entities and that the judge in effect was penalizing the company for the sins of Popper; and in that connection he referred to the case of *Hudsons Ltd.* v. *De Halpert.*[18] For my part, like my Lord, I very much doubt whether the decision in that case, in so far as it is based on that principle, can be correct. A company can only give evidence by its responsible officers, and if one of those officers gives evidence which is subject to criticism then it seems to me that the company itself must accept responsibility.

Finally, Mr. McDonnell pointed out, with some force, that in regard to the counterclaim at any rate Popper's evidence was wholly accepted, whereas the defendant's evidence was wholly rejected; and in those circumstances he says that there could be no material upon which the judge could deprive the plaintiffs of the costs of the counterclaim. I think for myself that the answer to that is that in a case such as this, where the counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one, and looked at in that way it seems to me that no valid distinction can be drawn between the way in which he should exercise his discretion in regard to the claim and in regard to the counterclaim.

[15] [1929] P. 190, 194.
[16] [1948] 1 K.B. 515, 517.
[17] [1927] A.C. 732, 811.
[18] 108 L.T. 416.

For those reasons, and for the reasons given by my Lord, I also would dismiss this appeal.

C. A.
1958
BAYLIS BAXTER LTD. v. SABATH.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *P. Cromwell; Herbert Oppenheimer, Nathan & Vandyk.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* WILLIAMSON *v.* BRITISH BOXING BOARD OF CONTROL (1929) AND OTHERS.

1958
April 23.
Devlin J.

PRACTICE NOTE.

Practice and Procedure—Settlement of action—Duty to inform Crown Office—Duty on all parties—R.S.C., Ord. 36, *r.* 29 (6).[1]

APPLICATION.

In an action by the plaintiff against three defendants, the first two defendants were dismissed from the action on failure of the plaintiff to deliver particulars, and on April 1, 1958, the third defendant obtained an order from Master Lawrence dismissing the action against him for want of prosecution. The case was down to be heard by a jury and was in the list for hearing on April 15. On being informed of the discontinuance of the action, Devlin J. ordered that the case should be put in the list again so that he might determine what order should be made.

Basil Garland for the plaintiff.
R. A. Gatehouse for the first and second defendants.
G. E. Janner for the third defendant.

DEVLIN J. This is the second case in this list in which notification has not been given to the Crown Office of some order that has been made in chambers which has affected the hearing of the action. In the case which I dealt with the other day[2] it was an order made by the master taking the case out of the term's list. In the present case the only remaining defendant in the action

[1] R.S.C., Ord. 36, r. 29 (6): "It "shall be the duty of all parties to "any cause or matter entered in any "of the . . . lists to furnish without "delay to the officer by whom the "list is kept all available information "relating to any settlement, or likeli-"hood of settlement, of the cause or "matter, or affecting the estimated "length of the trial."

[2] *Kloss* v. *Curtis*, The Times, April 18, 19, 1958.

1958

Williamson v. British Boxing Board of Control (1929) (Practice Note).

Devlin J.

obtained an order by which the action against him was to be dismissed for want of prosecution, under R.S.C., Ord. 31, r. 21. In this case as in the last one with which I dealt, the Crown Office was not given the necessary information to enable it to take the case out of the list, and, as in the last case, the solicitors have blamed each other, each one saying that it was the duty of the other to take the necessary steps to inform the Crown Office.

The overriding rule in this matter is Order 36, r. 29 (6), and that makes it abundantly plain that it is the duty of both solicitors to take the necessary steps, and that it is not open to either of them to advance the argument that has been advanced in this case that the responsibility lay wholly on the other one. If solicitors want to be safe in this matter the proper course to take is for each one of them to make sure that the Crown Office is notified; and it is because of the importance of the Crown Office being notified and of the List being kept in order that the rule, as I apprehend it, places the duty fairly and squarely upon both solicitors. It is the duty, therefore, of both of them either to make the communication direct themselves or to see and satisfy themselves that the communication is made on behalf of them both by one or other of the parties. If that rule is not fulfilled solicitors lay themselves open to being made to pay personally the costs that have been thrown away as a result of the waste of public time.

What I am doing today is to investigate where the responsibility lies. While, as I have said, it is the duty of them both, it may well be that the blame may fall more heavily upon one rather than the other. In this case I think it falls upon the solicitors for the third-named defendant. It was they who obtained the order which dismissed the action for want of prosecution. It has been argued on their behalf that all they had to do was to send a copy of that order to the plaintiff and to leave it to the plaintiff who had had his action dismissed to take the necessary steps to bring it to the attention of the Crown Office. I do not accept that view at all. I think it is the duty of the solicitor who obtains the order in the first place to see that it is filed with the Crown Office so that the action can be removed from the list. It might very well be that there was a plaintiff in person, a plaintiff who had not appeared at all and was not prosecuting the action because he had disappeared from the country or something of that sort; or, again, it might very well be that time was extremely short and that the matter could not wait until the order had been drawn up and sent through the post and left for the plaintiff to deal with. I think that the burden lay primarily upon the solicitors for the third-named defendant. While the plaintiff's solicitors cannot entirely be exonerated, in this particular matter, where the responsibility is principally upon the third-named defendant's solicitors, I think it is right that they should have to pay the costs thrown away.

Accordingly I order that they should pay personally the costs thrown away in this matter. Those costs will include the costs of bringing the twelve gentlemen of the jury here, whose time was entirely wasted; they will include all the costs of this application; and they will include the costs of the proceedings before me when the case came into the list, since the plaintiff very properly, in those circumstances, thought it right to be represented by counsel so that counsel might explain to me what the position was.

1958

WILLIAMSON v. BRITISH BOXING BOARD OF CONTROL (1929) (PRACTICE NOTE).

Order accordingly.

Solicitors: *Lewis & Shaw; Field, Roscoe & Co.; Barnett Janner & Davis.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

* GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM BOROUGH COUNCIL.

SAME *v.* SAME.

1958
April 22.

Lord Goddard C.J., Hilbery and Donovan JJ.

Rates and Rating—Profit—Housing trust—Trust to provide decent housing for poorer classes—Trustees required to obtain return on capital of trust fund and increase fund—Whether trust established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The trust deed of a housing trust showed that its main object was to provide proper dwelling accommodation for the poorer classes of London. The trustees were required by expending the original capital of the trust fund on objects of a permanent character returning a fair low rate of interest to keep the fund intact and increase it so as to make more assets available for the purposes of the trust. The trust claimed that a hereditament which it owned and occupied and a flat which it let to a tenant were entitled to rating relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] as premises "occupied for the purposes of "an organization (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects are "charitable . . .":—

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments, that is to "say—(*a*) any hereditament occupied "for the purposes of an organization "(whether corporate or unincorporate) "which is not established or conducted "for profit and whose main objects are "charitable or are otherwise concerned "with the advancement of religion, "education or social welfare."

1958

Guinness Trust (London Fund) Founded 1890 Registered 1902 v. West Ham Borough Council

Held, that the trustees having been directed to make investments and so earn a profit on the trust capital were conducting the trust for profit and were not entitled to relief.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 distinguished.

Cases stated by the Recorder of West Ham Quarter Sessions.

The appellants, the Guinness Trust (London Fund) Founded 1890 Registered 1902 (hereinafter called the "trust"), who owned and occupied premises known as the Working Persons Hostel and Premises situate at John Street, West Ham, appealed against the levying of rates on these premises by the respondents, the rating authority for the area.

The recorder heard the appeal on April 15, 1957, and gave judgment on June 3, 1957.

He found the following facts: The trust was an organization whose main objects were charitable. It was established in 1890 by a deed of trust and was incorporated by order of the Charity Commissioners in 1902. Its main activity was the provision of housing for persons who were not well-to-do. The policy of the trustees had been, after allowing for all outgoings, to realize a net income of 3 per cent. on the trust capital which was applied in acquiring additional properties and expanding the work of the trust. The original capital fund, which amounted to £200,000, had increased by the end of 1955 to something of the order of £1,500,000. Paragraph 1 (B) of the deed of trust provided: "Without restricting the interpretation "in the widest sense of the objects as before defined, it is the "intention of the founder that the original capital of the fund "should, by expenditure on objects of a permanent character "returning a fair low rate of interest, as far as possible, be "kept intact and go on increasing, so that, whilst payments "of money in the nature of gifts or not returnable by the "recipients are not precluded, the purpose to be kept in view "may be assistance to individuals to improve their condition, "without placing them in the position of being the recipients "of a bounty." The rateable value of the premises for the financial year 1955/1956—that is, for the last year of the old valuation list—was £188, and the rates paid for that year amounted to £263 4s. The rateable value of the premises for the financial year 1956/1957—that is, for the first year of the new valuation list—was £976 and the rates payable for that year would be £935 6s. 8d. The issue to be determined was whether or not the trust was "established or conducted for profit" within section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It was contended by the trust that it was not established or conducted for profit in that although it was the policy of the trustees to secure a surplus of receipts over expenditure in any

year, such surplus was applied exclusively for the charitable purposes of the trust.

It was contended by the rating authority that the terms of the deed of trust made it clear that a profit was deliberately aimed at, that the accounts and the course of business showed a profit was made, that its destination was irrelevant and that under the terms of the deed of trust it could in any event be lawfully applied in support of some other undertaking expressly formed for the purposes of profit.

The recorder was of the opinion that if it could be shown the trust was not established for profit, the question of whether or not it was conducted for profit did not arise; that "established for profit" meant established for the purpose of profit; and that for determining the question whether the trust was established for profit regard must be had to the objects of the trust as set out in the deed of trust. Profit, while contemplated by the deed of trust, was entirely incidental to the objects of the trust. The recorder, therefore, allowed the appeal.

There was a further appeal by the trust against the levying of rates on a flat, which they had let on a weekly tenancy, situate at 106 John Street, West Ham. The additional point raised was whether, assuming the trust was not established or conducted for profit, the flat was being occupied for the purposes of its organization.

The recorder was of opinion that the flat was so occupied.

The rating authority appealed. It was conceded by counsel in argument that if it be held that the trust was established or conducted for profit, the additional point in the second appeal did not arise.

Michael Rowe Q.C. and *Geoffrey Rippon* for the rating authority.

J. P. Widgery Q.C. for the trust.

The following cases were cited in argument, in addition to the case referred to in the judgments: *Reg.* v. *Whitmarsh* [2]; *Brighton College* v. *Marriott* [3]; *John Laing & Son Ltd.* v. *Kingswood Assessment Committee* [4]; *Guinness Trust (London Fund)* v. *Green.* [5]

LORD GODDARD C.J. stated the facts and continued: We have merely to consider the exemption which is given by the Act of Parliament to an organization which must not only be charitable but be neither established nor conducted for profit. Let it be assumed, as I think it may properly be assumed, that the

[2] (1850) 15 Q.B. 600.
[3] [1926] A.C. 192; 42 T.L.R. 228.
[4] [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 244.
[5] [1955] 1 W.L.R. 872; [1955] 2 All E.R. 871.

1958

GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM BOROUGH COUNCIL.

Lord Goddard C.J.

Guinness Trust is not established for profit, in the sense that that is not the object of the trust, but is to be conducted for profit and exists in order that there may become an accumulation of funds which will enable the trustees to invest in other buildings and thus increase the benevolent objects the settlor had in mind. So far as the rating authority is concerned, the rating authority is not, it seems to me, concerned with more than whether the conduct of the business is for profit; and it is for profit. It is for other objects, no doubt, but it is conducted for profit because clause 1 (B), which, to my mind, distinguishes the present case, if distinction is needed, from *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[1] to which we have been referred, shows that if there is profit being made the rating authority is not concerned with what is done with that profit. The rating authority does not have to consider whether the profit is used for charitable purposes or whether it is used for any other purpose. In my opinion, with all respect to the recorder and Mr. Widgery's argument, I think it is a very short point, and although I will assume it is not the case that the organization is established for profit, in my opinion it is conducted for profit because it is making profits, and its object is making profits for the purposes I have indicated; and, in my opinion, although its main objects are charitable it is not entitled to the benefit of the section, and the appeals must be allowed.

HILBERY J. I am of the same opinion. To bring these premises in question within section 8 of the Act of 1955 it must be shown that the Guinness Trust is not established or conducted for profit and its main objects are charitable. The difficulty in the way of the Guinness Trust seems to me to be in the terms of the deed which created the trust. It is quite true, perhaps, to say that under that deed the main object for which it was established is charitable, and indeed that is conceded. The main object is charitable, but the question arises whether it is conducted for profit as well as having for its main object charitable objects. I find it difficult to escape from the express terms of paragraph 1 (B) because there the founder of the trust expressed himself thus: "Without restricting the interpretation in the widest sense of the "objects as before defined, it is the intention of the founder that "the original capital of the fund should, by expenditure on "objects of a permanent character returning a fair low rate of "interest, as far as possible, be kept intact and go on increasing." In my view the fair interpretation of that is a direction to the trustees so to conduct the affairs of the trust as to produce a profit, which will, if possible, increase the fund available for the charitable purposes, and that is conducting for profit—true, for the purpose eventually of effecting the charitable purposes, but none the less they are directed to conduct for profit. That seems

[1] [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.

to me to distinguish the case from the decision of the Court of Appeal on which Mr. Widgery placed great reliance: *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[2] because the words of Parker L.J., on which particular stress was laid, were these [3]: "The organization accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organization is established or conducted for profit." In my view, if the facts were that in this case the trustees had merely, as incidental to the discharge of the trust, so to invest money as to increase the money available for charitable purposes, the case would come immediately within the reasoning of that judgment, but that is not the case here. It is not that incidentally or fortuitously these profits have been made by the trustees. They have been made pursuant to the direction given to the trustees about the affairs of the trust under the trust deed in that paragraph 1 (B). In my view, therefore, the contention of the trustees fails.

DONOVAN J. I agree. It seems to me that all that the learned recorder thought he had to decide was whether the trust was established for profit, and if he decided it was not, then he had automatically decided that the trust was not conducted for profit. I think that is clearly wrong. There are two separate conditions in the section, both of which must be satisfied before there is a claim for relief. I merely venture to repeat what I said in argument to Mr. Widgery in connexion with the judgment of Parker L.J. about the concern being conducted for profit. Where a concern simply invests its reserves in order to get a return until the reserves are required for the business, it is natural to say that in so investing its reserves the concern is not, merely on that account, conducting its affairs for profit. But I think it is otherwise where the whole business is to make investments and so earn a profit, whether the investments be in stocks and shares or in dwelling-houses.

Appeals allowed. Leave to appeal.

Solicitors: *G. E. Smith, West Ham; Travers Smith, Braithwaite & Co.*

[2] [1957] 2 Q.B. 573. [3] Ibid. 580.

[PRIVY COUNCIL.]

J. C.† 1958 March 17.

* ROSS-CLUNIS . . . . . APPELLANT;

AND

PAPADOPOULLOS AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Delegated Legislation—Public safety or order—Relation to purpose—Cyprus—Collective punishment regulations—Validity—Collective fine order—Prior inquiry—Whether statutory requirements complied with—Emergency Powers Order in Council, 1939, *s.* 6 (1)—*Emergency Powers (Collective Punishment) Regulations,* 1955 *to (No.* 1), 1955, *regs.* 3, 5 (1) (2). *Cyprus.*

Minister—Determination by—Whether subject to review by courts—Required to be "satisfied"—Whether any grounds on which he could be satisfied—"As thinks fit"—Cyprus commissioner—Collective fine order.

By section 6 of the Emergency Powers Order in Council, 1939: "(1) The Governor may make such Regulations as appear to him "to be necessary or expedient for securing the public safety . . . "the maintenance of public order . . ."

The Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, made under the Order in Council of 1939 provided: "3. If an offence has been committed . . . within any area of the "Colony . . . and the commissioner has reason to believe that all "or any of the inhabitants of the said area have: . . . (*c*) failed "to take reasonable steps to prevent the commission of the offence; "or (*d*) failed to render all the assistance in their power to discover "the offender or offenders . . . it shall be lawful for the commis-"sioner, with the approval of the Governor, . . . (i) to order that "a fine be levied collectively on the assessable inhabitants of the "said area . . ."

By regulation 5: "(1) No order shall be made under regula-"tion 3 . . . unless an inquiry into the facts and circumstances "giving rise to such order has been held by the commissioner. "(2) In holding inquiries under these Regulations the commissioner "shall satisfy himself that the inhabitants of the said area are "given adequate opportunity of understanding the subject-matter "of the inquiry and making representations thereon, and, subject "thereto, such inquiry shall be conducted in such manner as the "commissioner thinks fit."

The appellant, the Commissioner of Limassol, Cyprus, after holding an inquiry, made an order under regulation 3 imposing a collective fine of £35,000 on the assessable Greek-Cypriot inhabitants of the area of the Municipality of Limassol on the ground that "I have reason to believe that a substantial number of the Greek-"Cypriot inhabitants of the area failed to take reasonable steps to "prevent the commission of" a number of murders and other offences "and failed to render all the assistance in their power "to discover the offenders." The respondents, representative Greek-Cypriots, sought to have the order quashed on the grounds, inter alia, (1) that regulation 3 in so far as it purported to empower the imposition of a collective fine resulted in the punishment of the

† *Present*: LORD MORTON OF HENRYTON, LORD SOMERVELL OF HARROW, LORD DENNING.

innocent for the guilty, was contrary to British ideas of justice, and went beyond the powers vested in the Governor by section 6 (1) of the Order in Council of 1939 and was ultra vires; and (2) that the requirements of regulation 5 (2) in relation to the inquiry had not been complied with. Affidavit evidence on behalf of the appellant and the respondents stated their respective views of what had occurred at the inquiry:—

Held, first, that regulation 3 was clearly "related to the purposes prescribed" by section 6 (1) of the Order in Council of 1939 within the meaning of those words in *Attorney-General for Canada* v. *Hallet & Carey Ltd.* [1952] A.C. 427 at 450; [1952] 1 T.L.R. 1408 and was intra vires. The purpose of imposing a collective fine was to ensure that the inhabitants of the area would adopt an attitude more helpful to "securing the public safety" and "the maintenance of public order"—two of the purposes specified in section 6 (1) of the Order in Council.

Secondly, that if it could be shown that there were *no* grounds on which the commissioner could be satisfied that, within the meaning of regulation 5 (2), the inhabitants of the area were given adequate opportunity of understanding the subject-matter of the inquiry and making representations, a court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts; in the present case, however, there were ample grounds, as stated in his affidavit evidence, on which he could feel "satisfied" of the matters mentioned in regulation 5 (2). Further, the manner in which the inquiry should be conducted was, in the terms of regulation 5 (2), "as the commissioner thinks fit," and was thus a matter for the commissioner and not for the court.

The order imposing the collective fine was accordingly valid.

Order of the Supreme Court of Cyprus reversed.

APPEAL (No. 16 of 1957) by Robert Chattan Ross-Clunis, Commissioner of Limassol, Cyprus, from a judgment of the Supreme Court of Cyprus in its appellate jurisdiction (March 8, 1957) dismissing his appeal from an order of the Supreme Court of Cyprus in its original jurisdiction (December 15, 1956) ordering that an order made by the appellant on July 4, 1956, under the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955, as amended, made under the Emergency Powers Order in Council, 1939, be removed into the Supreme Court and quashed.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The question for decision in this appeal was whether an order made by the appellant, as Commissioner of Limassol, Cyprus, on July 4, 1956, was valid or invalid. The order imposed a fine of £35,000 on the assessable Greek-Cypriot inhabitants of the area of the Municipality of Limassol, and was made under regulation 3 of the Emergency Powers (Collective Punishment) Regulations, 1955, to (No. 1) 1955. These Regulations will hereafter by referred to as "the "Regulations." They were made in exercise (or purported exercise) of the powers conferred on the Governor by section 6 of the Emergency Powers Order in Council, 1939 (hereafter referred to as "the Order in Council").

The relevant provisions of the Order in Council and the regulations were as follows: "Emergency Powers Order in Council

J. C.
1958
ROSS-CLUNIS
v.
PAPADOPOULLOS.

"1939. Part I.—General. 2.—(1) In this Order, unless the "context otherwise requires—'territory' means any territory "mentioned in the First Schedule hereto and its dependances, "and includes the territorial waters, if any, adjacent thereto; "'Governor' includes any person administering the government "of the territory. . . .

"'Law' includes any Order of His Majesty in Council except "this Order, and any Ordinance, order, rule, regulation, by-law, "or other law for the time being in force in the territory."

"Part II.—Regulations. 6.—(1) The Governor may make "such Regulations as appear to him to be necessary or expedient "for securing the public safety, the defence of the territory, the "maintenance of public order and the suppression of mutiny, "rebellion and riot, and for maintaining supplies and services "essential to the life of the community.

"(2) Without prejudice to the generality of the powers con-"ferred by the preceding subsection, the Regulations may, so far "as appears to the Governor to be necessary or expedient for any "of the purposes mentioned in that subsection—

"(*a*) make provision for the detention of persons and the "deportation and exclusion of persons from the territory;

"(*b*) authorize—(i) the taking of possession or control, on "behalf of His Majesty, of any property or undertaking; (ii) the "acquisition on behalf of His Majesty of any property other than "land;

"(*c*) authorize the entering and search of any premises;

"(*d*) provide for amending any law, for suspending the opera-"tion of any law and for applying any law with or without modi-"fication;

"(*e*) provide for charging, in respect of the grant or issue of "any licence, permit, certificate or other document for the "purposes of the Regulations, such fee as may be prescribed by or "under the Regulations;

"(*f*) provide for payment of compensation and remuneration "to persons affected by the Regulations;

"(*g*) provide for the apprehension, trial and punishment of "persons offending against the Regulations;

"Provided that nothing in this section shall authorize the "making of provision for the trial of persons by Military Courts."

Cyprus was mentioned in the First Schedule to this Order.

The relevant portions of the Regulations were as follows:

"2.—(1) In these Regulations, unless the context otherwise "requires—'assessable inhabitant' in relation to any area means "any male who lives in such area and who is, or appears to the "Commissioner to be, not less than eighteen years of age; . . .

"'offence' means an offence the commission of which is, in "the opinion of the Commissioner, prejudicial to the internal "security of the Colony or to the maintenance of public order in "the Colony.

"3. If an offence has been committed or loss of or damage to "property has wilfully and unlawfully been caused within any "area of the Colony (hereinafter referred to as 'the said area') "and the Commissioner has reason to believe that all or any of "the inhabitants of the said area have:

"(*a*) committed the offence or caused the loss or damage; or

"(*b*) connived at or in any way abetted the commission of the "offence or the loss or damage; or

"(*c*) failed to take reasonable steps to prevent the commission "of the offence; or

"(*d*) failed to render all the assistance in their power to dis-"cover the offender or offenders, or to effect his or their arrest; or

"(*e*) connived at the escape of, or harboured, any offender or "person suspected of having taken part in the commission of the "offence or implicated in the loss or damage; or

"(*f*) combined to suppress material evidence of the commis-"sion of the offence or of the occurrence of the loss or damage; or

"(*g*) by reason of the commission of a series of offences in the "said area, been generally responsible for the commission of such "offences,

"it shall be lawful for the Commissioner, with the approval of the "Governor, to take all or any of the following actions:

"(i) to order that a fine be levied collectively on the assessable "inhabitants of the said area, or any part thereof;

"(ii) to order that all or any of the shops in the said area shall "be closed until such order be revoked or shall open only during "such times and under such conditions as may be specified in "the order;

"(iii) to order the seizure of any movable or immovable "property of any inhabitant of the said area;

"(iv) to order that all or any dwelling-houses in the said area "be closed and kept closed and unavailable for human habitation "for such period or periods as may be specified:

"Provided that where the Commissioner has reason to believe "that paragraphs (*a*) to (*g*) of this Regulation are applicable only "to any particular section, class, group or community of the "inhabitants of the said area, it shall be lawful for the Commis-"sioner, with the approval of the Governor, to take all or any "of the actions specified in paragraphs (i) to (iv) of this Regula-"tion in respect of only such section, class, group or community "of the inhabitants of the said area."

"5.—(1) No order shall be made under regulation 3 of these "Regulations unless an inquiry into the facts and circumstances "giving rise to such order has been held by the Commissioner.

"(2) In holding inquiries under these Regulations the Com-"missioner shall satisfy himself that the inhabitants of the said "area are given adequate opportunity of understanding the "subject-matter of the inquiry and making representations "thereon, and, subject thereto, such inquiry shall be conducted "in such manner as the Commissioner thinks fit.

J. C.
1958
Ross-Clunis v. Papadopoullos.

"(3) A written report of any inquiry shall be submitted to the "Governor as soon as possible after the completion thereof, and "shall contain a certificate that the requirements of this regula- "tion have been complied with.

"6. The Commissioner may at any time after an order under "regulation 3 of these Regulations has been made, in his absolute "discretion, remit the whole of any fine or any part thereof or "may order that any amount which has been paid by any assess- "able inhabitant shall be repaid to him or may return to any "inhabitant all or any of the property seized from any such "inhabitant or may generally revoke or vary any order made by "him under regulation 3 of these Regulations.

"7.—(1) It shall be lawful for the Commissioner to order that "out of a fine levied in pursuance of regulation 3 of these Regula- "tions compensation shall be paid to any person who has suffered "injury, or loss of, or damage to, his property unlawfully in the "area in which the fine was levied.

"(2) Application for compensation shall be made in writing "by the person aggrieved or his representative within two months "from the date upon which the fine has been levied.

"(3) Where the injury, for which compensation is being "sought, is a death, a dependant of the deceased may be deemed "to be a person aggrieved.

"(4) No application for compensation shall be granted if it "appears that the applicant, or in the case of a death, the "deceased participated in the offence or offences in respect of "which fines have been levied or was blameworthy in connexion "with such offence or offences.

"8. Any fine ordered to be paid in pursuance of these Regula- "tions shall be apportioned among the assessable inhabitants of "the said area by the Commissioner in such manner as he may "think fit and in particular he may order that each assessable "inhabitant shall pay any amount which the Commissioner shall "specify."

"13. Save as provided in regulation 6 of these Regulations, "an order made by a Commissioner, under regulation 3 of these "Regulations, shall be final and no appeal shall lie from any "such order."

The Regulations were revoked on December 19, 1956, by the Emergency Powers (Collective Punishment) (Revocation) Regulations, 1956, but that fact was immaterial for the present purpose.

The order made by the appellant on July 4, 1956 (hereafter referred to as "the order"), was in the following terms:

"Whereas between January 1, 1956, and June 10, 1956, six "murders, 10 attempted murders and about 70 other terrorist "offences have been committed within the area of the Muni- "cipality of Limassol (hereinafter referred to as 'the area') which "offences, in my opinion, are offences the commission of which "are prejudicial to the internal security of the Colony and to the

" maintenance of public order in the Colony (hereinafter referred " to as ' the offences ');

" And whereas I have reason to believe that a substantial " number of the Greek Cypriot inhabitants of the area failed to " take reasonable steps to prevent the commission of the offences " and failed to render all the assistance in their power to discover " the offenders;

" And whereas I have held an inquiry into the facts and " circumstances appertaining to the offences after giving adequate " opportunity to the inhabitants of the area of understanding the " subject-matter of the inquiry and making representations " thereon;

" And whereas I have submitted a written report of the inquiry " to His Excellency the Governor and have certified that the " requirements of regulation 5 have been complied with:

" Now, therefore I, the Commissioner of Limassol, in exercise " of the powers vested in me by regulation 3 of the Emergency " Powers (Collective Punishment) Regulations, 1955, to (No. 1) " 1955, and with the approval of His Excellency the Governor, " do hereby order that a fine of £35,000 (thirty-five thousand " pounds) be levied collectively on the assessable Greek Cypriot " inhabitants of the area.

" Made this 4th day of July, 1956.

" R. C. ROSS-CLUNIS,
" Commissioner of Limassol."

The events which followed upon the making of the order were as follows: On November 22, 1956, the respondents applied for, and obtained from Zekia J. leave to apply for an order of certiorari to remove the order into the Supreme Court of Cyprus and quash it. In the " Statement of grounds of application " filed by the respondents each of them described himself as a " Greek-Cypriot " carrying on business at Limassol " and the grounds were stated as follows:

" (*a*) That the said order is ultra vires, illegal, void and of no " effect on the following grounds:

" (1) The Emergency Powers (Collective Punishment) Regula- " tions 1955, to (No. 1) 1955, are, in so far as they purport to " empower the Commissioner with the approval of the Governor " to order that a fine be levied collectively on the assessable " inhabitants of an area in the Colony of Cyprus or any part " thereof, ultra vires, illegal, void and of no effect; and that all " the regulations contained in such Regulations and relating to the " levying, apportionment and collection of the collective fine and " of the enforcement of the order ordering the levying of such " fine as well as regulation 13 of the said regulations are ultra " vires, illegal, void and of no effect.

" (2) The requirements of regulation 5 of the Emergency " Powers (Collective Punishment) Regulations, 1955, to (No. 1) " 1955, if intra vires, have not been complied with and the said " order was in excess of the jurisdiction of the Commissioner of

J. C.

1958

ROSS-CLUNIS
v.
PAPADOPOULLOS.

"Limassol. Also the rules of natural justice were not observed "by the Commissioner in connexion with the inquiry held under "regulation 5.

"(3) That the said order was wrong in law.

"(4) That the said order was contrary to natural justice."

In support of the second ground in the respondents' application the first respondent alleged in his affidavit as follows:

"The defendants failed to hold such an inquiry into the facts "and circumstances giving rise to the above order as could reason-"ably satisfy the Commissioner that the inhabitants of the area "of the Municipality of Limassol were given adequate opportunity "of understanding the subject-matter of such inquiry and making "representations thereon. In fact the Commissioner summoned "a meeting at the office of the Commissioner of Limassol to "which only the Greek members of the Council of the Munici-"pality of Limassol and the Greek Mukhtars and Azas of the "Limassol town were invited to attend. Such meeting was held "and attended by me, five Greek Municipal Councillors and the "Greek Mukhtars and Azas of the town of Limassol to whom the "Commissioner spoke about certain murders and other offences "committed in Limassol and added that he was determined to "impose a collective fine unless cause was shown to the contrary. "Then all those present were asked by the Commissioner to show "cause why a collective fine should not be levied on the assess-"able inhabitants of the area of the Municipality of Limassol and "the reply was that the imposition of a collective fine would be "unjustified, unwarranted and anachronistic. None of the above "persons represented or claimed to represent the Greek-Cypriot "assessable inhabitants of the area of the Municipality of "Limassol in the above matter nor have they undertaken or "accepted to communicate anything conveyed to them at the "above meeting to the assessable inhabitants of Limassol nor "have they done so. Furthermore, according to information "received from Haralambos Hadji Arabis of Limassol, one of the "said Mukhtars, the great majority of the said Greek Mukhtars "(including the said Haralambos Hadji Arabis) and Azas of the "Town of Limassol had resigned their office as such and ceased "to exercise their powers and duties under the Village Authorities "Law long before the said meeting."

In paragraphs 3 to 14 inclusive of his affidavit of December 4, 1956, the appellant replied to the first respondent's affidavit as follows:

"3. In my official capacity I followed six murders, 10 "attempted murders and a great number of bomb outrages, "causing two other deaths and damage to property, which took "place in the Limassol town during the six or seven months prior "to July, 1956, and came to know, through confidential reports "and information, that a great many of the Greek inhabitants "living and working within the municipal limits of Limassol were "in a position to identify the persons committing these outrages,

"but were wilfully abstaining from doing so, and that a "great number of the remaining Greek inhabitants were either "actively or passively encouraging others to abstain from giving "useful information to the authorities. I was convinced that "with the full co-operation of the Greek inhabitants of the town "such outrages would not have taken place or remain undetected.

"4. After due consideration of the situation, I invited in "writing the six Greek Municipal Councillors (including the "Deputy Mayor) and nine Greek Mukhtars and 27 Azas of the "various quarters of the town of Limassol to attend a meeting "in my office on June 11, 1956, at 4 p.m. informing them that "the inquiry would be under regulation 5 of the Emergency "Powers (Collective Punishment) Regulations, 1955. I should "point out that these were the Greek authorities appointed and "elected of the town of Limassol and there were no other persons "qualified to represent its Greek inhabitants. In reply to the last "sentence of paragraph 8 of Dr. Papadopoullos' affidavit I say "that the resignation of the persons therein mentioned has never "been accepted.

"5. Publicity was given to the fact that such an inquiry was "to be carried out on June 11, 1956, through the local representa-"tive of the Greek Press.

"6. On June 11, at the time and place appointed the above-"mentioned Councillors, Mukhtars and Azas appeared. All local "representatives of the Greek Press were also there.

"7. I informed the meeting that I was holding this public "inquiry with a view to deciding whether I should recommend to "His Excellency the Governor the levying of a fine on the Greek "inhabitants of the town in respect of a long list of outrages "which had occurred within the town since January 1, 1956. I "invited them to show cause why a fine should not be imposed. "After discussion I came to the conclusion that no cause was "shown and I accordingly told them that I was not satisfied with "their representations and asked them to inform their co-inhabi-"tants as widely as possible of what had transpired at the "meeting and suggested that if there was any person or group "of persons wishing to make further representations they could "do so through the elected Municipal Councillors.

"8. The inquiry was fully reported in all Greek papers and "the invitation for further representations was given full pub-"licity. There is now produced and shown to me marked 'A' "the translation of an extract from the Greek paper Ethnos dated "June 12, 1956.

"9. In fact the following day I received petitions or represen-"tations submitted by groups of people representing the following "localities, quarters and associations:—(*a*) Ayios Ioannis Quarter. "(*b*) Katholiki Quarter. (*c*) Ayios Nicolaos Quarter. (*d*) Ayia "Zoni Quarter. (*e*) Kessarianis locality. (*f*) The Committee of "Shop-Keepers' Association. (*g*) Male and female members of "KEAN factory. (*h*) Trade Union of the workers of LOEL.

J. C.
1958
ROSS-CLUNIS
v.
PAPADOPOULLOS.

"(i) Pancyprian Labour Federation of Limassol (PEO). (j) "Twenty-four advocates of the Limassol town. Of the above "(g) was received on the 13th, (h) on the 15th, (i) on the 19th "and (j) on the 16th of June, 1956. Other individual representa- "tions were also received until the end of the first week in July, "but none of the above representations contained anything to "convince me that a fine should not be levied as aforesaid. I "hold the originals to the above petitions and representations.

"10. Accordingly, in compliance with the Emergency Powers "(Collective Punishment) Regulations, 1955, to (No. 1) 1955, I "submitted a report on the inquiry to His Excellency the "Governor and certified that the requirements of regulation 5 "had been complied with and with the approval of the Governor "I issued my order dated July 4, 1956, which was published in "the Gazette of July 12, 1956.

"11. None of the representations received between June 11 "and the issue of my order on July 4 have supplied material to "make me change my decision.

"12. In my view the inhabitants of the Limassol town were "given adequate opportunity of understanding the subject-matter "of the inquiry on June 11, 1956, and of making representations "thereon as laid down in regulation 5.

"13. The amount of the fine imposed was related to the "amount of the compensation which could properly have been "awarded for injury and damage under regulation 7 of the Regu- "lations mentioned.

"14. In conclusion I humbly submit that I am entitled to rely "on regulation 13 of the Regulations above mentioned as applic- "able to a ministerial act on my part, alternatively I deny that I "have acted in any way at variance with the rules of natural "justice in exercising quasi-judicial functions (if any)."

Exhibit "A," mentioned in paragraph 8 of this affidavit, was as follows: "On the conclusion of the public inquiry the Commis- "sioner said that those who attended the public inquiry said "nothing which could convince him not to suggest the imposition "of a fine and he added that if there are citizens who wish to "express their opinion why the collective fine should not be "imposed, they must submit it to the town authorities who will "forward it to him."

Zekia J. gave judgment on December 15, 1956. He rejected the respondents' contention that the Regulations exceeded the powers of the Governor under section 6 of the Order in Council, but he allowed the respondents' application, made an order of certiorari, and quashed the order of July 4, 1956, on the ground that the appellant had not complied with regulation 5 of the Regulations. In the course of his judgment the judge observed: "in the meeting held no inquiry going into the facts and circum- "stances giving rise to the order under question had been held. "The Commissioner simply informed persons attending the "meeting that he was determined to impose a collective fine

"owing to murders and other outrages committed in the town "and that they were invited to show cause why such a course "should not be taken. Nothing else transpired in the meeting of "June 11."

The judge then read paragraph 7 of the appellant's affidavit and paragraph 8 of the first respondent's affidavit and observed: "It is clear from the contents I quoted from the two affidavits "that in the meeting of June 11, 1956, no inquiry whatsoever "was held in the nature of one contemplated by regulation "5 (1). Nothing was said as to the facts and circumstances "giving rise to the proposed collective fine order. The persons "assembled were informed of the intention of the Commissioner "to make such an order on account of the offences committed in "Limassol and they were invited to show cause why this course "should not be taken. This was contrary to the letter and spirit "of regulation 5 (1) and (2)."

The Commissioner appealed from the order of Zekia J. and the respondents applied for a variation of that order in regard to the judge's decision that the order was not ultra vires. The appeal was heard by Hallinan C.J. and Zannetides J. Both members of the court rejected the respondents' contention that the regulations were ultra vires, but they differed on the question whether or not the Commissioner had complied with regulation 5. The Chief Justice was of opinion that the Commissioner had complied with this regulation, and Zannetides J. was of the contrary opinion. The appeal was therefore dismissed in accordance with section 23 (1) of the Courts of Justice Law, 1953, which was as follows: "Whenever an appeal is heard by two judges of the Supreme "Court, and the two judges differ in opinion as to whether the "appeal should be allowed, the judgment of the court below shall "stand."

On June 11, 1957, the Supreme Court granted the appellant final leave to appeal to Her Majesty in Council. Thereafter the appellant applied successfully, by petition, for leave to use two further affidavits at the hearing of the appeal. They were an affidavit by the appellant sworn on December 27, 1957, and an affidavit of Mr. Papadouris sworn on December 28, 1957. The former affidavit gave a full account of what was in fact said by the appellant at the meeting on June 11, 1956, and the latter affidavit exhibited extracts or translations of extracts from four newspapers, "The Times of Cyprus," "The Cyprus Mail," "Eleftheira" and "Ethnos," all published on June 12, 1956. Each newspaper gave an account of what was said at the meeting on June 11, 1956, and in substance confirmed the statements contained in the appellant's affidavit.

1958. February 18, 19, 20. *B. J. M. MacKenna Q.C.* and *J. G. Le Quesne* for the appellant.

Sir David Cairns Q.C. and *Ian Baillieu* for the respondents.

J. C.
1958
ROSS-CLUNIS v. PAPADOPOULLOS.

In addition to the cases referred to in the judgment the following were cited in argument: *Abitibi Power and Paper Co.* v. *Montreal Trust Co.*[1]; *Board of Education* v. *Rice*[2]; *Local Government Board* v. *Arlidge*[3]; *Liversidge* v. *Anderson*[4]; *Everett* v. *Griffiths*[5]; *Rex* v. *Comptroller-General of Patents, Ex parte Bayer Products Ltd.*[6]; *Rex* v. *Halliday, Ex parte Zadig*[7]; *King-Emperor* v. *Sibnath Banerji*[8]; *Chester* v. *Bateson*[9]; *In re The Vexatious Actions Act, 1896, In re Boaler*[10]; *Attorney-General* v. *Wilts United Dairies Ltd.*[11]; *Roberts* v. *Hopwood*[12]; *Robinson* v. *Minister of Town and Country Planning.*[13]

March 17. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the relevant statutory provisions and the facts as set out above, observed that paragraph 7 of the appellant's original affidavit contained only a very brief account of what was said by the appellant at the meeting of June 11, 1956, and exhibit "A" added little to that paragraph, and continued: It is indeed regrettable that the further affidavit evidence admitted by the Board was not before Zekia J., as it might have led that judge to a different conclusion at the original hearing. Again, if it had been before the Supreme Court on appeal, it might well have affected the result, for Zannetides J. said: "As "I said in dealing with the construction of regulation 5 (2), I take "the words 'subject-matter of the inquiry' to mean the facts and "circumstances giving rise to the making of the order as provided "in regulation 5 (1). Here the Commissioner did not tell them any-"thing about it. What he told them is contained in paragraph 7 "of his affidavit and paragraph 8 of Mr. Papadopoullos's affidavit. "This is far from giving them adequate opportunity of under-"standing the subject-matter of the inquiry. I do not propose "for a moment to hold that he was bound to give them all details "and disclose to them confidential information and its source but "I think that he ought to give them sufficient facts and circum-"stances of the outrages committed and sufficient facts and "circumstances showing that they were collectively liable. They "would then, and then only, be able to make representations on "the inquiry. This the Commissioner did not do and I am of "the opinion that he did not comply with regulation 5; and, "though I am deeply sorry that my opinion will have to differ "from the opinion of my Lord the Chief Justice on this point, I

[1] [1943] A.C. 536; 59 T.L.R. 348; [1943] 2 All E.R. 311.
[2] [1911] A.C. 179; 27 T.L.R. 378.
[3] [1915] A.C. 120, 132; 30 T.L.R. 672.
[4] [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338.
[5] [1921] 1 A.C. 631; 37 T.L.R. 481.
[6] [1941] 2 K.B. 306; [1941] 2 All E.R. 677.
[7] [1917] A.C. 260; 33 T.L.R. 336.
[8] (1945) L.R. 72 I.A. 241.
[9] [1920] 1 K.B. 829; 36 T.L.R. 225.
[10] [1915] 1 K.B. 21, 38; 30 T.L.R. 580.
[11] (1922) 38 T.L.R. 781.
[12] [1925] A.C. 578; 41 T.L.R. 436.
[13] [1947] K.B. 702; 63 T.L.R. 374; [1947] 1 All E.R. 851.

" am of the opinion that the order of the Commissioner was bad " and the appeal must fail also on this point."

And the Chief Justice said: " It is not entirely clear from the " affidavit before the court as to what precisely the Commissioner " told the Mukhtars and Azas. The affidavit of Mr. Papa- " dopoullos merely states that ' The Commissioner spoke about " ' certain murders and other offences committed in Limassol and " ' added that he was determined to impose a collective fine " ' unless cause was shown to the contrary.' Neither the notice " of motion nor the facts stated in what respect the information " given by the Commissioner fell short of what was required under " regulation 5 (2) and it is not surprising that the Commissioner " should give nothing more than a summary of what he said to " the meeting in paragraph 7 of his affidavit."

Their Lordships have found it necessary to set out this somewhat lengthy history for two reasons, first, because the events thus set out have an important bearing on the costs of this appeal, and, secondly, because they feel it is only fair to make it quite clear that the evidence before their Lordships differed very materially from the evidence before the courts in Cyprus. They will later set out in some detail the evidence contained in the affidavit of the appellant dated December 27, 1957.

Before the argument began at the hearing of the appeal before the Board, Sir David Cairns, for the respondents, stated that he desired to take a preliminary point, and their Lordships thought it convenient to hear the point argued at once. Sir David submitted that no valid leave to appeal had ever been given by the Supreme Court of Cyprus. He based his argument upon the provisions of the Cyprus (Appeal to Privy Council) Order in Council, 1927, and particularly upon articles 4 and 5 of that Order, which are as follows:

" 4. Where in any action or other proceeding no final judgment " can be duly given in consequence of a difference of opinion " between the judges, the final judgment may be entered pro " forma on the application of any party to such action or other pro- " ceeding according to the opinion of the senior member of the " court or in his absence of the member of court next in seniority, " but such judgment shall only be deemed final for purposes of an " appeal therefrom, and not for any other purpose.

" 5. Applications to the court for leave to appeal shall be made " by motion or petition within 30 days from the date of the judg- " ment to be appealed from, and the applicant shall give the " opposite party notice of his intended application."

Their Lordships find it unnecessary to set out Sir David's argument in detail, for the short answer to his preliminary objection is that article 4, so far at least as it applies to a case where an appeal is heard by two judges of the Supreme Court and the two judges differ in opinion, is superseded by section 23 of the Courts of Justice Law, 1953, already quoted, and the result is that the judgment of Zekia J. stood. This being so, the 30 days

J. C.
1958
ROSS-CLUNIS
v.
PAPADOPOULLOS.

mentioned in article 5 of the Order in Council of 1927 began to run from the date when the judgment on appeal, dismissing the appeal, was pronounced. That date was March 8, 1957, and the motion for leave to appeal to Her Majesty in Council was dated April 6, 1957.

Their Lordships now turn, at last, to consideration of the questions arising on this appeal. Mr. MacKenna, for the appellant, relied on the wide words of section 6 (1) of the Order in Council, and submitted that these words entirely justified the Regulations which were made by the Governor. He further submitted that on the true construction of regulation 5 (1) and (2), and on the facts as set out in the evidence, there had been no breach by the appellant of the provisions of regulation 5 (1) and (2). He cited several authorities in support of these submissions. He did not, however, rely on one argument put forward in the Supreme Court, namely, that by reason of regulation 13 and of the nature of the order made, the remedy by certiorari was not available to the respondents. Counsel for the respondents first submitted that regulation 3 went beyond the powers vested in the Governor by section 6 (1) of the Order in Council. They submitted that the specific powers set out in section 6 (2) were illustrative of the type of regulation covered by the general words in section 6 (1), and these general words should not be construed so widely as to cover a regulation such as regulation 3. The imposition of a collective fine, they said, resulted in the punishment of the innocent for the crimes of the guilty and was contrary to British ideas of justice. They also relied upon section 6 (2) (*g*) of the Order in Council, and the proviso thereto, as indicating that no regulation could be made enabling persons to be punished without any trial.

Similar arguments were addressed to both courts in Cyprus, and were rejected, and in their Lordships' opinion rightly rejected, by all the three judges there concerned. Words substantially identical with the words of section 6 (1) of the Order in Council were recently considered by the Board in *Attorney-General for Canada* v. *Hallet & Carey Ltd.*[1] Lord Radcliffe, delivering the opinion of the Board, quoted[2] with approval the words of Duff C.J. in *Reference re Chemical Regulations*[3]: "I cannot agree that "it is competent to any court to canvass the considerations which "have, or may have, led him to deem such regulations necessary "or advisable for the transcendent objects set forth. . . . The "words are too plain for dispute: the measures authorized are "such as the Governor-General in Council (not the courts) deems "necessary or advisable." Later, Lord Radcliffe said[4]: "It is "fair to say that there is a well-known general principle that "statutes which encroach upon the rights of the subject, whether

[1] [1952] A.C. 427; [1952] 1 T.L.R. 1408.
[2] [1952] A.C. 427, 445.
[3] [1943] S.C.R. 1, 12.
[4] [1952] A.C. 427, 450.

" as regards person or property, are subject to a ' strict ' construc-
" tion. Most statutes can be shown to achieve such an
" encroachment in some form or another, and the general prin-
" ciple means no more than that, where the import of some
" enactment is inconclusive or ambiguous, the court may properly
" lean in favour of an interpretation that leaves private rights
" undisturbed. But in a case such as the present the weight of
" that principle is too slight to counterbalance the considerations
" that have already been noticed. For here the words that invest
" the Governor with power are neither vague nor ambiguous:
" Parliament has chosen to say explicitly that he shall do what-
" ever things he may deem necessary or advisable. That does
" not allow him to do whatever he may feel inclined, for what he
" does must be capable of being related to one of the prescribed
" purposes, and the court is entitled to read the Act in this way.
" But then, expropriation is altogether capable of being so
" related."

In their Lordships' opinion regulation 3 is clearly " related to " the purposes prescribed " by section 6 (1) of the Order in Council. There can be no doubt as to the purpose of imposing a collective fine in a case where crimes have been committed in a particular area, and some or all of the inhabitants of the area have " failed to take reasonable steps to prevent the commission " of the offence," or have " failed to render all the assistance in " their power to discover the offenders or to effect their arrest." Clearly the purpose is to ensure, so far as possible, that in future the inhabitants of the area will adopt a different attitude, more helpful to " securing the public safety " and to " the maintenance " of public order," two of the purposes specified in section 6 (1) of the Order in Council. A further purpose is served by regulation 3, namely, the purpose of providing, out of the fine, for compensation to persons who have suffered injury by the crimes committed in the area. See regulation 7.

Counsel's argument, already mentioned, based on section 6 (2) (*g*), was briefly and conclusively answered by Zekia J. as follows: " There is nothing to warrant the reading of section 6 (2) (*g*) as a " restrictive proviso to section 6 (1). On the contrary, the words " ' without prejudice to the generality of the powers conferred by " ' the preceding subsection ' in section 6 (2) lead us to a contrary " view. The language of the relevant section is clear and " unambiguous."

Counsel next sought to contend that the Commissioner's order of July 4, 1956, was void for uncertainty because the phrase " Greek Cypriot " had no clear meaning. This was not one of the grounds stated in the respondents' application for an order of certiorari, but counsel asked the Board to admit this contention, in the exercise of its discretion. Their Lordships did not think it right to admit this contention at this stage, since it had never been considered by the courts in Cyprus, and if it had been raised in these courts the appellant might well have wished to file

J. C.
1958
ROSS-CLUNIS
v.
PAPADOPOULLOS.

evidence in answer to it. As matters stand, their Lordships are not assisted by any evidence on the subject, save the fact that each of the respondents described himself as "a Greek-Cypriot" in the "Statement of Grounds," which seems to indicate that to them, at least, the phrase had a definite meaning.

The last contention of counsel for the respondents was that the Commissioner had failed to comply with regulation 5 (1) and (2). In their Lordships' opinion the only question of substance arising under this contention is the question whether the appellant discharged the positive duty cast upon him to "satisfy himself "that the inhabitants of the said area are given adequate oppor- "tunity of understanding the subject-matter of the inquiry and "making representations thereon." Mr. MacKenna, for the appellant, submitted that the only duty cast upon the appellant was to satisfy *himself* of these facts; that the test was a subjective one, and the statement in paragraph 12 of the appellant's affidavit of December 4, 1956 (already quoted), was a complete answer to the argument of counsel for the respondents, unless it could be shown that the statement in the affidavit was not made in good faith, and bad faith was not alleged.

Their Lordships feel the force of this argument, but they think that if it could be shown that there were *no* grounds upon which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts. In the present case, however, there were ample grounds upon which the appellant could feel "satisfied" of the matters mentioned in regulation 5 (2). If the matter had rested only upon the appellant's affidavit of December 4, 1956, their Lordships might have felt considerable doubt on the matter, for it would appear from paragraph 7 of that affidavit that at the meeting on June 11, 1956, the appellant said nothing which would convey to the inhabitants of Limassol the reasons why *they*, as distinct from the persons who had actually committed the murders and other outrages, should be held blameworthy. It was this aspect of the matter which so strongly impressed Zekia J. and, on appeal, Zannetides J. The information in this paragraph is, however, greatly amplified by the affidavit of the appellant sworn on December 27, 1957, already mentioned, which contained the following full account of the proceedings at the meeting of June 11, 1956:

"I explained to the meeting that since January 1 there had "been six assassinations, 10 woundings and attempts to assassi- "nate and 70 bomb outrages which from my own knowledge of "the facts and circumstances and the investigations made by "the police led me to believe:

"(*a*) that the outrages were attributable to Greek terrorist "activity;

"(*b*) that in the majority of the cases mentioned members of "the Greek community were eye-witnesses and in a position to

"assist the police in tracing the perpetrators and in giving "evidence before the court, but without exception they had con- "cealed their knowledge and obstructed the process of law;

"(c) that there had been instances in which the perpetrators "had made good their escape through the failure of Greek on- "lookers to assist in their capture.

"In regard to (c) I quoted two instances as follows:—

"(i) On June 6, an English teacher, Mr. A. T. Mylrea, was "assassinated as he arrived at the Lanition Gymnasium to con- "duct certain school examinations. It was estimated there were "about 35 pupils at the actual scene of the assassination who "should have been in a position to recognize the assassins and to "effect their arrest, but no attempt was made to hinder the "criminals and no one had come forward with information to the "police.

"(ii) On June 7, Andreas Serghides, an Assistant District "Inspector of my office, was murdered as he arrived outside the "office for his morning's work, in the presence of a fair number "of persons, many of them believed to be persons of good stand- "ing. Here again no attempt was made to hinder the assassins "and the persons believed to have been present have all denied "knowledge of the incident.

"I went on to explain that under the terms of regulation 3 "of the Emergency Powers (Collective Punishment) Regulations, "1955, which I cited at the meeting in detail I had reason to "believe that the inhabitants of Limassol town had rendered "themselves liable to a collective punishment and that unless "they could show cause to the contrary, it was my intention to "recommend to His Excellency the Governor that a fine should "be imposed on the inhabitants of Limassol town in accordance "with the Collective Punishment Regulations. I then invited "them to make their representations. After hearing their "representations I came to the conclusion that no cause had been "shown why a fine should not be imposed and I accordingly told "those present at the meeting that I was not satisfied with their "representations but asked them to inform their co-inhabitants "as widely as possible as to what had transpired at the meeting "and suggested that if there was any person or group of persons "wishing to make further representations they could do so through "the elected municipal councillors.

"In conclusion I beg to state that in my affidavit dated "December 4, 1956, which was filed in opposition to that of "Mr. Vassos Papadopoullos dated November 20, 1956, I did not "enter upon a full narrative of the meeting held on June 11, "1956, and in particular did not recount the matters set forth in "this my present affidavit, for the following reasons, that is to "say:

"(i) because in paragraph 8 of the said affidavit of Mr. "Papadopoullos it was stated that I had spoken about the "murders and other offences committed in Limassol and there

J. C.
1958
ROSS-CLUNIS
v.
PAPADOPOULLOS.

"was no indication that it would be contended that I had done "so in such terms as not to make it clear why I held the "inhabitants responsible;

"(ii) because, as stated in paragraph 10 of my said affidavit, "I had already made my report to the Governor, and having done "so and deposed on oath in paragraph 12 my belief that I had "complied with regulation 5, I considered that I had sufficiently "dealt with the matter."

As has already been stated, this account of the meeting was confirmed by the contemporary accounts of the meeting in four Cyprus newspapers, set out in the affidavit of Mr. Papadouris.

When these affidavits are read in conjunction with the appellant's affidavit of December 4, 1956, it is manifest that the appellant had ample reason for being satisfied that the inhabitants of Limassol "had adequate opportunity of understanding the "subject-matter of the inquiry and of making representations "thereon." And it is to be noted that the opportunity given of making representations had the widespread results set out in paragraph 9 of the appellant's affidavit of December 4, 1956.

Counsel for the respondents submitted other objections to the manner in which the appellant conducted his "inquiry into the "facts and circumstances," but in their Lordships' opinion there is no substance in any of these objections. Regulation 5 (2) provides that, subject to the positive duty already mentioned, which was fully discharged, "such inquiry shall be conducted in such "manner as the Commissioner thinks fit." The manner in which the inquiry shall be conducted, if in fact an inquiry has been held, is thus a matter for the Commissioner and not for the court; but their Lordships think it only fair to say that the careful steps taken by the appellant, as set out in his two affidavits, seem to them adequate and sensible. For these reasons the arguments on behalf of the respondents fail, and the appeal succeeds.

There remains only the question of the costs of the proceedings. The appellant has already been ordered to pay the costs of his petition for leave to file further evidence. Having regard to the course which the proceedings have taken, as already described, their Lordships do not think it right that the respondents, though unsuccessful in their attack upon the appellant's order, should be required to pay his costs.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed; that the order of the appellant of July 4, 1956 should be restored, and that the order of Zekia J., dated December 15, 1956, should be set aside. They do not think fit to make any further order as to the costs of these proceedings.

Solicitors: *Charles Russell & Co.; Ince, Roscoe, Wilson & Griggs.*

C. C.

[COURT OF APPEAL.]

* KITCHEN *v.* ROYAL AIR FORCE ASSOCIATION AND OTHERS.

[1955 K. No. 1085.]

C. A.

1958
Mar. 18, 19, 20, 21, 24, 25, 26, 27, 31;
April 1.

Lord Evershed M.R., Parker and Sellers L.JJ.

Limitation of Action—Concealment by fraud—Solicitor—Negligence—Failure to issue writ in due time—Plaintiff's claim under Fatal Accidents Acts lost—Claim against solicitor after 13 *years—Whether "right of action . . . concealed by . . . fraud"—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 26 (*b*).

Solicitor—Negligence.

Damages—Negligence—Solicitor.

On May 22, 1945, the plaintiff's husband, a member of the Royal Air Force, was electrocuted and killed in the kitchen of his house. His death, the plaintiff alleged, was due to a defect in the control unit of an electric cooker, the wires of which had in 1940 been connected up by the local electricity company. The plaintiff, considering that the electricity company were responsible for her husband's death, consulted the Royal Air Force Association, who sent particulars of her case to a firm of solicitors. These solicitors investigated the matter but did not get any independent report of an expert on the cause of the accident. They allowed the time for proceedings under the Fatal Accidents Act to run out, since they failed to issue a writ on the plaintiff's behalf before May 22, 1946. The solicitors tried but failed to get an ex gratia payment from the electricity company. However, the plaintiff herself wrote in October, 1946, to the company, and thereupon their solicitor telephoned to the defendant solicitors saying that the company were prepared to make a donation to the Royal Air Force Association of £100 if they were satisfied that the money would be used for the plaintiff's benefit. The defendant solicitors made inquiries and, in the event, the £100 was paid to the association, from which sum five guineas were paid to the defendant solicitors for costs. The fact that this payment had been offered by the company was concealed from the plaintiff and she only discovered some years later that the company had made the payment. Subsequently, in 1950, the plaintiff started proceedings against the electricity company as administratrix of her husband, claiming damages under the Law Reform (Married Women and Tortfeasors) Act, 1935. That action was compromised by the payment of £250 by the company. Subsequently, the plaintiff started this action against the Royal Air Force Association and the defendant solicitors, claiming damages for negligence in the formulation and prosecution of her claim arising out of her husband's death against the electricity company. The action, as against the association, was dismissed, but Lloyd-Jacob J. awarded the plaintiff £2,000 as damages for negligence against the solicitors:—

Held, (1) that, on the facts, the solicitors were acting as the solicitors of the plaintiff during the years 1945 and 1946, and that the plaintiff's case of negligence against them was made out.

(2) That the failure of the solicitors to inform the plaintiff of her possible claim under the Fatal Accidents Acts did not of itself constitute a concealment of her right of action against the

C. A.

1958

KITCHEN
v.
ROYAL
AIR FORCE
ASSOCIATION.

solicitors by "fraud" within section 26 (1) (*b*) of the Limitation Act, 1939,[1] so as to prevent the Act running in the solicitors' favour.

Bulli Coal Mining Co. v. *Osborne* [1899] A.C. 351; 15 T.L.R. 257 and *Wood* v. *Jones* (1889) 61 L.T. 551 considered.

(3) That at the time of the payment of the £100 by the electricity company in October, 1946, the solicitors still remained the plaintiff's solicitors and, notwithstanding the fact that the judge had acquitted the solicitors of any deliberate motive of protecting their firm from the possible consequences of their failure to start proceedings under the Fatal Accidents Acts, the concealment by the solicitors from the plaintiff of the electricity company's offer to pay £100 amounted to "fraud" for the purposes of section 26 (*b*); no degree of moral turpitude was necessary to establish fraud for the purposes of that section, since it covered conduct, which, having regard to the relationship of the parties, was unconscionable and, accordingly, the solicitors were not entitled to rely on the Limitation Act, 1939, as barring the plaintiff's claim.

Beaman v. *A.R.T.S. Ltd.* [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465, C.A.; [1948] 2 All E.R. 89 applied.

(4) That the plaintiff having established negligence, the court had not to determine the question of liability as between the plaintiff and the electricity company, but that the plaintiff having satisfied the court that she had some prospect of success, it was the duty of the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted, and that the judge's award of £2,000 should stand.

Decision of Lloyd-Jacob J. affirmed.

APPEAL from Lloyd-Jacob J.

The plaintiff, Hilda Kitchen, was the widow and administratrix of John William Kitchen, who died intestate on May 22, 1945. In this action she claimed damages against the defendants, the Royal Air Force Association, and Donald, Darlington & Nice, a firm of solicitors, for negligence in and about the formulation and prosecution of a claim arising out of the death of her husband against the West Kent Electricity Co. In her statement of claim the plaintiff also alleged conspiracy and breach of trust. Those latter claims failed.

The following statement of facts is summarized from the judgment of Lord Evershed M.R.

The plaintiff's husband, a Leading Aircraftsman in the Royal Air Force, was home on leave with his wife, the plaintiff, in their flat in Renton Drive, St. Mary Cray. At about 8 o'clock in the morning of May 22, 1945, the husband went to the kitchen to prepare his wife a cup of tea, for which purpose he turned on the main switch at the control box. He was electrocuted and died almost at once. The plaintiff was firmly persuaded that the West Kent Electricity Co., now absorbed in the South Eastern Electricity Board, was in some way responsible for her husband's death. After the accident, the plaintiff was helped by Mrs.

[1] Limitation Act, 1939, s. 26: "Where, in the case of any action for "which a period of limitation is prescribed by this Act . . . (*b*) the "right of action is concealed by "the fraud of any such person as "aforesaid . . . the period of limitation shall not begin to run until "the plaintiff has discovered the "fraud . . . or could with reasonable "diligence have discovered it; . . ."

Griffiths, the local secretary of the Soldiers', Sailors' and Airmen's Families Association, a charitable organization. Her case was sent forward by Mrs. Griffiths to the first defendants, the Royal Air Force Association, in November, 1945; the association forwarded the information they had obtained from Mrs. Griffiths, together with the notes taken by a solicitor, then acting for the plaintiff at the inquest on her husband, to the firm of Donald, Darlington & Nice, the present appellants. Those notes showed briefly the case that the electricity company had put forward through one Penfold, who was their agent, but they did not show what the plaintiff's case was. It had not been put by anyone or to anyone. The appellants thereupon made out a back-sheet and sent the matter in that condition to junior counsel (not now appearing before the court) for advice. Counsel said that the first thing to do was to try to get some expert opinion which would assist them to arrive at a conclusion how the accident occurred, and he also advised them to get further information from the plaintiff herself. On receiving that opinion, the appellants sent it direct to the Royal Air Force Association. That was the sum of what they did on behalf of the plaintiff until the following May, except that in the February following, some ten weeks later, they wrote to the Royal Air Force Association to inquire if that association had "made the arrangements" which had been referred to in the appellants' earlier letter, namely, the arrangements for getting an expert opinion. As a result of that reminder, on April 15, a representative of the association called on the plaintiff; but as the installation responsible for the accident had long since gone, the representative could give no useful opinion as to the cause of the accident and, accordingly, so reported to the Air Force Association, a fact which the association in turn passed on to the appellants on April 29.

At this point of time, Mr. Arditti, a man experienced in legal work, but not an admitted solicitor, joined the appellants as articled clerk, and Mr. Darlington, the senior partner in the appellant firm, thought he would depute to him the plaintiff's case. In response to a letter which he accordingly wrote to the plaintiff she called, and there was an interview between her and Mr. Arditti on May 7, 1946. This left a fortnight within which any case based on the Fatal Accidents Acts could be made.

On May 9 there was a conference with counsel and the note of that conference is in the following terms: "Attending counsel, "discussing the case with him, when he was of the opinion that "no claim lay against the landlord, and that the only step we "could take would be to try and obtain an ex gratia payment "from the electrical company." Counsel, in the circumstances (no expert evidence having been obtained in answer to his earlier request) was in no position to add anything to what he had said before. According to their evidence, the appellants suggested that counsel had expressly stated that in no circumstances was there a ground, in his view, for any claim; the judge did not

C. A.
1958
KITCHEN
v.
ROYAL
AIR FORCE
ASSOCIATION.

accept that evidence. In the circumstances the appellants wrote on May 12 to the Royal Air Force Association a letter, in which they said: "The possibility of an action against the electric "company was discussed with counsel who advised that the "chances of success are extremely remote, and that our only "hope would be to try and obtain some form of ex gratia payment "from them. We accordingly approached the electric company, "but, in view of the fact that a writ must be issued before the "end of next week and this case does not warrant such expendi-"ture, we are not very hopeful that our approach will meet with "any appreciable success."

It was clear that at this stage the appellants had formed the view that the thing to do was to allow time to expire, so barring the plaintiff's claim. There was no evidence whatever that they had applied their minds to the distinction between the more valuable claim under the Fatal Accidents Acts and the Law Reform claim, which was not subject to the 12 months' limitation period. So much was in terms admitted in evidence by Mr. Arditti. The appellants had obtained no instructions whatever from their client, the plaintiff. They had made no distinction at all between the Fatal Accidents claim and the Law Reform claim. The letter said (admittedly wrongly) that they "had approached" the electric company. The truth was, that shortly afterwards they did so, and a meeting took place between Mr. Arditti and Mr. Stubbins, who was the solicitor for the West Kent Co.

Following that meeting, and by arrangement, Mr. Arditti proceeded to write a letter, which Lord Evershed M.R. considered to be an extremely feeble presentation of the plaintiff's case, and it contained no reference whatever to the distinction between the Fatal Accidents claim and the Law Reform claim. Further, this letter in requesting an ex gratia payment, and notwithstanding the absence of any instructions, contained the following statement: "Needless to say, any such grant by your company will be "reciprocated by an undertaking on the part of Mrs. Kitchen "that anything she accepts is in full and final settlement of any "claim she may have as a result of the accident aforesaid."

On July 8 the reply of the electricity company to this request was a firm and uncompromising negative. The appellants then wrote to the Royal Air Force Association: "Further to our letter "of May 10, we are now informed by the solicitor to the West "Kent Electric Co. that after careful consideration of this matter "his board have decided they cannot recommend any form of ex "gratia payment to Mrs. Kitchen. In view of the unfortunate "outcome of this case, we do not propose making any charge to "Mrs. Kitchen for our services."

Lloyd-Jacob J. dismissed the action as against the Royal Air Force Association, but held that the defendant solicitors had been guilty of negligence, that the plaintiff's claim for negligence against them was not statute barred and he awarded the plaintiff

£2,000 as damages. The judge acquitted both Mr. Darlington and Mr. Arditti of any dishonesty.

The solicitors appealed.

Patrick O'Connor and *J. G. H. Gasson* for the defendants.
Neil Lawson Q.C. and *John Wilmers* for the plaintiff.

The following cases which were cited in argument were not referred to in the judgments: *In re Halifax Sugar Refining Co. Ltd.*[2]; *Dow Hager Lawrance* v. *Norreys (Lord)*[3]; *R. B. Policies at Lloyd's* v. *Butler*[4]; *In re McCallum*[5]; *Nocton* v. *Ld. Ashburton*[6]; *Shephard* v. *Cartwright*[7]; *Shaw* v. *Shaw*[8]; *Sellars* v. *Best*[9]; *Faithfull* v. *Kesteven*[10]; *Clayton* v. *Kearsey*.[11]

LORD EVERSHED M.R. This long and difficult case has raised three distinct points for our determination: (1) Did the appellants act as solicitors for the plaintiff during some, and if so, what period in the years 1945 and 1946; and if they did so act, did they fail to devote the standard of care which was due from them as solicitors to their client: in other words, were the appellants guilty of negligence towards the plaintiff? (2) If so, then since admittedly the Limitation Act, 1939, applies to a cause of action founded on such negligence, and since admittedly the statutory six-year period elapsed since any alleged act of negligence and before the commencement of proceedings against the appellants, can the solicitors rely on the Statute of Limitations? More precisely, can the plaintiff escape the effect of the statute by showing concealment by fraud of her right of action within the terms of section 26 (*b*) of the Act of 1939? (3) Assuming that both the first and second questions are answered in the plaintiff's favour, what was the loss or damage, if any, which flowed from the negligence?

I have stated the three questions in the order in which they were argued before us and in the order in which they were decided by the judge below. I have also stated them in what may be an ascending order of difficulty. If the plaintiff fails on any one of the three points, she fails altogether. The onus is squarely upon her as regards the first and second points. To a substantial extent it is also upon her as regards the third point.

An action against a firm of solicitors for alleged negligence by one who says that she was their client is always a matter of special anxiety to the court, for to some extent, inevitably, our system and profession of the law is impugned and its adequacy

[2] (1891) 7 T.L.R. 293.
[3] (1890) 15 App.Cas. 210.
[4] [1950] 1 K.B. 76; 65 T.L.R. 436; [1949] 2 All E.R. 226.
[5] [1901] 1 Ch. 143; 14 T.L.R. 112.
[6] [1914] A.C. 932; 30 T.L.R. 602.
[7] [1955] A.C. 431; [1954] 3 W.L.R. 967; [1954] 3 All E.R. 649.
[8] [1954] 2 Q.B. 429; [1954] 3 W.L.R. 265; [1954] 2 All E.R. 638.
[9] [1954] 1 W.L.R. 913; [1954] 2 All E.R. 389.
[10] (1910) 103 L.T. 56.
[11] (1935) 79 S.J. 180.

C. A.
1958
KITCHEN v. ROYAL AIR FORCE ASSOCIATION.
Lord Evershed M.R.

and competence challenged. Especially is this so in the present case.

[His Lordship reviewed the evidence, held that the appellants were the plaintiff's solicitors and she was their client from November or December, 1945, to June or July, 1946, and, further, that they owed a duty to her which they had not discharged, and continued:] In my judgment, the appellants adopted the line of least possible effort. It is not merely that the firm never applied their minds at all to what their duties were, and what the possible rights of the plaintiff might be, but they never applied their minds, as Mr. Darlington himself stated, to the question who their client was. They did not even think fit in the circumstances to ask for the depositions before the coroner. It is not merely that they put the case so feebly to the West Kent Co., and included without any authority whatever the suggestion that anything they paid would be accepted in full settlement, but the real gravamen of the case, as it seems to me, is that they deliberately allowed the time to run out without getting any instructions at all, and knowing that no expert evidence had been obtained. I cannot, for my part, understand how, in the circumstances, a responsible firm of solicitors failed to make any attempt at least to keep the case alive, while they made some effort to get the essential expert evidence which counsel had advised them to do months before. I will only add that, in my judgment, it is no answer to what I have said to say that the appellants, by writing and giving the information they did to the Air Force Association were thereby to be taken to be giving information to the plaintiff on the ground that the Air Force Association were, in some sense, the agents of the plaintiff to accept and receive such information as the appellants chose to give. I, therefore, agree with the judge that the case of negligence by the appellants is made out.

But they have pleaded the Statute of Limitations, 1939, as they are entitled to do. I think it is no doubt true that the court will not be astute in an action by a client against his or her solicitors for proved negligence to find that the solicitors can escape the consequences of their default by relying upon the statute. Still, the appellants are entitled, if the case is made out, to set up the Statute of Limitations. What is more, in the present case, as I have said, the statutory period of six years since the breach of duty had occurred had elapsed long before the action had been brought, and so the onus lies upon the plaintiff to show, if she can, that the solicitors are disentitled to rely upon the Statute of Limitations. This she has sought to do, so far as this court is concerned—we need not look further—by relying upon section 26 (1) (*b*) of the Act of 1939. The relevant passage is as follows: "Where, in the case of any action for "which a period of limitation is prescribed by this Act, . . . (*b*) the "right of action is concealed by the fraud of any such person "as aforesaid . . . the period of limitation shall not begin to run

"until the plaintiff has discovered the fraud . . . or could with "reasonable diligence have discovered it." As Mr. O'Connor has pointed out, the plaintiff has to show, first, that the right of action raised in this case was concealed by the appellants, and, further, that it was so concealed by their fraud. The judge decided the point in the plaintiff's favour. The first ground of his decision was, as I understand it, that the original failure by the appellants to inform the plaintiff in regard to the limitation of time in regard to her possible claim under the Fatal Accidents Acts was itself, not merely an act of negligence, but also constituted concealment by fraud. In this matter, however, "fraud" in the section is to be defined, I am unable to agree with the judge's conclusion. No doubt in some cases the facts may be such that the circumstances of the wrongful acts may also constitute concealment by fraud; for example, where the wrongful acts are continuous and are also surreptitious. Such was the case, for example, in *Bulli Coal Mining Co.* v. *Osborne*.[1] I will cite a sentence from the headnote to show what the position in that case was: "Where the appellants had furtively for a series of years taken "the respondent's coal by means of a wilful and secret under-"ground trespass." That, however, is not, in my judgment, the present case. Indeed, a decision to the effect that the failure to inform the plaintiff, while being an act of negligence, also constituted the requisite concealment by fraud, would be contrary to the decision in *Wood* v. *Jones*,[2] where it had been suggested that the failure of solicitors to give the client proper information as to a valuation also constituted the necessary concealment. That suggestion was rejected, and, in my judgment, rightly so, by Kekewich J. I do not think that the present case can be distinguished in this respect by the mere circumstance that the appellants continued to act as the plaintiff's solicitors after the particular act of negligence to which I have referred.

But Lloyd-Jacob J. also based himself upon the events which occurred in October and November, 1946, and those events I must now shortly relate. It will be recalled that by the letter which the appellants had written to the West Kent Co.'s solicitor, they had suggested that any grant made by the company would be reciprocated by an undertaking on the part of the plaintiff to accept it in full and final settlement of her claim. On October 8, the plaintiff had written to the company. As a consequence, two telephone conversations are recorded. The first is the record made by Mr. Arditti of the call made by the solicitor of the West Kent Co.: "Attending solicitor of West Kent Electric on phone "when he informed us that his company was unable to make any "ex gratia payment to Mrs. Kitchen because she may consider "this as an admission of liability on the part of his company. "However, the board might consider making a donation to the "Royal Air Force Association but they would want to know how

[1] [1899] A.C. 351; 15 T.L.R. 257. [2] (1889) 61 L.J. 551.

C. A.
1958
Kitchen v. Royal Air Force Association.
Lord Evershed M.R.

"the money would be used. We undertook to make inquiry and "report back."

The second conversation was as follows: "Attending "Squadron Leader O'Donnell of the Royal Air Force Association "and informing him that the West Kent Co. had approached us. "He advised that the full amount of any donation that the "company cared to make to the Royal Air Force Association "would be used for the benefit of the Kitchen family." Then: "We undertook to inform this to the company and keep Squadron "Leader O'Donnell informed. We also advised him that we "would have to make a small deduction in respect of our "charges." The note which Squadron Leader O'Donnell made of that conversation was made a little time afterwards: "Mr. "Arditti spoke to me re this case on October 25, 1946, to the "effect that he had received a communication from the solicitor "of the West Kent Electricity Co. Ltd. stating that there might "be a possibility of a donation from a certain quarter to the "R.A.F.A. funds and that it might be appropriate if such dona-"tion were distributed to Mrs. Kitchen, tactfully, by such means "as the R.A.F.A. should decide." At the end of his note Mr. O'Donnell recorded: "Confidentially, it appears to me, that the "West Kent Electricity Co. Ltd. may be thinking of helping "Mrs. Kitchen in this indirect way, without making any actual "ex gratia payment which would probably in law be rather "awkward." Finally—and this is underlined: "*Mrs. Kitchen "must not know, of course, the originator of the donation when "it is received and distributed.*" The reference to secrecy is to be observed, and that, in fact, was how the matter was carried out. The West Kent Co. sent £100 and that sum diminished by an amount of five guineas for the appellants' charges was entrusted to the Royal Air Force Association, who applied it in assisting the plaintiff and her family; but there was never any disclosure—in fact there was careful non-disclosure—to the plaintiff or to Mrs. Griffiths of the source of the money.

In a case fruitful of mysteries this is indeed one. From the point of view of the West Kent Electric Co., if the plaintiff was a person who might be inclined (in Mr. O'Connor's phrase) to misconstrue any grant, why did they not accept the suggestion in the appellants' letter, namely, that if they made a payment it would be taken in full settlement of all claims the plaintiff had? Vis-à-vis the plaintiff, by doing as they did they were no better off. They remained liable to the plaintiff's importunities. What is said is this, not that it was necessary to do as they did, but that it eased their conscience, and, indeed, that may be the simple answer. It may be that, though they had avoided for their own purposes making officially any payment at all, for some reason or another they felt under an obligation to help the plaintiff. That, of course, would be wholly creditable. However, any further light on what they were thinking is not available to us. The West Kent Co.'s solicitor appears to have been in

court during the trial, but he was not called to give evidence. Another possible solution is that this idea of secrecy was something which was thought of and suggested by Mr. Arditti, and done (for example) for the reason that he knew that he could not in fact implement the suggestion he had made in his letter.

On this matter the judge reached a clear finding. He treated Mr. Arditti's evidence as requiring caution and he concluded that the secrecy suggestion was an idea of Mr. Arditti's put forward by him, in order that he or the firm could avoid entering into the relationship of solicitor and client with the plaintiff. I must, however, add that the judge expressly acquitted Mr. Arditti of any deliberate motive, for example, of protecting his firm or himself from possible consequences. He said it was a snap decision to avoid the consequences of the solicitor and client relationship. I think, in fairness to Mr. Arditti, I should read this passage of the judgment: "I hope I made it perfectly clear that in finding, "as I do, that the initiation of secrecy must plainly be accepted "by Mr. Arditti as his responsibility, I do not wish it to be "thought that in so determining and introducing it into the tele-"phone conversation he had in mind any particular consequences "to himself or to his firm which might have saved them from "criticism or difficulty thereafter. It was plain that it was a "telephone conversation at which a decision was made, so to "speak, on the spur of the moment."

The finding has been strongly challenged by Mr. O'Connor. Assuming, he says, that the idea was to make the payment to the Royal Air Force Association, then the secrecy provision is really a matter of very little significance and this suggestion, which Mr. Arditti was supposed to be putting forward, was a prior (and his) elaboration. I have found this point, as I earlier indicated, one of great difficulty, but, on the whole, I am not prepared to differ in this respect from the conclusion of the judge, to the extent that I think Mr. Arditti ought to be taken as having been at heart a willing and ready party to this secrecy scheme even if he was not its author, though I am not thereby qualifying the judge's acquittal of deliberate motive on Mr. Arditti's part.

If that is right, what is the result? The judge said that the suggestion was made on the spur of the moment in order that Mr. Arditti, and his firm, might not reconstitute or constitute the solicitor and client relationship; and that he was successful is so doing. On this last matter I must say that I find myself in disagreement with the judge. I am satisfied that at this period and for the purposes in hand the appellants were, and remained, the plaintiff's solicitors. I cannot accept Mr. O'Connor's argument that there was some clear determination of the relation which followed upon the express refusal in July of the West Kent Co. to make an ex gratia payment. Such determination would, perhaps, be somewhat more easy to establish if the appellants had ever clearly thought out and assumed the duties and responsibilities of acting (as they did in fact act) as the plaintiff's

C. A.
1958
KITCHEN
v.
ROYAL
AIR FORCE
ASSOCIATION.
Lord Evershed
M.R.

solicitors. But, and this goes to the root of their conduct—they were always, to say the least of it, hazy in the extreme in thinking out what their relationships were with those with whom they were in communication.

I base my conclusion on the fact that the solicitor and client relationship existed in this vital period. Mr. Arditti and his firm knew nothing whatever of the plaintiff's letter of October 8. Any approach from the West Kent Co. so far as Mr. Arditti was concerned must have been related to his last communication to them. Indeed, Mr. Darlington went so far as to say in his letter: "Subsequently we were able to induce the West Kent Electric "Co. to pay a sum of £100." Further, if reference is made, to the correspondence, the appellants were there writing to the Air Force Association that if they could be "of any further "assistance in this unfortunate matter please do not hesitate to "let us know." Elsewhere they refer to their having failed "so "far" to obtain anything for the plaintiff.

But the conclusive matter I take to be the matter of their charges. They had written to the association to say: "We do "not propose to make any charge to Mrs. Kitchen." But in reporting the telephone conversation with the company's solicitor on October 25, Mr. Arditti had said to Squadron Leader O'Donnell: "We have to make a small deduction in respect of "our charges," that is to say, a deduction from the sum which otherwise would be wholly applied for the plaintiff's benefit.

If then the solicitors were acting, as I think they were, for the plaintiff, what was the effect of the concealment from her of this payment? It is all very well now to justify their having done so on the ground that otherwise she possibly, or probably, would have got nothing from the West Kent Co., but I cannot accept that as a satisfactory answer. If the appellants were, as I hold they were, acting as solicitors for the plaintiff, they clearly should have informed her of what the West Kent Co. were proposing and, indeed, Mr. Darlington himself so stated. A necessary consequence of the concealment was, as they must, if they had given any thought to the matter at all, have realized, was a concealment also from the plaintiff of the real effect of their having thrown away—and I use that word deliberately—any case which she might have possessed under the Fatal Accidents Acts in the previous May. Does, however, that concealment amount to fraud? I repeat that there is no finding and no justification for any finding of dishonesty as that word is ordinarily understood. But it is now clear that the word "fraud" in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman* v. *A.R.T.S. Ltd.*[3] that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not

[3] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465, C.A.; reversing 64 T.L.R. 285; [1948] 2 All E.R. 89.

attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

In *Beaman* v. *A.R.T.S. Ltd.*,[3] the relationship between the parties was that of bailor and bailee. The complaint was that the bailee, in breach of their duty and contrary to what the bailor relied upon them to do, took steps to get rid of certain goods belonging to the bailor, not for any malevolent motive, or any motive which, in the ordinary way, would be called dishonest, but because it suited their own business to do so, and since they thought the goods were of no use to the plaintiff. The plaintiff was abroad during the war and the defendants thought that by disposing of the goods they would assist the bailor by saving her charges. Lord Greene M.R. said[4]: "The defendants' principal "purpose, if not their sole real purpose, in getting rid of the "plaintiff's goods was to obtain for themselves the commercial "advantage of being able to close down their business. In breach "of their duty as bailees to communicate with the plaintiff before "converting her goods, they recklessly and without making the "slightest effort to ascertain the true position, assumed that com-"munication was impossible, and it is noticeable that, even after "the Mediterranean was opened in 1943 on the surrender of Italy, "they made no attempt to let the plaintiff know what they had "done. They recklessly and without taking the least trouble to "verify the facts assumed (what was false and on a simple "examination of their records would have been shown to be false) "that the plaintiff had not troubled about her goods, and that "large storage charges had mounted up and would continue to "mount up which the plaintiff would be unable to pay. They "recklessly formed the opinion that the goods were valueless "without having any independent valuation and in disregard of "the fact (which as bailees carrying on business as such they "must have known) that the absence of pecuniary value could "afford no justification for disregarding their obligations." A little later on the Master of the Rolls says: "I am of opinion that "the conduct of the defendants, by the very manner in which "they converted the plaintiff's chattels in breach of the con-"fidence reposed in them, and in circumstances calculated to "keep her in ignorance of the wrong that they had committed "amounted to a fraudulent concealment of the cause of action." In my judgment, similar reasoning applies in this case. The nature and consequences of the relationship between solicitor and client are, to my mind, more powerful in favour of the plaintiff here than was the relationship of bailee and bailor. I think that in this case the conduct of the appellants was, in the sense in

[3] [1949] 1 K.B. 550. [4] Ibid. 550, 565.

C. A.
1958
Kitchen
v.
Royal
Air Force
Association.
Lord Evershed
M.R.

which Lord Greene M.R. used the word, reckless, in at least to the same degree as it was in *Beaman's* case.[5]

Assuming, as I do, that the plaintiff was the appellants' client, she was entitled to rely upon them to look after her interests, and it was in breach of that confidence, as I think, that they did what they did in October and November, and concealed from her facts which would undoubtedly, if disclosed, have brought to light what her true rights against the appellants were. Therefore, though I have felt considerable difficulty about this part of the case, on the whole I have come to the conclusion that there is here just enough established by the plaintiff to enable her to say that there was concealment by fraud by the appellants, and so to deprive them of the right to set up against her the Statute of Limitations.

Mr. O'Connor, in opening the case, put the argument that even though the position was as I have stated, still the plaintiff had not acted with reasonable diligence within the provisions of the section and should have found out earlier than she did what her rights were against the appellants. I do not think she could or should. She says she did not find out what her rights were till 1954, and she was in fact believed by the judge. I cannot think it would be reasonable to expect a woman in her position to have found out by reasonable diligence what the situation was at least until about the time of the action brought by her in 1950.

I come last to what may be the most difficult point of all; namely, assuming that she has established negligence, has the plaintiff proved anything other than nominal damages? It is necessary to say something of the nature of the problem which (as I understand the law) the court has to solve in determining the measure of damages in such a case as this. Mr. O'Connor's point is that we have now to consider the question of liability as between the plaintiff and the electricity company (or their successors) as though it were a distinct proceeding within the present action; and Mr. O'Connor says that, if we find on balance against the plaintiff, that is to say, that she fails in her claim against the electricity board (considered as if it were a separate and existing proceeding), then it follows that her damage is no more than nominal. If that is the right approach, it must follow that in any case such as the present the result expressed in terms of money is always all for the plaintiff or nothing. I cannot, for my part, accept that as the right formulation of the problem.

If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that

[5] [1949] 1 K.B. 550.

there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence. I would add, as was conceded by Mr. Neil Lawson, that in such a case it is not enough for the plaintiff to say: "Though "I had no claim in law, still, I had a nuisance value which I could "have so utilized as to extract something from the other side and "they would have had to pay something to me in order to "persuade me to go away."

But the present case falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try "the action within the "action" as Mr. O'Connor asks. It may be that for one reason or another the action for negligence is not brought till, say, twenty years after the event and in the process of time the material witnesses or many of them may have died or become quite out of reach for the purpose of being called to give evidence.

In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can. In the present case, I start with this. The judge here found all these points in the end for the plaintiff. Moreover, he, having seen the plaintiff in the witness-box, found expressly that she was a truthful and candid witness. He, therefore, concluded that she should be entitled to recover £2,000, which was a figure he arrived at as being equivalent to two-thirds arithmetically of the full amount which (admittedly) was the maximum recoverable under the Fatal Accidents Acts. The relevant passage in the judgment is: "I am "not prepared myself to say that there was no hope for this "action. I think there were certain difficulties in the way, and "I think that having regard to the fact that this lady had three "children to look after, it was a very heavy responsibility upon "those advising her, if an offer of compromise had been made to "reject it out of hand. The more I think about it the more I "think that, weighing up these possibilities and considering that "even successful actions may involve a party in some part of "the costs, the fair figure at which to estimate the damage which "was suffered by the failure to bring this matter to trial or to "issue proceedings is the sum of £2,000."

However that may be, this finding has been strongly and most formidably criticized by Mr. O'Connor on more than one ground. [His Lordship considered the evidence and continued:] After giving my best consideration to the matter and directing myself, I hope, properly to the problems which are to be solved in this case, I find it impossible to say that there was here no valuable right, no cause of action, which was lost by the negligence. I

C. A.
1958
KITCHEN v. ROYAL AIR FORCE ASSOCIATION.
Lord Evershed M.R.

agree with the judge that there were difficulties. The whole case is fraught with mystery and you are almost at a loss to conceive how such a state of things ever should have arisen. But the fact is that it did arise because, unfortunately, the husband was killed. The plaintiff has suffered many buffetings in the course of the last thirteen years but in this one respect fortune, it may be, has smiled upon her; for I think for my part she has been generously treated in being awarded £2,000. But the appellants are not quarrelling with the matter of quantum. There is, therefore, nothing I need say on that matter. I think that the plaintiff established that there was a cause of action and that she had lost something of value. So I think on this matter, too, that we should not disturb the judge's finding. In the end, therefore, I would say that this appeal should be dismissed.

PARKER L.J. I have come to the same conclusion. That the solicitors were negligent towards the plaintiff in May of 1946 I have no doubt and for the reasons given by my Lord.

Whether, however, by fraud they concealed the cause of action from the plaintiff is a matter upon which I have had considerable doubt. If there was such a concealment it is to be found and to be found only, in my view, in the events of October, 1946. On the whole, though with considerable hesitation, I have come to the same conclusion as my Lord and I would accept his judgment on this point.

The only matter on which I would desire to add something is on the difficult question of damages. As to this, the first question to consider is how this unfortunate man met his death by electrocution. That his left hand was on the tap over the sink is, I think, clear. The tap and pipe were torn away from their proper position in his convulsions. That his right hand must at the same time come in touch with the control unit is also, I think, clear. It could not have been the cooker itself because this was found to be adequately earthed. Moreover, the plaintiff herself, immediately after the accident, in putting on the kettle, got a slight shock from the control unit. According to the plaintiff, the switch on the control unit was turned off at nights, and since it was found on I think that it seems probable that he was pulling down the switch on the control unit with his right hand at the same time as his left hand was on the tap. Thus he was making himself into a conductor from the control unit to earth. [His Lordship considered the evidence as to the cause of the accident and continued:] The matter remains a mystery and were it necessary for this court to decide whether the plaintiff would have succeeded, I, for my part, would have found great difficulty in coming to that conclusion; but, as I understand it, that is not our task. If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words,

unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded.

Bearing that in mind, what is the position? The plaintiff is clearly a person whose evidence was likely to be believed. The judge was clearly impressed by her. Mr. O'Connor has raised forcible criticisms of her evidence, but it is to be observed that all those criticisms were made, and no doubt made with equal force, before the judge, and he, despite that, was prepared to accept the plaintiff's evidence. No doubt the plaintiff would in the action have maintained that the company reconnected the lead wires in 1940. As my Lord has said, that is not a last minute assertion on the part of the plaintiff. In January, 1946, that was her case. Furthermore, whoever connected those wires connected them wrongly, and, if capable of doing that, he might equally be capable of breaking the lead sheath and trying to hide his fault by fixing the clip over or in the gap so caused.

If, in the year 1946, in an action against the electricity company, she had given this evidence, it would clearly have called for an answer by the company, and what would have happened then nobody knows. Edwards, the fitter, might or might not have been called. If the company were not in a position to call him, they might have sought to compromise the action, as indeed they did the Law Reform Act claim. If Edwards had been called, he might or might not have been believed. True, he was an experienced meter fixer but he was not a wireman and for all one knows he might have left the work of reconnection to a mate or underling. There remains, above all, the fact to which I have already referred, that there is really no alternative suggestion as to how the lead sheath was broken. In these circumstances, I cannot say that the claim was bound to fail, and accordingly the plaintiff is entitled to something more than nominal damages.

The judge assessed the damages at £2,000 as against £3,000 the amount agreed to be the maximum recoverable if she had succeeded in the action. I confess that, in the light of my analysis of the position, I should have valued the plaintiff's potential claim at very much less, but there is no appeal against this award insofar as it exceeds nominal damages, and, accordingly, that award must stand.

In these circumstances, I would, like my Lord, dismiss the appeal.

SELLERS L.J. I agree with the judgments of my Lords, and I will add only a few observations of my own on some of the issues.

With regard to the appellants' reliance on the Limitation Act, 1939, and the plaintiff's endeavour to overcome it, there was, in my view, no active concealment by the defendants in June or July, 1946. There was a negligent decision by Mr. Arditti on the plaintiff's proposed claim, because inadequate efforts had been made to obtain the evidence on which an opinion could properly

C. A.
1958
Kitchen v. Royal Air Force Association.
Sellers L.J.

be expressed. The evidence of the plaintiff and others, available at the time, required careful investigation and assessment by an experienced expert in electrical matters and this was not obtained.

There were further acts of negligent omission by Mr. Arditti. He failed to serve a writ within the statutory period of one year to keep the claim open and so, at least, to enable an expert to be consulted and his report to be considered. He failed to inform the plaintiff of the time-limit for the writ and the consequences of not issuing the writ and to obtain her instructions one way or the other.

It has been accepted by the appellants, and, indeed, it is quite obvious, that the plaintiff would have insisted on a writ being issued and would have rejected advice to let the matter drop. Those are the acts of omission, which gave rise to the claim against the appellants for negligence or breach of duty, but I do not find in them or in the circumstances surrounding them any evidence of fraudulent concealment. But, in October and November, 1946, there was an active concealment, a deliberate and intentional failure for some reason to disclose the offer of £100 made by the West Kent Co. What was the reason? If it had been solely to benefit the plaintiff and ensure that she received safely from an undisclosed source financial benefit she would not otherwise have received, then, although there was concealment, I would not have thought that fraud, even in its widest sense, or on general equitable grounds, had been established.

But if the evidence establishes that the non-disclosure to the plaintiff of the West Kent Co.'s renewed approach to the defendants in October and their offer of some payment for the benefit of the plaintiff amounted to a further breach of duty to the plaintiff by the defendants, or that disclosure was withheld in order to benefit the defendants themselves, then I think circumstances arise which would establish fraudulent concealment under section 26 (1) (*b*) of the Limitation Act, 1939, as it has been interpreted in the authorities to which my Lord has referred.

The judge rejected the defendants' contention that their motive and interest were solely to obtain a benefit for the plaintiff and that the West Kent Co. enforced secrecy as a basis of their financial assistance. I see no reason to reject the judge's view. The approach to the West Kent Co. had been brought about by the plaintiff's letter direct to them of October 25, 1946, requesting a reconsideration of her claim. Although the evidence did not touch on it, I find it hard to believe that no reference was made to that letter by the West Kent Co.'s solicitor, Mr. Stubbins, to Mr. Arditti during the vital telephone conversation. For all the electricity company knew, it might have been followed up by many more such letters or by direct personal approach or both, and it would hardly seem to have been serving the West Kent Co.'s interest to require secrecy and to dispense with a receipt in final settlement of all claims, which the defendants earlier and without any authority had been rash enough to offer.

I think there was abundant justification for the judge's finding that the suggestion of secrecy emanated from Mr. Arditti. The judgment holds, if I understand it aright, that Mr. Arditti, not wishing to make a full disclosure of what had taken place, sought to evade that responsibility by acting in a manner which would not involve him in a solicitor and client relationship with the plaintiff. I agree with my Lords that the appellants were solicitors and were acting as solicitors for the plaintiff in October and November and that their decision not to disclose the approach to the West Kent Co. was a breach of their duty in that capacity. The plaintiff had written the letter and if she had heard that in response the electricity company were making some offer, call it ex gratia or a donation, after an earlier complete refusal to do anything, she would no doubt have been prompted to press further. The offer of £100, generous as it was, if there was no legal liability, was modest indeed in comparison with the needs of the plaintiff and her children. If she had known of what was taking place and had demanded more and had insisted, as it seems she would have done, that action should be taken, the defendants would have been in a difficulty and their failure to inform her of the omission to have issued a writ would have been revealed.

Whatever may have been in the mind of Mr. Arditti at the time of the telephone conversation, his failure of duty concealed from the plaintiff facts which would, in all probability, have revealed the appellants' earlier breach of duty. The concealment was intentional and did, in fact, benefit and save the interests of the appellants. If the "device," as it has been called in argument, was Mr. Arditti's, as I would hold it to have been, it cannot be regarded in all the circumstances merely as a high-minded endeavour to benefit the plaintiff, and in my view, it is sufficient to prevent the appellants from relying on the defence of the Statute of Limitations. Whatever is to be said for it, the result was that the plaintiff was put in a false position. She received a curt and rather callous letter from the electricity company on October 28, 1946, saying that "they felt no useful "purpose would be served by granting the interview for which "you have asked."

The only other matter on which I would wish to touch is the damages. Cases concerning electricity are often difficult and may develop surprisingly in the course of a trial when all the factors are judicially investigated by examination, cross-examination and argument, and therefore, until judgment, may leave a position of uncertainty in the minds of the contesting parties. The plaintiff was not an expert electrician but she did know something, perhaps more than anyone else who gave evidence, about the electrical arrangements in her kitchen. The judge believed her as a witness, and, notwithstanding Mr. O'Connor's powerful criticisms of her evidence and its inconsistencies, I would not feel justified in saying the judge was wrong.

C. A.
1958
Kitchen v. Royal Air Force Association.
Sellers L.J.

It became apparent that a vital factor in the case was the finding after the accident of a fracture in the lead covering of the lead running from the control box to the meter. The question arises how this fracture could have occurred. The plaintiff recalled that in 1940, when the cooker was not connected and was out of use, this lead and also the lead covering to the cooker were detached and bent back. It is possible that a fracture could have occurred then. When the available evidence is examined, there is no other evidence to be contrasted or balanced with it, and, if fracture there was, that it occurred at the time of the bending back or the reinstating becomes a probability.

Then there is some evidence that the connecting up in 1940 of this lead, which had been bent back and possibly or probably damaged, had been done by a servant of the electricity company. I do not repeat the evidence with regard to the suggested earthings or the absence of an earth to the control box. I adopt fully Parker L.J.'s analysis with regard to that. But, in my view, it is quite untenable to regard the claim against the electricity company as one without any foundation and as one which was bound to fail.

On behalf of the plaintiff, it has not been sought to establish that she was certain of victory and should have recovered £3,000, which was agreed as the appropriate sum in a successful claim under the Fatal Accidents Acts. There was room for compromise on both sides, and, as I view it, every probability of a compromise if the plaintiff's action had been pressed, and I would not disturb the judge's assessment of £2,000, high though I regard it.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown; H. C. L. Hanne & Co.*

B. A. B.

[NORWICH ASSIZES.]

1958
Feb. 12, 13, 17, 18.
Gorman J.

* COSTAGLIOLA *v.* BUNTING and Another.

Agriculture—Agricultural holding—Notice to quit—Death of tenant—Administratrix of tenant—Whether "tenant with whom the contract of tenancy was made"—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*g*).

By a memorandum of agreement dated August 19, 1914, agricultural land was leased by the plaintiff's predecessor in title to B. On B.'s death in 1932 his widow remained in occupation on the terms of her husband's tenancy until her death on March 8, 1956. Her sons continued in possession and on May 23, 1956, the plaintiff gave them a year's notice to quit. The notice stated that it was given in pursuance of the provisions of section 24 (2) (*g*) of the Agricultural Holdings Act, 1948,[1] and for the reason that the

[1] Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to quit an "agricultural holding or part of an "agricultural holding is given to the

late tenant had died within three months before the date of the giving of the notice. In June, 1956, the defendants served a counter-notice under section 24 (1) [1] of the Act:—

Held, that the widow was not "the tenant with whom the "contract of tenancy was made" within section 24 (2) (*g*) of the Act of 1948, and that the Minister not having consented to its operation as required by section 24 (1) the notice to quit was bad.

ACTION.

The plaintiff, Alexandra Tamzen Johannah Costagliola, was the successor in title of two parcels of agricultural land at Terrington St. John, Norfolk, one of them situate at 63, Church Lane, and the other at 15, Middlegate Lane. By a memorandum of agreement dated August 19, 1914, the Church Lane holding was leased to John Bunting by Captain Richard Charles Monson, the plaintiff's predecessor in title. On John Bunting's death in 1932, his widow, Sarah Bunting, remained in occupation of the holding on the terms of her husband's tenancy until her death on March 8, 1956. By a memorandum of agreement dated March 12, 1934, the Middlegate holding was leased to her by Captain Monson. She had paid a total rent of £20 15s. per annum for both the holdings; and her sons, the defendants, had worked on the land at both holdings since 1929.

The plaintiff served a notice to quit on May 23, 1956, on the defendants who had continued in possession of both holdings after Sarah Bunting's death. The notice to quit required delivery up to the plaintiff of the possession of both holdings and the last paragraph read: "Please take notice that this notice to quit is "given for the following reason and in pursuance of the provisions "of section 24 (2) (*g*) of the [Agricultural Holdings Act, 1948] "namely, that the said Sarah Bunting, the late tenant, has died "within three months before the giving of this notice to quit."

The defendants served a counter-notice in June, 1956, under section 24 (1) of the Act of 1948. The consent of the Minister to the operation of the notice to quit had not been obtained, and the defendants contended that the notice was thereby rendered ineffective by the service of the counter-notice. The plaintiff contended that Mrs. Bunting was the "tenant" within section 24 (2) (*g*) of the Act, and that therefore the Minister's consent was not required to the operation of the notice to quit. Alternatively, the plaintiff contended that the defendants were estopped from denying that Mrs. Bunting was the "tenant."

"tenant thereof, and not later than "one month from the giving of the "notice to quit the tenant serves on "the landlord a counter-notice in "writing requiring that this subsec-"tion shall apply to the notice to "quit, then, subject to the provisions "of the next following subsection, the "notice to quit shall not have effect "unless the Minister consents to the "operation thereof. (2) The foregoing "subsection shall not apply where ". . . (*g*) the tenant with whom the "contract of tenancy was made had "died within three months before the "date of the giving of the notice to "quit, and it is stated in the notice "that it is given by reason of the "matter aforesaid."

1958

Costagliola v. Bunting.

The defendants conceded that Mrs. Bunting was the "tenant" so far as the Middlegate holding was concerned, since she held that tenancy under an express contract. They contended that so far as the Church Lane holding was concerned she was not the "tenant" within section 24 (2) (*g*) of the Act.

Other defences were raised to the plaintiff's claim for possession but the case is only reported on the construction of the statute.

Gorman J. held that the plaintiff was entitled to possession of the Middlegate holding.

Michael Havers for the plaintiff.
Claud Allen for the defendants.

The following case and authority relevant to the report was referred to in argument: *Woodward* v. *Earl of Dudley*[2]; Scammall's Law of Agricultural Holdings, 2nd ed., p. 223.

Gorman J. stated the facts and continued: The defendants submit that section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, do not authorize the giving of notice to quit in respect of the Church Lane property because Mrs. Bunting was not the tenant with whom the contract of tenancy was made. There appears a general definition of "tenant" in section 94 (1) of the Act in these terms: "In this Act, unless the context otherwise "requires, the following expressions have the meanings hereby "respectively assigned to them, that is to say:—'tenant' means "the holder of land under a contract of tenancy, and includes "the executors, administrators, assigns, committee of the "estate or trustee in bankruptcy of a tenant, or other person "deriving title from a tenant." It is said by Mr. Allen on behalf of the defendants that Mrs. Bunting was not at any time the person with whom a contract of tenancy was made; that she was the administratrix of her husband, and though she qualifies, as a tenant within the meaning of section 94 (1) of the Act, she is not the tenant within section 24 (2) (*g*). It is contended that the words "with whom the contract of tenancy was made" have a limiting effect on the definition of "tenant" in section 94 (1), so that in section 24 (2) (*g*) the meaning of the word "tenant" is restricted by the qualifying words "with whom the contract of "tenancy is made." It is said by Mr. Allen that the only person who comes within the scope of section 24 (2) (*g*) is the tenant with whom the contract of tenancy was made. Mr. Havers contends that the meaning of "tenant" in section 24 (2) (*g*) was not limiting, but has the width of the definition in section 94 (1).

I am clearly of the opinion that the contention of the defendants is right, and that the words "with whom the contract of "tenancy was made" in section 24 (2) (*g*) have a limiting effect upon the word "tenant" in section 94 (1). Under section 24

[2] [1954] Ch. 283; [1954] 1 W.L.R. 476; [1954] 1 All E.R. 559.

(2) (*g*) the legislature only contemplated the original tenant who had actually been in contractual relationship with the landowner. The effect of this construction is that one is unable to get rid, without the consent of the Minister, of a tenant other than the tenant having a direct contract with the owner of the land.

Mr. Havers said that if he was wrong in saying that the interpretation of section 24 (2) (*g*) was the wide one, then whether one considered the position from the point of view of estoppel, or as a question of inferences to be drawn from the facts, whatever might be the initial relationship between Mrs. Bunting and the landlord it would be sufficient if she was the contractual tenant at the time of the death.

I have been referred to *Foster* v. *Robinson* [3] but I cannot accept that there is evidence upon which I can find—whether I consider it as a question of estoppel or as an inference to be drawn from the facts—that there was a change in the relationship in the sense that Mrs. Bunting ceased to be holder by virtue of her being administratix of her husband, and became holder by reason of a contract of tenancy between her and Captain Monson or some other person. Therefore, so far as the first contention is concerned, the notice served in respect of Church Lane was a bad notice because Mrs. Bunting was not the person who came within the scope of the word "tenant" within section 24 (2) (*g*).

Solicitors: *Metcalfe, Copeman & Pettefar; Sadler, Lemmon & Gethin, King's Lynn.*

J. D. P.

[3] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 343.

[PROBATE, ETC., DIVISION.]

* IN THE ESTATE OF HASLIP, DECD.

1958
April 2.
Karminski J.

Administration—Administration pendente lite—Possibility of minority or life interest arising—Power to appoint a sole administrator—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 163 (1).

The court has power to appoint a sole administrator pendente lite under section 163 (1) of the Judicature Act, 1925,[1] although there is the possibility of a life or minority interest arising.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 163 (1): "Where any legal proceedings touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any grant, are pending, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the court and act under its direction.

"(2) The court may, out of the estate of the deceased, assign to an administrator appointed under this section such reasonable remuneration as the court thinks fit."

1958

IN THE ESTATE OF HASLIP, DECD.

In the Estate of Lindley, decd. [1953] P. 203; [1953] 3 W.L.R. 168; [1953] 2 All E.R. 319 followed.

In re White [1928] P. 75; 43 T.L.R. 729 distinguished.

PROBATE MOTION.

A testatrix executed a will and codicil appointing by the latter the plaintiff, a nephew, executor. The will, which was drawn by the testatrix herself contained interlineations and deletions the effect of which required, according to counsel for the plaintiff, decision by the court in default of settlement between the parties. The will disclosed on its face the possibility of a life interest arising.

The application was for the appointment of the plaintiff or some other fit and proper person to be administrator pendente lite of the real and personal estate of the testatrix under section 163 of the Supreme Court of Judicature (Consolidation) Act, 1925.[1]

Douglas Lowe for the plaintiff. There is recent authority that section 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, is not governed by the preceeding section 160 (1) [2] and that the court may appoint a sole administrator under that section even though the possibility exists of a minority or life interest arising: see *In the Estate of Lindley, decd.*[3] The current edition of Tristram and Coote, Probate Practice (19th ed., p. 515), however, states that the court must appoint two administrators and maintains that the authority referred to conflicts with the decision of the Court of Appeal in *In re White.*[4]

James Comyn for the defendant, who was one of those entitled on intestacy. The application is not opposed; it is agreed that the court is entitled, under this section, to appoint a sole administrator. It was, however, thought that the statement in Tristram and Coote should be brought to the attention of the court.

KARMINSKI J. In *In re White* * an application to grant letters of administration to a sole administratrix was refused but that decision is to be distinguished from the present application since it concerned an application under a different section of the Supreme Court of Judicature (Consolidation) Act, 1925, namely, section 162. The section now invoked, namely, section 163, refers to "administrator" in the singular. Further, an administrator pendente lite is clearly, by virtue of the statute, in an

[1] For foonote 1 see p. 583.

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 160: "(1) Probate or administration shall "not be granted to more than four "persons in respect of the same "property, and administration shall, "if there is a minority or if a life "interest arises under the will or "intestacy, be granted either to a "trust corporation, with or without "an individual, or to not less than "two individuals: Provided that the "court in granting administration "may act on such prima facie "evidence . . . as to whether or not "there is a minority or life interest, "as may be prescribed by the probate "rules and orders."

[3] [1953] P. 203; [1953] 3 W.L.R. 168; [1953] 2 All E.R. 319.

[4] [1928] P. 75; 43 T.L.R. 729.

* [1928] P. 75; 43 T.L.R. 729.

especial position since he is under the constant supervision of the court.

1958

IN THE ESTATE OF HASLIP, DECD.

It is obviously to the benefit of the estate not to be burdened with the possible expense of a second administrator and I have no hesitation in following the decision of Wallington J. in *In the Estate of Lindley, decd.*[2]

Order accordingly.

Solicitors: *Wilkinsons; Kimbers.*

E. J.

[2] [1953] P. 203; [1953] 3 W.L.R. 168; [1953] 2 All E.R. 319.

[CHANCERY DIVISION.]

*FYNN *v.* INLAND REVENUE COMMISSIONERS.

1957 *Dec.* 10, 11.

Upjohn J.

Revenue—Income tax—Transfer of assets to company incorporated abroad—Charge by company of transferred assets to bank—Subsequent payment by taxpayer into company's account at same bank of moneys on unsecured loan to company—Whether company's income deemed to be taxpayer's income — "Associated operation" — Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch.* 1, *Sch. D, Case VI —Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 412 (2) (4) (5), 413 (1).

In 1947 a taxpayer caused to be incorporated in the Republic of Ireland a company to which, in 1948, he sold investments worth about £35,437, allowing the price to be left owing to him. In 1949 there were allotted to the taxpayer ordinary shares at a price satisfied by cancelling the company's indebtedness to him, which shares he settled on trusts governed by the law of the Republic of Ireland. Later, the company at various times bought further investments in the market, largely by borrowing from its bankers on an overdraft limited to £35,000 and secured by a charge on the company's securities, including those which the taxpayer had transferred to it. In January, 1952, at a date when the overdraft approached and possibly exceeded the limit, the taxpayer lent to the company out of his surplus funds, free of interest and on day to day loan, £12,000, which was paid into the company's bank and enabled the company to buy more investments. There was no evidence of pressure by the bank to reduce the overdraft.

It was conceded (1) that the sale of the transferred securities to the company was a "transfer of assets" abroad to avoid tax within section 412 of the Income Tax Act, 1952,[1] and (2) that the charge by

[1] Income Tax Act, 1918, Sch. 1, Sch. D: "(2) Tax under this "Schedule shall be charged under the "following cases respectively; that "is to say,— . . . Case VI. Tax in "respect of any annual profits or "gains not falling under any of the "foregoing cases, and not charged by "virtue of any other Schedule . . ."

Income Tax Act, 1952, s. 412: "For the purpose of preventing the "avoiding by individuals ordinarily "resident in the United Kingdom of "liability to income tax by means of "transfers of assets by virtue or in "consequence whereof, either alone "or in conjunction with associated "operations, income becomes payable "to persons resident or domiciled out "of the United Kingdom, it is hereby "enacted as follows: . . .

"(2) Where, before or after any "such transfer, such an individual "receives or is entitled to receive any "capital sum the payment whereof is "in any way connected with the

1957

Fynn
v.
Inland
Revenue
Commissioners.

the company of those transferred assets to secure its overdraft was an operation associated with that transfer:—

Held, in respect of the loan of £12,000, (1) that neither the making of the loan nor the right to receive repayment of it was "in any way connected with the transfer" of the original assets, within the meaning of section 412 (2), or with the charging of those assets that was the associated operation.

(2) That the actual loan itself was not an "associated operation" within section 412 (4), being an unsecured loan which the company could have used as it pleased, and not made either to reduce the ovedraft or to free the assets from the charge.

Appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated, so far as relevant, provided in substance as follows: At a meeting of the commissioners on July 13 and 16, 1956, the taxpayer, B. M. Lindsay Fynn, appealed against assessments to income tax made on him under Case VI of Schedule D for 1951–52 in the sum of £4,005 and for 1952–53 in the sum of £1,769. The assessments were in respect of sums, being income of Crescent Investments Ltd. (hereinafter called "Crescent"), which the Inland Revenue Commissioners contended were deemed to be income of the taxpayer by virtue (in the case of the 1951–52 assessment) of section 18 of the Finance Act, 1936, as amended by section 28 of the Finance Act, 1938, and (in the case of the 1952–53 assessment) of section 412 of the Income Tax Act, 1952. It was agreed that, for the purposes of this appeal, there was no material difference between section 18 as amended and section 412, and the appeal was argued, and the case stated, as if section 412 applied to both assessments.

On July 25, 1947, the taxpayer caused Crescent to be incorporated in the Republic of Ireland, where, accordingly, it was

"transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled out of the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of that individual for all the purposes of this Act. In this subsection, 'capital sum' means—(*a*) any sum paid or payable by way of loan or repayment of a loan. . . .

"(4) For the purposes of this section, 'an associated operation' means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

"(5) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if . . . (*b*) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit. . . ."

S. 413 (1): "Tax at the standard rate shall not be charged by virtue of the last preceding section in respect of income which has borne tax at the standard rate by deduction or otherwise but, save as aforesaid, tax chargeable at the standard rate by virtue of that section shall be charged under Case VI of Schedule D and all assessments in respect thereof shall be made by the special commissioners."

resident and domiciled, with a capital of £30,000 divided into 15,000 preference shares of £1 each (none of which had been issued at the date of these proceedings) and 15,000 ordinary shares of £1 each, of which 998 were issued to the taxpayer and one each to E. J. Shott and W. S. Cunningham. Shortly afterwards the taxpayer's wife lent £3,200 to Crescent. In March, 1948, the taxpayer sold to Crescent investments (hereinafter called "the transferred securities") to the value of £35,437 10s. at that price, which was left outstanding and owing by Crescent to the taxpayer: and the taxpayer's wife transferred to the taxpayer the benefit of her loan to Crescent, whose indebtedness to the taxpayer amounted to £38,637 10s. It was not disputed that the sale of the transferred securities by the taxpayer to Crescent was a "transfer of assets" within section 412 or that one of the transfer's purposes was to avoid liability to taxation. In June, 1949, Crescent's capital was increased to £41,000 by the creation of 11,000 further ordinary shares, making 26,000 ordinary shares in all. On June 14, 1949, a further 25,000 ordinary shares were allotted to the taxpayer for £38,637 10s., which was satisfied by cancelling Crescent's indebtedness to him. About June 20, 1949, he caused his 25,998 ordinary shares to become vested in Shott and Cunningham, executing, on that date, a deed of settlement whereby they were to be held by Shott and Cunningham as trustees on trusts in favour of the taxpayer's children. The settlement was irrevocable and was governed by the law of the Republic of Ireland where the trustees resided. Later, questions arose between the taxpayer and the Revenue about the effect of section 412 of the Income Tax Act, 1952, in relation to Crescent's income up to the date of the settlement. At various times between the date of the settlement and August, 1951, the taxpayer sold further investments to Crescent for full consideration and at various times Crescent bought further investments in the market, largely by borrowing from its bankers, the overdraft being secured by a charge on the securities which Crescent held, including the transferred securities. On September 30, 1951, Crescent held investments which had cost £81,286 and the overdraft, which was then limited to £35,000 stood at £33,654. On January 3, 1952, the taxpayer wrote to Shott, who was, as well as a trustee, a director of Crescent: "As I have for the moment some surplus "funds, I have to-day arranged to transfer £12,000 from my "personal account to the credit of the account of Crescent Invest-"ments Ltd. with the Midland Bank Ltd., 133 Regent Street, on "day to day loan, free of interest. Would you be good enough to "send to me an undated letter addressed to the Midland Bank "Ltd., in terms similar to the carbon copy letter which I attach "requesting them to debit the Crescent Investment Ltd. account "and credit my account with the sum of £12,000. This is merely a "protection on my part. The manager of the Midland Bank will "then be in a position to let me know at any time if there is "any risk of the loan account of Crescent Investments Ltd.

1957

Fynn v. Inland Revenue Commissioners.

"being frozen at a lower level." The "loan account" was the overdraft, which was near, and possibly exceeded, the limit at the date of the loan of £12,000 by the taxpayer, who happened to have cash available. There was no evidence of pressure by the bank to reduce the overdraft and the loan enabled Crescent to buy more investments. On September 19, 1952, the taxpayer wrote to Shott: "With reference to the loan of £12,000 . . . the "best thing to do would be to add it to the settlement . . ." On March 1, 1954, the taxpayer executed a deed releasing Crescent from its obligation to repay the £12,000. The substantive offect from the taxpayer's point of view was that he added £12,000 to the amount settled on his children and—the point in his mind when he executed the deed—that it ended the period for which it might be possible for Crescent's income to be deemed to be his by virtue of section 412. Part (possibly all) of Crescent's income consisted of dividends paid under deduction of income tax, Crescent obtaining repayment of the income tax deducted under the double taxation convention between the United Kingdom and the Republic of Ireland set out in Schedule II to the Finance Act, 1926 (or Schedule 18 to the Finance Act, 1952).

The Revenue contended: (i) that the taxpayer's transfer of the transferred securities to Crescent was a "transfer of assets" within section 412; (ii) that the charging of those assets to Crescent's bankers as security for Crescent's overdraft was an "associated "operation" in relation to that "transfer of assets"; (iii) that the loan of £12,000 also was an "associated operation" in relation thereto; (iv) that by lending the £12,000 to Crescent the taxpayer became entitled within section 412 (2) to a capital sum payment whereof was connected with each of those "associated operations" and that, accordingly, Crescent's income for the financial years 1951–52 and 1952–53 was deemed to be the taxpayer's income by virtue of section 412 (2); (v) alternatively that by making that loan the taxpayer acquired rights by virtue of which he had, within the meaning of section 412 (5) (*b*) and (*c*) (and by reference to section 412 (4)) power to enjoy the income of Crescent for the financial years 1951–52 and 1952–53 and that that income was deemed to be his income by virtue of section 412 (1); (vi) that the whole of Crescent's income for the fiscal year 1951–52 must be deemed to be the taxpayer's income; (vii) that Crescent's income had not borne tax at the standard rate within the meaning of section 413 (1), that no relief was due to the taxpayer under section 413, and that the assessments under Case VI of Schedule D were correctly made and should be confirmed.

The taxpayer contended: (i) that the taxpayer's loan of £12,000 to Crescent was not an operation associated with the transfer of the transferred securities; (ii) that, if the charging of the transferred securities was an associated operation, the taxpayer was at no time entitled to receive any capital sum the payment whereof was in any way connected therewith; (iii) that, if the taxpayer was entitled to receive any capital

sum, the payment thereof was not in any way connected with anything, since no such payment ever had been made or ever would be made; (iv) that, accordingly, section 412 (2) had no application; (v) that the taxpayer did not at any material time have power to enjoy the income of Crescent within section 412 (5) (*b*) and (*c*); (vi) that, if the taxpayer did have power to enjoy the income of Crescent by reason of his having made the loan to Crescent, he did not have that power by virtue of any rights which were acquired by means of the transfer of the transferred securities, either alone or in conjunction with an associated operation, since the loan was not an associated operation; (vii) that, accordingly, section 412 (1) had no operation; (viii) that if, contrary to the taxpayer's contentions, any income of Crescent was deemed to be the taxpayer's income by virtue of any of the provisions of section 412, the only income which could be affected was income which became the income of Crescent since January 3, 1952, when the loan was made; (ix) that in any event Crescent's income had borne tax at the standard rate and, accordingly, the assessments should not have been made, by virtue of section 413.

The commissioners held that the charging of the transferred securities to Crescent's bankers was an associated operation in relation to those securities. They held that, on January 3, 1952, when the taxpayer lent £12,000 to Crescent, he became entitled to a capital sum the payment whereof was connected with that associated operation. In so concluding, they were of opinion that, if (as they held to be the case) the loan itself was in any way connected with the charge which secured Crescent's overdraft, the taxpayer's right to demand repayment of the loan was equally so connected. Further, in so concluding they held that, on the true construction of section 412 (2), the fact that no capital sum was ever paid or would ever be paid was immaterial so long as the taxpayer was entitled to demand payment.

For the foregoing reasons the commissioners held that Crescent's income was deemed to be the income of the taxpayer by virtue of section 412 (2), and they expressed no opinion on the other questions raised by both parties relating to section 412 (1) and (2). On the question whether the income which had in their opinion to be so treated included the whole of Crescent's income for the whole of the fiscal year 1951–52 or only such part of that income as became Crescent's income after January 3, 1952, the commissioners held that, on the true construction of section 412 (2), the Crown's contention was right and that the whole of Crescent's income for the fiscal year 1951–52 must be deemed to be the income of the taxpayer. On the taxpayer's contention as to section 413, the commissioners held that the income of Crescent in question was not income which had borne income tax at the standard rate within the meaning of that section. They confirmed the assessments. The taxpayer appealed.

1957

FYNN v. INLAND REVENUE COMMISSIONERS.

C. N. Beattie for the taxpayer.

Sir Lynn Ungoed-Thomas Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown.

Case cited in argument not referred to in the judgment: *Inland Revenue Commissioners* v. *Dalgety & Co. Ltd.*[2]

UPJOHN J. This is an appeal by way of case stated from two assessments made by the Revenue and confirmed by the special commissioners, on the taxpayer for 1951–52 under the Finance Act, 1936, section 18, as amended by the Finance Act, 1938, section 28, and for 1952–53 under the Income Tax Act, 1952, section 412. The Income Tax Act, 1952, section 412, substantially re-enacted the earlier sections which were repealed, and before the commissioners, and before me, the matter has been treated as arising entirely in both years under section 412. That section, as appears from the sidenote, is designed to prevent the avoidance of income tax by transactions resulting in the transfer of income to persons abroad.

In 1947 the taxpayer caused a company known as Crescent Investments Ltd. (to which I shall refer as "Crescent") to be incorporated in the Republic of Ireland and shares were issued to him. In March, 1948, the taxpayer sold some £35,000 worth of securities to Crescent, the amount due to the taxpayer being left outstanding. It is not disputed that that transfer of securities was a transfer of assets within section 412, and it is also admitted that one of the objects of the transfer was to avoid liability to English taxation. I shall refer to these securities as "the transferred "assets."

In 1949 25,000 shares were issued to the taxpayer in satisfaction of Crescent's indebtedness to him in respect of the transfer of assets, and in 1949 the taxpayer settled the shares then vested in him on the trusts of a settlement, which was governed in all respects by the law of the Republic of Ireland. Later, Crescent purchased further investments in the open market, which were financed by borrowing from its own bankers; and the position in September, 1951, was apparently that Crescent held investments to the extent of about £81,000, and the bank overdraft, secured by a charge on the transferred assets, stood at some £33,000, the limit permitted by the bank being apparently £35,000.

In January, 1952, the transaction took place with which this appeal is concerned. The taxpayer, being possessed of some surplus funds, lent £12,000 as an interest-free unsecured loan to Crescent, repayable on demand, and caused that sum of £12,000 to be paid to Crescent's bankers. No doubt the immediate effect of that was to reduce the overdraft (for which the transferred assets were security) by that amount, but, as is stated in the case, "At the time when the [taxpayer] made this loan of £12,000 to

[2] [1930] A.C. 527; 46 T.L.R. 349.

" Crescent, Crescent's overdraft was near the limit and may have " exceeded the limit; the taxpayer happened to have cash avail- " able; there was no evidence that Crescent was being pressed by " the bank to reduce the overdraft, and the loan enabled Crescent " to make further purchases of investments." The inference I draw from that is that Crescent, had it wanted to, could have forthwith withdrawn that £12,000 and used it for any purpose that it cared to.

Nothing further happened that is relevant to this case, but, as a matter of history, in March, 1954, the taxpayer in fact released Crescent from its obligation to repay the loan of £12,000. The substantive effect of that was to increase the value of the settled shares by that amount.

Section 412 of the Act of 1952 begins: " For the purpose of " preventing the avoiding by individuals ordinarily resident in the " United Kingdom of liability to income tax by means of transfers " of assets by virtue or in consequence whereof, either alone or in " conjunction with associated operations, income becomes payable " to persons resident or domiciled out of the United Kingdom, it " is hereby enacted as follows . . . "

It is common ground that that part of the section is entirely satisfied, that is to say, the individual, the taxpayer, is ordinarily resident in the United Kingdom and he has transferred assets whereby income becomes payable to a person (i.e., Crescent) who is resident or domiciled out of the United Kingdom, and it was done with the avowed object of avoiding income tax. On that matter I need say no more than that the taxpayer is perfectly entitled to avoid income tax if he properly can. If, on the other hand, he finds himself in difficulties with a penal section such as this, then one has no sympathy with him if, to use the language of the late Lord Greene M.R. in *Howard de Walden* v. *Inland Revenue Commissioners*,[1] he finds that his fingers have been burnt.

[His Lordship read section 412 (2), (4), and (5) of the Act of 1952, and continued:] After the transfer the taxpayer was entitled to receive a capital sum, i.e., repayment of the £12,000 lent by him to Crescent. The question which I have to consider is whether it is proper to say that, within the terms of section 412 (2), the taxpayer was entitled to receive a capital sum " the " payment whereof is in any way connected with the transfer or " any associated operation." Having regard to the definition of " an associated operation " in subsection (4), it is conceded that the charge by the company of the transferred assets to secure its overdraft is an operation which can properly be described as associated with the transfer of assets. We do not know exactly when that charge was created, but it is common ground that it was so created.

The special commissioners have held that the right to receive the capital is connected with the associated operation of the

[1] [1942] 1 K.B. 389, 397; [1942] 1 All E.R. 287, 289.

1957

Fynn v. Inland Revenue Commissioners.

Upjohn J.

charge of assets, and they put it in this way, in paragraph 7 of the case: "We, the commissioners who heard the appeal, held "that the charging of the transferred securities to Crescent's "bankers was an associated operation in relation to the transfer "of the transferred securities. We held that on January 3, 1952, "when the [taxpayer] lent £12,000 to Crescent, he became "entitled to receive a capital sum the payment whereof was "connected with the said associated operation; in coming to this "conclusion we were of the opinion that if (as we held to be the "case) the loan itself was in any way connected with the charge "which secured Crescent's overdraft, then the [taxpayer's] right "to demand repayment of the loan was equally so connected; "further, in coming to this conclusion, we held that on the true "construction of section 412 (2), the fact that no capital sum was "ever paid or will ever be paid was immaterial, so long the [tax-"payer] was entitled to demand payment."

I am not going to attempt any definition of what meaning should be given to the phrase "the payment whereof is in any "way connected with the transfer"; or in particular to attempt any definition of the vital word "connected" except to say it must receive its ordinary meaning. Every case must be dependent on its own facts, but I look at those facts and ask myself whether it can be said that the right to receive repayment of the sum of £12,000 is in any way connected with the original transfer or with the charging of the transferred assets by Crescent. It is said that it is so connected because the payment of the £12,000 reduced the overdraft secured on the transferred assets. Speaking for myself, I can only express my view in one sentence. I can see no connexion whatever between the charge of transferred assets on the one hand and either the lending of the money or the right to receive payment on the other. They do not seem to me to have any connexion at all one with the other on the facts of this case.

Then it is said that the actual loan itself is "an associated "operation," and attention is drawn to the words in section 412 (4) "an operation of any kind effected by any person." So far so good. Is it an operation effected in relation to any of the transferred assets? It is said that it is because the loan reduced the overdraft. There, again, I propose not to attempt any definition of the phrase "in relation to any of the assets transferred." I cannot see that the making of the unsecured loan can be said in any ordinary use of language to have any relation to the previously created charge. It was an unsecured loan made on the facts of this case, not for the purpose of reducing the overdraft because the bank were pressing for payment; nor for the purpose of freeing the assets from the charge. It was made to Crescent as an interest-free unsecured loan and Crescent could have used it in any way that it pleased. I cannot see that it bears any relation to any of the transferred assets or to the charge.

A further argument was addressed to me. It was said that the

operation was in relation to the transferred assets even if the assets had not been charged, because the assets are available for repayment of the loan. I do not follow this argument.

1957

FYNN v. INLAND REVENUE COMMISSIONERS.

Upjohn J.

An argument was addressed to me on subsection (5). It was said that the taxpayer had power to enjoy income because he fell within paragraph (*b*) of that subsection. That may or may not be so. There is some authority on that, but in my judgment, subsection (5) is linked up with subsection (1) where the phrase is used "power to enjoy income," and, in my judgment, subsection (5) cannot be used to enlarge the definition in subsection (4).

In my judgment the special commissioners have misdirected themselves, and the appeal must be allowed and the assessment discharged.

Order accordingly.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

K. R. A. H.

[CHANCERY DIVISION.]

* WRIGHT *v.* BOYCE (INSPECTOR OF TAXES).

1958
Mar. 5, 6.

Vaisey J.

Revenue — Income tax — Employment — Perquisites or profits — Professional huntsman—Whether gifts received from hunt followers and others at Christmas time part of remuneration—Whether such gifts taxable—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sch. E, paras.* 1 *and* 2; *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

W. was a professional huntsman and was engaged by the master and was responsible to him. As senior hunt servant W.'s duties involved the feeding and care of the hounds and the management of the kennels, and he was responsible for controlling the hounds in the field. W.'s appointment was made orally, and at the time nothing was said about Christmas gifts. Voluntary gifts were made to W. at Christmas time, both in cash and in kind, by followers of the hunt and persons interested in it, but although it was found that many donors were influenced by their personal regard for W., that regard had its origin in the way in which he performed his duties. W. was assessed to income tax under Schedule E in respect of those gifts made in cash, and on appeal the special commissioners held that such gifts (other than those given by persons not connected with the hunt) were taxable since they accrued to him by way of his employment. On appeal:—

Held, that such gifts were taxable since they accrued to W. by reason of his employment as huntsman and could not be considered as presents or testimonials.

Moorhouse v. *Dooland* [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1 applied.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

1958

WRIGHT
v.
BOYCE
(INSPECTOR OF TAXES).

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

Joseph Wright, a huntsman, of Brigstock near Kettering, Northants, appealed to the special commissioners against assessments to income tax under Schedule E made upon him in respect of gifts made to him in the form of cash presents at Christmas time by members and followers of the hunt as follows: additional assessments in respect of gratuities only, 1948–49 £200; 1949–50 £200; first assessments, 1950–51 £341; 1951–52 £353; 1952–53 £583; 1953–54 £709; 1954–55 £658. The question for the determination of the court as stated by the special commissioners was whether certain sums received by Wright were taxable emoluments of his employment. Wright had been successively huntsman of the Bathurst and the Woodland Pytchley, and it was contended on his behalf that the sums involved which were given to him at Christmas time by hunt members and followers were not taxable emoluments. On behalf of the Inland Revenue it was contended that the sums were a profit accruing to Wright by reason of his employment as huntsman and were properly assessable to tax. The special commissioners dismissed his appeal, having found that, apart from certain gifts in kind and gifts which came to Wright from persons not connected with the hunt by which he was employed during the relevant years under consideration, most gifts came to Wright because he was employed as huntsman, and accrued to him by virtue of his employment as such, notwithstanding that the givers were influenced by personal regard for Wright, such personal regard having its origin in the way in which he carried out his duties as huntsman. Wright appealed.

H. B. Magnus Q.C. and *R. A. Watson* for the appellant.
Cyril King Q.C. and *Alan Orr* for the Crown.

The case referred to in the judgment was cited in argument.

VAISEY J. This is a case which comes before the court by way of an appeal from the decision of the special commissioners assessing for tax under Schedule E the appellant Mr. Joseph Wright. The assessments were made in respect of the appellant's emoluments as a huntsman, first to the Bathurst Hunt and later to the Woodland Pytchley Hunt. The question is whether in those emoluments there ought to be included certain sums of money which Wright received at or about Christmas time in each of the years in question. The amounts are not great, but the point which is raised is not easy. This is the latest of many decisions on a similar point.

The Bathurst Hunt, which operates in the South of Gloucestershire and North of Wiltshire, has no written rules. Its hounds and kennels are owned by Lord Bathhurst, and he appoints the master. There is a hunt club which is a social club without funds,

and I do not think anything turns on it. There is a committee, and the committee guarantees to the master a sum of money which goes towards his working expenses or the working expenses of the hunt. The Woodland Pytchley Hunt, which operates in Northamptonshire, again has no written rules. The master is elected by a committee which represents subscribers, farmers and landowners, and there is an annual general meeting at which persons who contribute more than a certain sum are invited, together with certain landowners and farmers who are concerned and interested.

In the case of both hunts it appears that the hunstman is engaged by the master and is under the master's orders, and his principal duties are to be responsible for the feeding of the hounds, management of the pack and the kennels and, as the case somewhat naively states, "finding foxes and getting the hounds on to "them." There is no doubt (it is found as a fact and it is no doubt a truism) that the success of the hunt is largely dependent on the huntsman's abilities. The appellant had been a hunt servant since boyhood. He was engaged as huntsman with the Bathurst Hunt in 1946 orally at an interview, and at that interview nothing was said about Christmas presents or Boxing day presents or tips or anything of that kind. He was told the terms of his employment, which I suppose included the terms of his salary, and the same thing happened when, in 1952, he left the service of the Bathurst Hunt and was engaged as huntsman to the Woodland Pytchley Hunt. Again, at the time of his appointment, which was by word of mouth, nothing was said about tips or presents.

The commissioners find that in each year when the appellant was huntsman to the Bathurst Hunt and the Woodland Pytchley Hunt he received presents of cash at or about Christmas time. Some of them came from persons with whom he had come into contact in his capacity as a hunt servant earlier in his career but who had no connexion with the hunt with which he was huntsman at the time the presents were given. These people were few in number and most of the presents of cash given to the appellant at Christmas or on Boxing Day came from people with whom he was at the time in contact in his capacity as huntsman. Such persons would mostly be people who regularly rode in the hunt but would also include persons who occasionally rode and persons who did not ride but had an interest in the hunt. Many of those were personal friends of the appellant, who, in his capacity of huntsman, had become a personality of some note to a wide circle of people in the district, not only to people who hunt but also to people who voluntarily assist in the work of the kennels, to farmers and people who attend meets on foot. He also got presents in kind from farmers. I gather from that, although the word is not used, that Wright was a very popular as well as a very successful huntsman.

The commissioners find these facts: "It is a widespread "custom in hunts in most parts of the country (including the

1958

WRIGHT
v.
BOYCE
(INSPECTOR
OF TAXES).

Vaisey J.

"Bathurst and Woodland Pytchley Hunts) for followers of the "hunt to give the huntsman presents of cash at Christmas time, "and the usual occasion for the gifts is the meet on Boxing Day. "The custom is one of long standing and well known to people "who hunt" (including, if I may say so, obviously the appellant himself) "and soon becomes known to people who take up hunt-"ing. There is no compulsion on followers of the hunt to give "such presents nor (in the case of the Bathurst and Woodland "Pytchley Hunts) was any form of circular or reminder given to "followers about it, or any organized collection or cap, either on "Boxing Day or at any other time. There is no conventional "amount to give; a person would give a larger amount if he "liked or respected the appellant, or a smaller one or none at "all if he disliked him. About half of the persons riding at the "Boxing Day meet would give the appellant a present (where "several members of the same family were riding, the appellant "generally receives one present from the head of the family "only); some people (particularly those who could not attend the "Boxing Day meet) give the appellant a present before or after "Boxing Day; if, however, there is no meet on Boxing Day the "appellant does not receive many presents. For example in one "year when hunting was stopped by frost from October to "February and in another year when the appellant was prevented "by illness from hunting during the Christmas season he received "very few presents of cash."

Pausing there, it was opened to me, and I have no doubt it is the fact, that in addition to the presents of cash Wright was accustomed to receive presents in kind—a box of cigars, or a bottle of whisky, or a bottle of port, or a couple of pheasants; I do not know what; but at any rate not in cash. Those presents in kind do not come into this case at all. No claim is made by the Crown for treating those presents or the value of them as a taxable interest in the hands of Wright; but his contention was that the sums in question were not taxable as emoluments of his employment as huntsman, and that the assessments under appeal should be reduced accordingly. In other words, his submission and contention before me is that these were not part of his income at all; they were not remuneration, they were not pay, they were not salary or accretion either of pay or salary; they were testimonials or presents. Drawing the line between those types of things received is not a very easy task.

The inspector of taxes, on the other hand, before the commissioners, stated or urged that the sums in question were a profit accruing to the appellant by reason of his employment as huntsman and were properly assessable to income tax under Schedule E.

We now come to the finding of the commissioners. They found, after considering the evidence, that, with the exception of the gifts which I will mention in a moment, the sums of money in

question came to the appellant because he was employed as huntsman, and accrued to him by virtue of his employment, and they say that in coming to that conclusion they did not overlook the fact that in the case of many of the sums the giver was influenced to some extent by personal regard for the appellant, but they found that such personal regard had its origin in the way in which the appellant personally performed his duties as huntsman. The gifts which were found to be not liable to tax are the amounts which are excluded from the assessment as those which came from persons who had no connexion with the hunt with which the appellant was employed in the relevant years. In other words, they say that no tax should be paid on presents which came from old friends.

It is difficult for me to express my own conclusions in terms which are completely accurate, having regard to the many authorities on this subject; but as I understand the matter, if these sums were received not merely because Wright was a huntsman and because, being a huntsman, he came in contact with a good many people who enjoyed hunting or joined in the hunting, that is not enough. The question is: Do they come to him by virtue of his office? That is to say, are they linked up with his office as distinct from his personality that they must fairly be regarded not as mere presents, not as mere gifts, but as contributions to what he was paid, looked at from his own point of view, from the point of view of those who made the gifts and from the point of view of the taxing authorities?

The most recent case on this kind of point was the case of *Moorhouse* v. *Dooland*.[1] That was the case of a cricket club professional who, under the terms of his employment, was permitted to have collections made for him in respect of any meritorious performance on the cricket field. The judgments of Harman J. in the court below and of the members of the Court of Appeal contain many statements as to the law applicable to this subject to which I have referred. I, personally, find much guidance from the statement of principles which were enunciated by Jenkins L.J. in that case. Jenkins L.J. said this[2]: "(i) The test of "liability to tax on a voluntary payment made to the holder of an "office or employment is whether, from the standpoint of the "person who receives it, it accrues to him by virtue of his office "or employment, or in other words by way of remuneration for "his services. (ii) If the recipient's contract of employment "entitles him to receive the voluntary payment" [as was obviously the case here] "whatever it may amount to, that is a "ground, and I should say a strong ground, for holding that, from "the standpoint of the recipient, it does accrue to him by virtue "of his employment, or in other words, by way of remuneration "for his services. (iii) The fact that the voluntary payment is of

[1] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.

[2] [1955] Ch. 284, 303.

1958

Wright v. Boyce (Inspector of Taxes).

Vaisey J.

"a periodic or recurrent character affords a further, but I should "say a less cogent, ground for the same conclusion. (iv) On the "other hand, a voluntary payment may be made in circumstances "which show that it is given by way of present or testimonial "on grounds personal to the recipient, as, for example, a collection "made for the particular individual who is at the time vicar of a "given parish because he is in straitened circumstances."

The question of law which is now before me is: In view of the facts herein set out, are the sums in question assessable to income tax under Schedule E? I do not think that it is necessary for me to cite Schedule E at length, but what Schedule E says is that tax (that is to say, income tax under that Schedule) "shall "be charged in respect of every public office or employment of "profit or in respect of any stipend," leaving out the words that do not apply, "payable out of the revenue by the Crown." Then, in the second paragraph, it says: "Tax under this Schedule shall "also be charged in respect of any office, employment or pension "the profit or gains arising or accruing from which would be "chargeable to tax under Schedule D but for the proviso of para-"graph 1 of that Schedule," which throws us back to Schedule E, but I do not think that I need refer to that. Then in the Ninth Schedule, which contains rules applicable to Schedule E, we have these words: "Tax under Schedule E shall be annually charged "on every person having or exercising an office or employment "of profit," again leaving out some words which are not material, "in respect of all salaries, fees, wages, perquisites or "profits whatsoever therefrom for the year of assessment," after making certain deductions.

What I have to decide is: Were these payments, this collection made on Boxing Day or thereabouts in favour of Wright, part of the fees, wages, perquisites or profits arising from his employment?—because they did not come from the person employing him, either the master or the committee of the hunt; they came from sympathizing supporters of the hunt, and no doubt also largely from personal friends. Considering the matter from the unsympathetic point of view of everybody having to pay tax on what they earn, Wright really earned as huntsman of these two hunts successively first of all his salary and secondly the customary collection which is made for him at Christmas or Boxing Day. The special commissioners, having seen Wright and having very carefully set out the circumstances under which he was employed and under which he was remunerated, came to the conclusion that these sums were not mere presents nor mere testimonials. I pause to observe that a testimonial, of course, indicates some special matter which has to be commemorated, either making a large score at cricket or some other special performance of a duty it may be, or at any rate on some special occasion such as a birthday or wedding and so forth, and I cannot regard these payments as testimonials, nor, I think, in the strict sense are they gifts. Mr. Magnus, who

has said everything that could possibly be said for the appellant in this case, points out that many of them came from people who were personal friends of Wright and indeed perhaps all of them came from people who could call themselves friends, although the degree of friendship must have been somewhat variable. Still, he got them not merely because he was huntsman. Of course, if he had never been huntsman he would not have been there; he would not have been dressed up as huntsman at the meet and therefore the occasion of his receiving presents would never have arisen but for the fact that he was huntsman. That is not the way to look at it, I think. The way to look at it is: Is it part of what resulted by virtue of his being huntsman, that is to say, because of his performance of his duties as huntsman?

I think that, so regarded, the findings of the special commissioners were correct, though I regret the result in this case, just as I have regretted it in the past in the cases of a clergyman's Easter offerings, because it is very much against the wishes of those who made the presents that Wright should have to pay tax on them instead of taking them and treating them as spending money without deduction. I have no doubt that they would say that that was the last thing they wanted, just as the last thing that an ordinary contributor who gives an Easter offering to a clergyman wishes is that it should be depleted by the requirements of the Revenue.

I say that with, I hope, a not improper feeling of regret but undoubtedly a strong feeling of regret, that sums which were never contemplated as being taxable profits or taxable income of that sort have to be so treated on the authority of the very large number of cases that have been decided on this point. If the parson has to pay on his Easter offering and if the taxi driver has to pay on his tips and if the waiters have to pay on their tips from the customers and in other cases (I need not mention other kinds of employment), I feel bound to hold that these sums were assessable to income tax. I uphold these assessments and dismiss this appeal.

Appeal dismissed.

Solicitors: *Withers & Co.; Solicitor, Inland Revenue.*

[CHANCERY DIVISION.]

* *Ex parte* NATIONAL COAL BOARD.

1958
May 6.
Roxburgh J.

[1957 N. 1056.]

Mines and Minerals—Coal—Working—Application by National Coal Board for leave to work—Delay of months through extension of time to objectors to file evidence—Application for interim order to expedite working—Expense caused by delay—"National interest"—Jurisdiction to make interim order—Form of order—Mines

1958

NATIONAL COAL BOARD, *Ex parte.*

(*Working Facilities and Support*) *Act*, 1923 (13 & 14 *Geo.* 5, *c.* 20), *s.* 1—*Railway and Canal Commission* (*Abolition*) *Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 11), *s.* 1 (1) (*a*)—*R.S.C., Ord.* 54o.

In 1957 the National Coal Board, at a time when it was working certain areas which it had a right to work and, in course of so doing, was approaching others which it had possibly no such right, made, under the Mines (Working Facilities and Support) Act, 1923,[1] an application to work the latter, which, because of extensions of time for evidence by objectors, could not be heard before October, 1958. In May, 1958, the board applied for an interim order giving leave to continue its workings on the grounds (i) that not to continue them would involve it in great expense, and (ii) that it would be contrary to the national interest for it to have to discontinue the workings merely because of the impracticability of getting the application of 1957 heard before the long vacation of 1958. No objections were lodged by interested parties, who had been notified:—

Held, in upholding the board's contentions and making the order asked, that the court had jurisdiction to make the order under R.S.C., Ord. 54o.

ADJOURNED SUMMONS.

An application was made by the National Coal Board for an interim order under the Mines (Working Facilities and Support) Act, 1923, for an interim order, pending the hearing by the court of an original application by the board, granting the board certain rights of letting down surfaces and of searching for and working coal. The original application was under the same Act by originating summons dated September 13, 1957. It was for the right to let down certain lands and work certain seams in the neighbourhoods of Stoke-on-Trent and Newcastle-under-Lyme: and the present application was for liberty to work certain small portions of those lands and to let down surfaces, subject to terms of compensation to be determined on the hearing of the main application. The master referred that application to the Chancery Division and the summons was taken out on September 13, 1957, asking

[1] Mines (Working Facilities and Support) Act, 1923, s. 1: "(1) Where "there is danger of minerals being "left permanently unworked—(*a*) by "reason of the minerals being com-"prised in or lying under land which "is or has been copyhold land, or land "subject to a lease exception reserva-"tion restriction covenant or condi-"tion, or otherwise not being capable "of being worked without the concur-"rence of two or more persons . . . a "right to work the minerals may be "conferred in the manner and subject "to the provisions hereinafter appear-"ing on any person having an interest "in them, or, in the case of minerals "owned in small parcels, in minerals "adjacent to them, who is desirous of "working them either by himself or "through his lessees."

Railway and Canal Commission (Abolition) Act, 1949, s. 1: "(1) The "Railway and Canal Commission . . . "shall cease to exist, and the func-"tions which immediately before the "commencement of this Act were "functions of the Commission shall— "(*a*) so far as they extend to England "and Wales, be exercised and per-"formed by the High Court . . ."

R.S.C., Ord. 54o, r. 1: "Applica-"tions under any enactment which "are referred to the High Court pur-"suant to section 1 (1) (*a*) of the "Railway and Canal Commission "(Abolition) Act, 1949, shall be made "in the Chancery Division by ex "parte originating summons."

R. 12: "The ordinary practice "and rules of the Chancery Division "so far as they are not inconsistent "with this Order shall apply to pro-"ceedings under this Order."

for the grant of specified rights. The master made the usual form of order requiring any objectors to give notice on or before December 19, 1957, and requiring the board to file an affidavit giving particulars of those notices on or before January 21, 1958. On January 2, 1958, the board filed an affidavit listing 85 objectors who had given notice and 10 more received out of time, and on January 21, 1958, the master ordered that all 95 be at liberty to enter appearances. Seventy-five did so and 65 of those obtained an extension of time to file their evidence until May 9, and later 50 asked for a further extension until July 9. The board had proceeded with all due diligence. The main application was not likely to be heard for a considerable time. At the date of this application the board had until July 11 in which to reply. The objectors were certain to ask for further time and there was no likelihood of getting the main application on before the long vacation. The objectors were not saying that the board had no right to work the coal. Their objections were rather to methods, or they were wanting more compensation than the board was offering, e.g., consequential damages. At the time of the main application the board was working seams which it had a right to work but the work was progressing towards an area where the right was in doubt or the board had not got it. The board was going to come up against two areas in mid-May and mid-July respectively, and took out this present summons on February 25, 1958. On March 12 the master directed service on seven persons or bodies whom he thought to be affected by the workings. On April 10 the board filed an affidavit showing the number served. Six wrote saying that they did not object. The seventh did not reply.

The present application was made because it would have been very expensive for the board and contrary to the national interest to suspend working just because the original application could not be heard for some months.

The form of order asked for and made is set out at length in his Lordship's judgment.

Sir Andrew Clark Q.C. and *J. C. Leonard* for the board. If there is any doubt as to the jurisdiction to make the interim order asked for, that doubt is set at rest by R.S.C., Ord. 54o, which clearly enables the court to make it.

ROXBURGH J. This is an application for an interim order under the Mines (Working Facilities and Support) Act, 1923, and is so straightforward that I should not have given reasons for my judgment had I not understood that it is the first case, at any rate since the matter was transferred to the Chancery Division, in which there has been a separate application for an interim order.

That there is jurisdiction to entertain such an application seems quite clear. There is no specific reference to interim

1958

National Coal Board, *Ex parte.*

Roxburgh J.

applications in the Act or in the rules, which are in Order 540 of the Rules of the Supreme Court, but rule 12, at the end of that Order, provides: "The ordinary practice and rules of the "Chancery Division so far as they are not inconsistent with this "Order shall apply to proceedings under this Order." That seems to me plainly to imply that there is jurisdiction to make interim orders where the circumstances so require.

I am not going to state the facts at length. The original application, for an order applying to an extensive area, is one by which 60 or 70 people consider themselves to be affected, mainly in connexion with compensation. The present application relates, however, only to a minute portion of that area, and the urgency of the matter is that, having regard to the multiplicity of the objections and the weight of the evidence, which is still being filed, the original application clearly cannot be determined for many months, and meanwhile the workings have come so near to these two small areas that it is quite plain that not only would it cause the National Coal Board a great deal of expense to suspend working, but it would be contrary to the national interest that working should be suspended merely because of the difficulty of getting the case heard at an earlier date than is practicable.

The two areas affected, minute as they are, have been very carefully considered by the board and by the master, and everybody who appears to have any conceivable interest in resisting the application has been notified and given an opportunity of appearing to oppose it. The numbers of persons or bodies of persons who were thought to be possibly affected—and some of them clearly are affected—were seven. The board thought that there were five and the master added two more. Of those seven persons, six have consented, in letters which I have read, to the making of the order which I propose to make. The seventh, a body, has not availed itself of the opportunity of either appearing before me or writing a letter, and obviously is, therefore, in effect, acquiescing. Even if it did not acquiesce, in point of fact I should have no hesitation in granting the application on the evidence which I have read.

I would not have given my reasons for my judgment but for this application being, apparently, the first of its kind. The matter is clearly urgent, it is in the national interest that the order sought should be made, and every possible person concerned has had an opportunity of objecting. I cannot see what more could be expected to have been done.

The form of the order may be of some little interest, as this is the first one. I propose to make the order scheduled to the summons with one modification, which Sir Andrew Clark has himself drafted, and I will read it: "This court doth order "that pending the determination by the court of an application "made by the above-named applicants the National Coal Board "pursuant to an originating summons dated September 13, 1957, "the short title whereof is 1957 N. 1056 or further order the

"applicants be granted upon such terms and conditions as shall "be determined by the court upon the determination of the said "application to be just"—and those words are important—"the "following rights," and these, of course, are not unusual.

"(1) The right so far as such right is not already vested in "the applicants to search for and work by underground operations "only and in a skilful and workmanlike manner so much of the "coal in the Ten Feet Seam as lies under the area coloured brown "on the plan attached hereto. (2) The right so far as such "right is not already vested in the applicants to let down the "surface of the said area coloured brown and of the lands "adjacent thereto coloured green on the said plan to such extent "as is necessary for the working of the said coal in the Ten Feet "Seam."

Now comes another pair of rights which, mutatis mutandis, are the same as those which I have just read: "(3) The right so far "as such right is not already vested in the applicants to search "for and work by underground operations only and in a skilful "and workmanlike manner so much of the coal in (i) the Chalkey "Mine Seam and (ii) the Moss Seam as lies under the area "coloured yellow on the said plan." That, of course, is a different area. "(4) The right so far as such right is not already "vested in the applicants to let down the surface of the said "area coloured yellow and of the lands adjacent thereto coloured "green on the said plan to such extent as is necessary for the "working of the said coal in the Chalkey Mine Seam and the "Moss Seam." Then come the words which Sir Andrew drafted and which I approve: "And the applicants and any of the "objectors or other owners of surface rights affected by the work-"ings authorized by this interim order are to be at liberty to apply "as they may be advised."

Those are the words, and I may say about those words that they are not words which are normally in a final order, but that is because it is a final order. The variation is not because I am in any way suggesting that there is anything wrong with final orders in that form, but because this is an interim order and the first of its kind, and it requires that slight modification.

Order accordingly.

Solicitors: *Donald H. Haslam (Solicitor, National Coal Board) for F. W. Dawson, Dudley.*

K. R. A. H.

[CHANCERY DIVISION.]

1958
April 23.

Upjohn J.

* *In re* TROTT, DECD.
TROTT AND ANOTHER *v.* MILES AND ANOTHER.

Family Provision—Limitation—Extension of time—Person having "an "interest in the estate"—Circumstance affecting the administration or distribution of the estate—Posthumous child of deceased—Summons issued after expiration of six-month period—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *as amended, s.* 2 (1A) (*b*) *and* (*c*).

On April 13, 1955, a posthumous daughter was born to a testator who died on October 8, 1954. The testator had made no provision for the infant by his will dated January 27, 1951. The will was proved on November 17, 1954, and the infant took out a summons under the Inheritance (Family Provision) Act, 1938, on July 11, 1955.

On the question whether the court had jurisdiction under section 2 (1A) [1] of the Act to extend the period of six months within which a summons under the Act must be issued:—

Held, that on the birth of the infant plaintiff "a circumstance "affecting the administration or distribution of the estate" within section 2 (1A) (*c*) arose, because she became entitled to issue a summons under the Act; accordingly, she could claim the benefit of section 2 (1A) (*c*) and the time would be extended to July 12, 1955.

ADJOURNED SUMMONS.

The testator was married to the adult plaintiff on June 24, 1950. The testator had been married once before and by that former marriage he had three sons. It was the adult plaintiff's first marriage. At the date of his death, October 8, 1954, the testator and the adult plaintiff were living happily together and the adult plaintiff was expecting a baby, a fact of which the testator knew.

By his will dated January 27, 1951, the testator gave the adult plaintiff a legacy of £100 and gave four other small legacies. He gave the residue of his estate on trust to be divided into three parts, one third part each for two of the sons of his former marriage and one third for the issue of his third son by his former marriage. Probate of his will was taken out by his executors, the first two defendants, on November 17, 1954. On April 13, 1955, a posthumous child, a daughter, was born to the testator.

[1] Inheritance (Family Provision) Act, 1938, s. 2 (as amended by Sch. III to the Intestates' Estates Act, 1952): "(1) Except as provided by "the following provisions of this "section or section 4 of this Act, an "order under this Act shall not be "made save on an application made "within six months from the date on "which representation in regard to "the deceased's estate is first taken "out.

"(1A) If it is shown to the satisfaction of the court that the limitation to the said period of six months "would operate unfairly . . . (*b*) in "consequence of a question whether "a person had an interest in the "estate, or as to the nature of an "interest in the estate, not having "been determined at the time when "representation was first taken out, "or (*c*) in consequence of some other "circumstances affecting the administration or distribution of the estate, "the court may extend that period."

The widow took out her summons under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, within the six-month period. The infant daughter issued a summons under the Act on July 11, 1955. On December 19, 1955, the two summonses were consolidated.

W. J. C. Tonge for the plaintiff.
G. M. Parbury for the executors.
Timothy Jones for the infant plaintiff.
D. S. Chetwood for the infant residuary legatees.

No cases were cited in argument.

UPJOHN J. stated the facts and continued: The first question that arises is whether, in those circumstances, I have jurisdiction under section 2 (1A) of the Inheritance (Family Provision) Act, 1938, as amended, to extend the period within which I ought to allow the infant's summons to be issued. [His Lordship read the relevant part of the section and continued:] It is clear from the definition section, section 5 (1), in the Act of 1938 that "son" and "daughter" include "a son or daughter of the "deceased en ventre sa mere at the date of the death of the "deceased."

It is submitted by Mr. Chetwood, who appears for infants interested in the residue, that section 2 (1A) (*b*) has no application because the infant has no "interest in the estate," that is to say, under and by virtue of the provisions of the testator's will. I do not find it necessary to decide that matter, however, because, in my judgment, the infant can also rely on sub-paragraph (*c*). It is plain that upon her birth another circumstance "affecting the administration or distribu-"tion of the estate" arose, because she took out this summons under the Act. It seems to me plain in the circumstances of this case, namely, that she was born only one month and a few days before the expiry of the requisite period, that the time ought to be extended. I am told in fact that no time was wasted and that application was made for a legal aid certificate, but strictly that is not in evidence. Accordingly, I propose to extend the time within which the infant's summons may be issued to July 12, 1955, which makes the summons valid. [His Lordship then proceeded to consider the question what provision should be made for the widow and the infant.]

Declaration accordingly.

Solicitors: *Bischoff & Co., for Selwood & Leathes, Brighton; Garrard, Wolfe & Co.; Champion & Co., for Bonnett, Son & Turner, Hounslow.*

P. P.

[QUEEN'S BENCH DIVISION.]

1958
May 8.

Lord Goddard C.J., Cassels and Diplock JJ.

* KRUHLAK *v.* KRUHLAK (No. 2).

Legitimacy—Subsequent marriage—Time at which earlier marriage dissolved—Decree absolute and birth of child on same day—Decree subsequent in time to birth—Whether mother married when illegitimate child born—Legitimacy Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 60), s. 1 (1), (2).

Practice—Order—Time of effect—Whether relating back to earliest moment of day on which made.

At 7.30 a.m. on December 2, 1953, the appellant gave birth to a child of which she alleged the respondent was the father. At 10 a.m. on the same day a decree nisi in favour of the appellant's former husband was made absolute. Subsequently the appellant and respondent were married. In 1957 a separation order was made in favour of the appellant, who thereupon instituted bastardy proceedings against the respondent in respect of the child:—

Held, that a judicial act, such as the granting of a decree absolute, was deemed to relate back to the earliest moment of the day on which it was made, and accordingly, the appellant was divorced from her former husband before the birth of the child and the child was legitimated by the subsequent marriage of the parties by virtue of section 1 (1) of the Legitimacy Act, 1926.

CASE STATED by Osgoldcross justices sitting at Castleford.

On April 5, 1957, a complaint was preferred by the appellant, Hilda Mary Kruhlak, under section 3 of the Bastardy Laws Amendment Act, 1872, against the respondent, Hilko Kruhlak, alleging that the respondent was the father of a bastard child of which she was delivered on December 2, 1953, and at a hearing on May 22, 1957, the justices dismissed the complaint, being of the opinion that it was not open to them to hold that the appellant was a single woman quoad the respondent, whom she had married on December 19, 1953. On appeal the Divisional Court [1] reversed the justices' decision and ordered a rehearing.

On February 5, 1958, the justices reheard the complaint and found the following facts: The appellant gave birth to a girl named Joan on December 2, 1953, at 7.30 a.m., of which she alleged the respondent was the father. On the same day at 10 a.m. a decree nisi was made absolute in favour of the appellant's former husband, from whom she had been living separate and apart since 1940. The appellant and respondent, who had been on intimate terms since September, 1952, were married on December 19, 1953. On March 26, 1957, a separation order was made in favour of the appellant against the respondent by the Skyrack justices sitting at Leeds, on the grounds of persistent cruelty, the order containing a non-cohabitation clause and providing that maintenance of £3 a week be paid to the appellant. No application was pursued in respect of the girl Joan, of whom the respondent admitted being the father.

[1] [1958] 2 W.L.R. 131; [1958] 1 All E.R. 154.

It was contended on behalf of the respondent that the marriage of the parties legitimated the child by virtue of section 1 of the Legitimacy Act, 1926,[2] the decree absolute as a judicial act having been effective from the beginning of the day on which it was made and the appellant, accordingly, not having been married to a third person when the child was born at 7.30 a.m. on the same day on which the decree absolute was dated.

It was contended on behalf of the appellant that the decree absolute became effective only from 10 a.m., when it was stated on the face of it to have been made and that, accordingly, section 1 (2) of the Legitimacy Act, 1926, prevented the child from becoming legitimated by the subsequent marriage of the parties.

The justices were referred to *In re Warren, Ex parte Wheeler* v. *Trustee in Bankruptcy*,[3] and to the notes and authorities cited in the Annual Practice, 1958 ed., at p. 1818.[4]

The justices were of opinion that the decree absolute became effective from the beginning of the day on which it was made, and that the child therefore became legitimated by the subsequent marriage of the parties. They accordingly dismissed the complaint. The wife appealed.

Duncan Ranking, for the appellant wife, was not disposed to press the appeal, but intimated that he desired a decision of the court in order that he might know the basis on which he could claim maintenance in respect of the child.

J. B. Deby, for the respondent husband, was not called on.

DIPLOCK J. The appellant gave birth to a girl named Joan on December 2, 1953, at 7.30 a.m. On the same day a decree absolute was made in favour of the appellant's former husband, from whom she had been living separate. The father of the child was the respondent to the summons, and they were married on December 19, 1953; that is to say, 17 days after the birth of the child.

In the present proceedings the appellant took out a summons under the Bastardy Laws Amendment Act, 1872, against the respondent. The justices dismissed that summons on the ground that the child in respect of whom the application was made was a legitimate child. They relied on the rule that where a judicial

[2] Legitimacy Act, 1926, s. 1: "(1) Subject to the provisions of this "section, where the parents of an illegitimate person marry or have "married one another . . . the marriage shall . . . render that person, "if living, legitimate from the commencement of this Act, or from the "date of the marriage, whichever last "happens. (2) Nothing in this Act "shall operate to legitimate a person "whose father or mother was married "to a third person when the illegitimate person was born."

[3] [1938] Ch. 725; 54 T.L.R. 680; [1938] 2 All E.R. 331.

[4] R.S.C., Ord. 64, r. 12, note: "*Fractions of a day*. . . . There "appears . . . still to be a rule of "law that a judicial act relates back "to the earliest moment of the day "on which it is made . . . unlike "an administrative act such as the "issue of a writ."

1958

KRUHLAK
v.
KRUHLAK.

Diplock J.

act takes place, such as the granting of a decree absolute, it dates from the earliest time of the day on which it is made. In my view, that is correct, and it follows that the appellant and her former husband were divorced before the birth of the child at 7.30 a.m. on that day, and the child is, accordingly, a legitimate child of the marriage of December 19, 1953, by virtue of section 1 of the Legitimacy Act, 1926. This appeal is therefore dismissed.

LORD GODDARD C.J. I agree. Having separated from the father of the child and the child having been legitimated, the mother can now go back to the justices and ask for an increase in the amount she has been awarded under the separation order.

CASSELS J. I agree.

Appeal dismissed.

Solicitors: *Long & Gardiner for A. Maurice Smith, Castleford; Collyer-Bristow & Co. for Alf. Masser & Co., Castleford.*

J. D. P.

[PROBATE, ETC., DIVISION.]

1958
March 15.

Collingwood J.

* BURGESS *v.* BURGESS.

PRACTICE NOTE.

Husband and Wife—Practice (in matrimonial causes)—Fresh evidence—Application to call fresh evidence after judgment reserved—Evidence not immediately relating to issues pleaded—Irrelevance—Application refused.

After judgment had been reserved in proceedings under section 23 of the Matrimonial Causes Act, 1950, in which the husband had alleged adultery with a man unknown prior to his return to England on leave on April 22, 1955, as a result of which the wife became pregnant of a child born on December 2, 1955, the husband applied for leave to call further evidence of adultery, such evidence being in support of an allegation of adultery with a named man after the husband had returned to Kenya on May 14, 1955, although the court was asked to infer therefrom earlier adultery. It was stated that the evidence only became available as a result of certain statements made in the wife's cross-examination during the hearing:—

Held, that the application should not be allowed, for the allegation was not relevant to the issue of adultery considered at the hearing, which was based upon the subsequent birth of a child.

APPLICATION.

The parties were married in 1952 and lived in Kenya; at the end of 1954 the wife came to England and the husband joined her on April 22, 1955, staying with her on leave until his return to Kenya on May 14, 1955. Marital intercourse took place during

that period and the wife became pregnant; but she did not inform her husband of her pregnancy until November, 1955, nor of the arrival of the child until 10 days after the birth on December 2, 1955. In January, 1956, the husband ceased to provide her with maintenance and in due course the wife began proceedings under section 23 of the Matrimonial Causes Act, 1950. The husband contended that the wife had deserted him, that the birth of the child was the result of adultery, and that he had just cause for believing that she had committed adultery; and medical evidence was called in relation to the possible period of gestation, the gravamen of the husband's case being that as the child showed no signs of prematurity, a conception must in the ordinary course of nature have occurred prior to his return to England on April 22, 1955, when the first opportunity of marital intercourse occurred, some 224 days before the birth of the child. The allegations of adultery and desertion were denied.

After a hearing lasting several days judgment was reserved by Collingwood J. on February 28, 1958. During her cross-examination, however, the wife admitted that she had been for a holiday in Jersey, very shortly after her husband's return to Kenya. It appeared that certain inquiries were accordingly made in Jersey, as a result of which application was made on behalf of the husband, prior to delivery of reserved judgment, for leave to tender further evidence of adultery. The application was resisted.

Leave was requested to make the amendments referred to in the judgment.

John Sims and *A. B. Ewbank* for the husband. The husband knew nothing of the trip to Jersey until his wife referred to it in cross-examination; he then took immediate steps to have inquiries made, and it is submitted that the fresh evidence which it is desired to call is of the nature which would be permitted upon an appeal. It is directly material to the issues, and well founded. Although the only direct evidence goes to show an adulterous association after the husband's return to Kenya on May 14, 1955, the proper conclusion, if adultery was to be established in the later period, would be that the same parties were on adulterous terms at the date when the husband alleges that the child was conceived, namely, before he (the husband) came to England. It is conceded that there might be delay in finding and serving the man concerned.

R. J. A. Temple Q.C., *David Henderson* and *V. K. Winstain* for the wife. This is an application to reopen the case so as to put forward a fresh case not hitherto pleaded, and not to adduce fresh evidence such as might be allowed by the Court of Appeal. It is conceded that there is a discretion in the court to receive fresh evidence up to the time of judgment, but only upon matters directly material to issues in hand. The husband in effect is seeking to prove adultery after May 14, 1955, with a named man, whereas his previous case has been to establish adultery in

1958

Burgess
v.
Burgess.

February or March, 1955, with a man unknown. Should the husband fail upon this summons, in which judgment has been reserved, nothing would prevent him taking further proceedings if they were justified. But to grant the application now made on his behalf would unduly complicate the issues before the court, and would cause unconscionable delay.

[He referred to Phipson on Evidence, 9th ed., p. 48 (as to reopening the case); Daniell's Chancery Practice, 8th ed., vol. 1, p. 528 (as to the very special circumstances required before a case can be reopened), and *Thexton* v. *Edmonston*.[1] (Leave refused in parallel case to this.)]

Sims in reply. The issue was never confined to adultery before April 22, 1955, save as to the conception of the child.

[Collingwood J. Your affidavit, however, deals with that conception, and I am, moreover, much impressed by the long delay and serious hardship likely to arise if the application is granted.]

Collingwood J. This is an application to call further evidence as to adultery. The proposed evidence relates to the wife's alleged activities in Jersey after the return of the husband to Africa on May 14, 1955.

By a proposed amendment which has been put in, giving further particulars of the alleged adultery by the wife, it is alleged "That from about a date commencing immediately after May 14, "1955, for a period of about 10 days, the applicant frequently "committed adultery with J. . . . C. . . . at a place not precisely "known to the [husband] save that it was in or near Portinfer, "Plemont, in the Island of Jersey."

If one looks at the husband's defence it is quite clear that the case of adultery was based upon the birth of the child on December 2, 1955, coupled with the fact that no intercourse had taken place between himself and his wife saving during the period from April 23 to May 14, 1955, coupled with a number of allegations as to the wife's coldness during the relevant period, and the circumstances attending the arrangement for the birth of the child, and other matters of that kind.

So that it is quite clear from that defence that an allegation of adultery from May 14, 1955, onwards is quite irrelevant. However, it is sought to bring the matter in by adding these words: "The court will further be asked to infer that on divers "occasions, the exact dates of which are unknown to the [hus-"band] but prior to April 22, 1955, the applicant and the said "J. . . . C. . . . at places unknown to the [husband] committed "adultery together."

I think that Mr. Temple is right in saying that an application of this kind is restricted to evidence relating to the issues in the case; and, in my opinion, this proposed amendment cannot be

[1] (1868) L.R. 5 Eq. 373.

granted, and the application for leave to call further evidence must be refused.

1958

BURGESS v. BURGESS.

Application dismissed with costs.

[NOTE: Judgment was in fact given on March 27, 1958, in favour of the wife, Collingwood J. holding that the medical evidence did not itself establish adultery, and rejecting the other defences, and an order was made accordingly.[1]]

Solicitors: *Gordon Dadds & Co.; Bracewell & Leaver.*

J. B. G.

[1] The Times, March 28, 1958.

[QUEEN'S BENCH DIVISION.]

* CUSACK-SMITH AND OTHERS *v.* GOLD AND OTHERS.

1958 *May* 5, 6, 7, 8, 9.

Pilcher J.

[1956 C. No. 3663.]

Landlord and Tenant—Repairs—Act of 1938—*Proceedings for damages for breach of covenants to repair—Whether "lessee" no longer in possession entitled to benefit of the Act of* 1938—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146—*Leasehold Property (Repairs) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

The plaintiffs were the freeholders of premises, the long lease of which was assigned to the tenth defendant in 1946. In 1954 he assigned it to the ninth defendants, who granted to the tenth defendant an underlease. On September 6, 1956, the tenth defendant assigned his underlease to another party and, accordingly, had had no estate or interest in the premises since that date. The premises had been allowed to fall into disrepair and in December, 1955, the plaintiffs served on the ninth defendants a notice under section 146 of the Law of Property Act, 1925,[1] together with a schedule of dilapidations. A similar notice and schedule was fixed to the door of the premises constituting a proper notice to the tenth defendant. Within 28 days the ninth defendants served a counter-notice on the plaintiffs under section 1 (2) of the Leasehold Property (Repairs) Act, 1938,[2] claiming the benefit of that Act, the effect of

[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in the "lease shall not be enforceable, by "action or otherwise, unless and until "the lessor serves on the lessee a "notice—(*a*) specifying the particu-"lar breach complained of; and (*b*) if "the breach is capable of remedy, "requiring the lessee to remedy the "breach; and (*c*) in any case, requir-"ing the lessee to make compensation "in money for the breach . . . (5) For "the purposes of this section— . . . "(*b*) 'Lessee' includes an original "or derivative under-lessee, and the "persons deriving title under a "lessee; . . ."

[2] Leasehold Property (Repairs) Act, 1938, s. 1 (as amended by the Landlord and Tenant Act, 1954, s. 51 (2)): "(1) Where a lessor serves on "a lessee under subsection (1) of "section 146 of the Law of Property "Act, 1925, a notice that relates to "a breach of a covenant . . . to . . .

1958

Cusack-Smith v. Gold.

the counter-notice being to require the plaintiffs to obtain the leave of the court before instituting proceedings. The plaintiffs having moved the Divisional Court for leave, citing only the ninth defendants as respondents, who did not appear, that court gave leave in general terms. The plaintiffs then issued their writ in the present proceedings against a number of defendants, who were present occupiers of the premises, and the ninth and tenth defendants. The only defendant to put in a defence was the tenth defendant, alleging, inter alia, that the present proceedings were not maintainable against him because the plaintiffs had not obtained the necessary leave of the court to take proceedings against him as required by the Act of 1938:—

Held, that the word "lessee" in section 146 of the Law of Property Act, 1925, referred only to a lessee in possession or to a lessee who had some present estate or interest in the premises, and that the effect of section 1 of the Act of 1938 was to require the leave of the court before proceedings were brought by a landlord against the same category of persons on whom the appropriate notice had been served under section 146 of the Act of 1925; accordingly, the tenth defendant was not within the category of persons on whom the benefit of the Act of 1938 was conferred.

Preliminary point of law.

The plaintiffs, Sir William Robert Dermot Joshua Cusack-Smith, Bart., Elizabeth Dora Allworth and Rosa May Cohen were the owners in fee simple of properties known as 113, Holland Road, and 42 and 43, Elsham Road, Kensington, London.

By their statement of claim the plaintiffs alleged, inter alia, the following facts. By a lease dated November 9, 1872 (called the first lease), 113, Holland Road, was demised to Charles Martin Chambers for a term of 96 years from June 24, 1865. By a lease dated October 10, 1871 (called the second lease), 42, Elsham Road, was demised to William Weekes for 96 years from June 24, 1865. By a lease dated October 9, 1871 (called the third lease), 43, Elsham Road, was demised to William Weekes for 96 years from June 24, 1865. In 1954 the first lease was assigned to Elgin Properties Ltd., the ninth defendants. About the same time, the second and third leases were assigned to George William Leslie Steele-Davies, the tenth defendant. Shortly thereafter the tenth defendant assigned the second and third leases to the ninth defendants. In 1956 all three leases were assigned to John Bowie. John Bowie was a declared bankrupt and the Senior Official Receiver disclaimed the three leases.

"repair . . . and at the date of the "service of the notice three years or "more of the term of the lease "remain unexpired, the lessee may "within 28 days from that date serve "on the lessor a counter-notice to the "effect that he claims the benefit of "this Act. (2) A right to damages "for a breach of such a covenant as "aforesaid shall not be enforceable "by action commenced at any time "at which three years or more of the "term of the lease remain unexpired "unless the lessor has served on the "lessee not less than one month before "the commencement of the action "such a notice as is specified in sub-"section (1) of section 146 of the Law "of Property Act, 1925, and where a "notice is served under this subsec-"tion, the lessee may, within 28 days "from the date of the service thereof, "serve on the lessor a counter-notice "to the effect that he claims the "benefit of this Act. . . ."

The plaintiffs alleged that the ninth and tenth defendants had failed to keep the premises in repair. On December 5, 1955, the plaintiffs served a notice in accordance with section 146 of the Law of Property Act, 1925, and the Leasehold Property (Repairs) Act, 1938, on the lessee under each of the leases, specifying the breaches complained of and a schedule of dilapidations, and requiring them to be remedied. The breaches were not remedied. On December 9, 1955, the ninth defendants served a counter-notice under the Act of 1938 on the plaintiffs in respect of all the leases.

On November 30, 1956, the Divisional Court gave leave to institute proceedings for forfeiture of the leases and for damages for the breaches of covenant. The first, second, third, fourth, fifth, sixth, seventh and eighth defendants were persons in occupation and were made defendants for the purpose of being the persons against whom the plaintiffs could claim forfeiture and mesne profits, although they admitted that their physical occupation would be protected.

The plaintiffs claimed as against the ninth defendants arrears of rent and damages for breach of covenant to repair contained in each of the leases and, as regards the tenth defendant, for breaches of covenant to repair contained in the second and third leases.

By his defence, the tenth defendant denied that he had committed any breaches of covenant. In any event, he alleged that no notice complying with the provisions of the Act of 1938 had ever been served on him in respect of any breaches nor had any leave to take proceedings against him ever been obtained and therefore the plaintiffs' claim against him was not maintainable.

By their reply the plaintiffs alleged that the notice was served on the tenth defendant by affixing it to the door of each of the premises, and the general leave granted by the Divisional Court was effective leave in relation to the tenth defendant if, which was denied, any such leave was necessary.

The relevant facts are more fully set out in the judgment.

H. Heathcote-Williams Q.C. and *Francis Coningsby* for the plaintiffs.

R. E. Megarry Q.C. and *John D. May* for the tenth defendant. [The following points, inter alia, were raised in argument:] The whole purpose of the Act of 1938 is for the protection of tenants. The landlord's construction would mean that every tenant would lose the protection of the Act as soon as he assigned the tenancy. It would also mean that although the Act would protect the tenant in possession from direct action by the landlord, he would be unprotected by the Act against indirect attack; for if the landlord sued the original lessee, who remains liable by privity of contract for the entire term, the original lessee could then claim indemnity from the tenant in possession under the doctrine of *Moule* v. *Garrett*[3] and the claim for indemnity would not be

[3] (1872) L.R. 7 Exch. 101.

1958

Cusack-Smith v. Gold.

within the Act. A landlord must serve a notice under section 1 of the Act of 1938 on every person he proposes to sue for the matters dealt with in that section.

Heathcote-Williams in reply on those points. The Act of 1938 is not for the protection of tenants; it is an Act to cut down the common law rights of landlords and therefore must be strictly construed. An assignee who has assigned his interest ceases to be a lessee for the purposes of the Act of 1938. Section 146 of the Act of 1925 only refers to a lessee who has an estate or interest which can be subject to forfeiture. Section 1 (1) of the Act of 1938 is in terms limited to cases in which notices have to be given under section 146 and therefore contemplates the same lessee as that section. It would be incredible if the lessee referred to in subsection (2) of section 1 of the Act of 1938 were to be of a very much wider class than the one referred to in subsection (1) of that section. It would cause a real hardship on the landlord if a former lessee were to be included in the provisions of section 1 of the Act of 1938.

Reference was also made to the following cases in argument: *Church Commissioners for England* v. *Ve-Ri-Best Manufacturing Co. Ltd.*[4]; *Kanda* v. *Church Commissioners for England*[5] and *Keith* v. *Twentieth Century Club.*[6]

Cur. adv. vult.

Pilcher J. The plaintiffs in this action are the freeholders of three houses in Kensington, No. 113, Holland Road, and Nos. 42 and 43, Elsham Road. In these proceedings on the writ and the statement of claim, the plaintiffs claim possession of each of these three houses, mesne profits against certain of the defendants, and damages for breach of covenant to repair under the leases of the respective premises. In particular, they claim against the tenth defendant damages for breaches of covenant to repair in relation to No. 43, Elsham Road.

There are in all ten defendants to the action. The first eight defendants are the present occupiers of the three houses I have mentioned. The tenth defendant, Steele-Davies, was between the years 1946 and 1954 the assignee of a long lease of No. 43, Elsham Road. This lease was dated October 9, 1871, and was for 96 years from June 24, 1865. Accordingly, it expires in midsummer of 1961. On June 24, 1954, the tenth defendant, Steele-Davies, assigned the remainder of the lease of No. 43, Elsham Road to the ninth defendants, Elgin Properties Ltd. On July 12, 1954, the ninth defendants granted to the tenth defendant an underlease of these premises. The tenth defendant remained the underlessee of the premises until September 6, 1956, on which date he in his turn assigned his underlease to Cronfield Estates Ltd.

[4] [1957] 1 Q.B. 238; [1956] 3 W.L.R. 990; [1956] 3 All E.R. 777.

[5] [1958] 1 Q.B. 332; [1957] 3 W.L.R. 353; [1957] 2 All E.R. 815.

[6] (1904) 73 L.J.Ch. 545; 20 T.L.R. 462.

Accordingly, since September 6, 1956, the tenth defendant has had no present estate or interest in the house in question.

It seems that, over the years, the house with which I am concerned has been allowed to get into disrepair in breach of the repairing covenants in the lease. Accordingly, in December, 1955, the plaintiff landlords served on the ninth defendants, Elgin Properties Ltd., who were at that time the assignees of the lease, a notice in the appropriate form under section 146 of the Law of Property Act, 1925, together with a schedule of dilapidations. At about the same time the landlords caused to be affixed to the front door of the premises a similar notice and schedule of dilapidations. I am satisfied that this notice, so affixed, constituted proper notice to the tenth defendant of its terms, and it is with the rights of the plaintiffs against the tenth defendant alone that I am concerned.

The plaintiff landlords have, by appropriate action, obtained orders for possession or forfeiture against the first eight defendants, the occupiers of the three premises. The ninth defendants are now in liquidation. On April 30, 1956, they assigned their lease of the premises to one Bowie, who was a bankrupt; and on July 29, 1956, the Official Receiver gave notice to the landlords disclaiming Bowie's interest in the lease.

Within the 28 days envisaged by the provisions of section 1 (2) of the Leasehold Property (Repairs) Act, 1938, the ninth defendants served on the plaintiffs a counter-notice as provided for in the subsection, claiming " the benefit " of the Act. The effect of the service of such a counter-notice is to require the landlord to obtain the leave of the court before he can institute any proceedings for forfeiture or re-entry or for damages for breach of covenant. No counter-notice under the section was served on the landlords by the tenth defendant.

On May 30, 1956, the plaintiffs applied by originating summons to the master, citing the ninth defendants only, and seeking leave to proceed by virtue of the provisions of section 1 (5) of the Act of 1938. The summons was adjourned, and before any further step was taken it was ascertained that a change in the practice had occurred. The plaintiffs accordingly moved the Divisional Court for leave to proceed, citing only Elgin Properties Ltd. as respondents to the motion. Mr. Heathcote-Williams appeared for the plaintiffs, and Elgin Properties Ltd. were not represented. The Divisional Court, by order dated November 30, 1956, granted to the plaintiffs leave in general terms to take proceedings for forfeiture on the ground of breaches of covenant to repair, and also for damages. While the tenth defendant was not cited to appear to the motion, an affidavit by him was read and it seems reasonably clear that he must have been aware of what was happening.

In pursuance of the leave to proceed so granted by the Divisional Court, the plaintiffs on December 12, 1956, issued the writ in the present proceedings against all the ten defendants to

1958

Cusack-Smith v. Gold.

Pilcher J.

whom I have referred. The only defendant to put in a defence to the statement of claim was the tenth defendant. By his defence, the tenth defendant denies that any proper notice was ever served on him in accordance with the provisions of the Leasehold Property (Repairs) Act, 1938, as amended by the Landlord and Tenant Act, 1954. I have already stated that in my view such notice was properly served on him by affixing the notice and schedule of dilapidations to the door of the premises in question. The tenth defendant also put forward a defence based on the facts in regard to his liability for breaches of covenant. It was agreed by counsel that this was a matter with which I need not concern myself. The tenth defendant further contended that the present proceedings were not maintainable against him because the plaintiffs had not obtained the necessary leave of the court to take proceedings against him in accordance with the provisions of section 1 (3) of the Leasehold Property (Repairs) Act as amended. Upon this point a number of arguments were addressed to me by counsel on either side, and it is this point only which I have to determine.

It was not in dispute that the tenth defendant, having been an assignee of the lease from 1946 to 1954, and having been an under-lessee until June 9, 1956, had before the writ was issued in the present proceedings on December 12, 1956, parted with all his estate and interest in the premises. It was also common ground that, although the ninth defendants served the landlords with a counter-notice under section 1 (1) of the Act of 1938, the tenth defendant did not do so.

On behalf of the plaintiffs, Mr. Heathcote-Williams submitted that the tenth defendant did not, on the admitted facts, come within the category of persons who were entitled to receive a notice under section 146 of the Act of 1925 or under section 1 (1) of the Act of 1938. Both these sections, as he pointed out, place restrictions on the right of a landlord to take proceedings against lessees. The situation of the parties and their relationship to each other must therefore be viewed as at the date of the issue of the writ when, as in this case, a writ has been issued. Mr. Heathcote-Williams submitted that on December 12, 1956, when the writ in the present proceedings was issued, the tenth defendant had parted with all his estate and interest in the house in question, and was not in any sense of the word a "lessee" within the meaning of the definition of the word both in the Acts of 1925 and 1938. He further submitted that, not having issued a counter-notice, the tenth defendant was not in any case entitled to claim "the benefit" of the Act of 1938.

It is quite clear that section 146 of the Act of 1925 deals only with the restrictions on the landlord's right to re-enter and claim forfeiture for breaches of covenant and it was not, I think, in dispute that where the word "lessee" appears in this section it can only refer to a lessee in possession or one who has a subsisting lease at the time when proceedings for forfeiture or re-entry are

taken. The definition of "lessee" in section 1 (5) (*b*) of the Act must, I think, be read in this light. Re-entry and forfeiture are clearly not remedies which can be sought against anyone in the position of the tenth defendant who had, at the material time, divested himself of all present estate and interest in the premises. Section 1 (1) of the Act of 1938, which deals for the first time with restrictions on the landlord's right to take proceedings for damages for breaches of covenant, requires the service by a lessor on a lessee of a notice under section 146 of the Act of 1925.

[His Lordship read subsection (1) and (2) of section 1 of the Act of 1938 and continued:] In my view, a reading of the whole of section 1 of the Act of 1938 leads to the conclusion that throughout the section wherever the words "a lessee" or "the lessee" are used, they must be given the same meaning as they have in section 146 of the Act of 1925. The effect of section 1 of the Act of 1938 is, in my view, to require that the leave of the court be obtained before proceedings for re-entry, forfeiture or for damages for breach of covenant are brought by a landlord against the same category of persons upon whom the appropriate notice had to be served by the landlord before he took proceedings for re-entry or forfeiture under section 146 of the Act of 1925. Section 7 (1) of the Act of 1938 provides that the expression "lessee" in that Act shall have the same meaning as in the Act of 1925. If one looks at section 1 (5) of the Act of 1938, one finds set out what the landlord has to satisfy the court about before he is granted leave to proceed against a lessee for forfeiture or re-entry or damages. The matters there set out seem to me to be consistent with the view that the protection afforded by the Act of 1938 was intended to be confined to lessees in possession or lessees having a present estate or interest in the premises. It is quite true that the matters which the court has to take into consideration may also be important when considering persons who are not lessees in possession or lessees with a present estate or interest in the premises; but it seems to me that they are all matters which are important when one is dealing with the lessee in possession or the lessee with a present estate or interest in the premises.

On behalf of the tenth defendant, Mr. Megarry submitted that the definition of the word "lessee" in section 146 (5) (*b*) of the Act of 1925 as including "the persons deriving title under a "lessee" was wide enough to cover an assignee in the position of the tenth defendant who had parted with all his estate and interest before the material date. Such a person would not, however, in my view, have been entitled to receive a notice under the Act of 1925 where re-entry or forfeiture only was in question. The notice required by the Act of 1938, where damages are also in question, is the very notice under the Act of 1925 and must, in my view, be confined to such persons as would have been entitled to receive a notice under the Act.

I therefore conclude that the tenth defendant was not entitled to receive a notice in this case. He does not, in my opinion, come

1958

Cusack-Smith v. Gold.

Pilcher J.

within the category of persons to which the landlord is required to give a notice under the Act of 1925 before taking proceedings for re-entry or forfeiture, and is thus not within the category of persons upon whom "the benefit" of the Act of 1938 is conferred.

This finding is sufficient to dispose of the only point in the case which I have been asked to determine. A number of interesting arguments were addressed to me by counsel on either side on the basis that the tenth defendant was within the category of persons on whom the landlord was entitled to serve a notice under section 146 of the Act of 1925 and under section 1 of the Act of 1938. Mr. Megarry submitted with some force that if the tenth defendant was entitled to such a notice and was properly served, section 1 (3) of the Act of 1938 had the effect of preventing the landlord from instituting proceedings against all other persons within the category without the leave of the court, whether they had served a counter-notice or not. It would seem from the recent decision of the Court of Appeal in *Kanda* v. *Church Commissioners for England* [1] that this argument is probably well founded. Arguments were also addressed to me on either side as to the effect of the order of the Divisional Court dated November 30, 1956, granting to the plaintiffs leave to proceed in general terms, although only the ninth defendants had been cited as respondents to the motion. I am inclined to the view that the intention of the Divisional Court, in spite of the form of the Order, was only to grant to the plaintiffs leave to proceed against the ninth defendants, who were the only party cited. However, taking the view which I do, for the reasons which I have stated, namely, that the tenth defendant is not within the category of persons to whom protection is given by the Act of 1925 against a landlord's claim to forfeiture or re-entry or by the Act of 1938 against the landlord's claim for damages for breaches of covenant, the other points to which I have referred and which were argued before me do not arise.

I determine the point of law submitted to me in favour of the plaintiffs. In my view, the plaintiffs are entitled to recover in the present action against the tenth defendant such damages for breaches of covenant to repair as they can prove to be properly payable by him. The plaintiffs will have the costs of the argument of the preliminary point of law submitted to the court.

Judgment for the plaintiffs.

Solicitors: *Boxall & Boxall; George H. Gibson & Co.*

C. J. E.

[1] [1957] 3 W.L.R. 353; [1957] 2 All E.R. 815.

[PROBATE, ETC., DIVISION.]

* B. (ORSE. S.) *v.* B.

1958
Feb. 12, 13.

Barnard J.

Husband and Wife — Nullity — Incapacity — Proof of — Parties only together for short period—Husband's impotence established.

A wife by her petition prayed for a decree of nullity on the ground of the alleged incapacity of her husband with whom she had only lived for seven days. The husband alleged that the marriage had been consummated on the first night; but he had suggested in a letter written shortly after the separation that a week was not long enough to prove his impotence. The court accepted the wife's evidence that the marriage had not been consummated. On the issue whether a week was long enough to establish incapacity:—

Held, that on the facts of the case the wife was entitled to a decree, for no amount of time would help the marriage to be consummated.

Dictum of Lord Penzance in *G*——. v. *G*——. (1871) L.R. 2 P. & D. 287, 291 applied.

DEFENDED PETITION by wife for a decree of nullity on the ground of her husband's alleged incapacity. The husband denied that the marriage had not been consummated, alleging penetration without emission on the first night.

The parties went through a ceremony of marriage in England on June 1, 1956, after a year's engagement. There was evidence by the wife, which was accepted, that on one occasion before the marriage the husband had failed to have intercourse although she was willing to allow it. The wife was a German, the husband, a widower, was in the forces. Seven days later the wife returned to Germany, where it was arranged that they should live together when the husband obtained married quarters there; but on her return to Germany the wife wrote an indignant letter to him in which she accused him of impotence and said that she was going to get the marriage annulled. In his reply, the husband did not suggest that the marriage had been consummated; in a letter full of apology he said: "Surely you do not think six days and "nights is enough to prove I am impotent. The courts do not "think so, because it is not. But give me a reasonable time with "you, then if you are not satisfied I will help you get an annul-"ment. . . . No court, dear, will accept a week of married life "as being long enough to prove anything or even to give the "marriage a chance of success." The parties, however, never lived together again.

The medical evidence showed that the wife was not a virgin, and she admitted having had sexual intercourse with two men before the marriage; the husband was reported to be normally formed and apparently capable.

F. S. Bresler and *John I. Gordon* for the wife

C. A. Marshall-Reynolds for the husband.

1958

B.
(ORSE. S.)
v.
B.

The cases cited in argument are referred to in the judgment.

BARNARD J. referred to the short compass of the marriage and to the medical evidence, and said that upon that evidence his decision must in the first instance depend on whether he believed the husband or the wife. His Lordship continued: The first thing I have to decide is whether or not the marriage was consummated. The husband's story is a little odd. He said that it was consummated on the night of June 1, 1956, that they went to bed together, but that they had been celebrating and he had been drinking a lot of beer, and that although he was able to penetrate his wife—his own evidence was that his person remained erect inside her from four to five minutes—he never had an emission.

During the rest of the week he and his wife continued to celebrate and, as he knew if he went on drinking beer it would lead to his not being able to have an emission, he never made any further attempt. On the last night they spent together, when the wife was due to go back to Germany, he came up to London with her and they slept at an hotel. He does not suggest that he had too much beer to drink on that occasion. What he says is that he thought she would be tired, as she had a long journey in front of her, and therefore it was only considerate to leave her alone. I could well accept that if he had been having sexual intercourse pretty well every night during the honeymoon, but as he had only had it on this first night, according to his own evidence, I find it a little difficult to believe. Again, it is a little odd that if this man, who was obviously in love with this woman, and had married her, realized that a few drinks of beer were likely to upset him in this way, did not abstain from beer in order to have normal sexual relations with his wife.

I find it quite impossible to accept his story. The wife's story is a much more credible story. She says that on this first night she did all she could to stimulate him. She was a woman with some experience, having had affairs with two other men. But it was hopeless, and the husband never really obtained a proper erection and never penetrated her. She told him then that she did not consider that this was a marriage. He was not able to consummate the marriage. According to the husband, although he said he was inside her with his person erect for four to five minutes, she told him he ought to see a doctor on this occasion.

Again, the wife told me that on the next two nights he made attempts equally feeble and unsuccessful; and then for the rest of the honeymoon, including the night they spent together in London, he made no attempt whatsoever, and on the last night that they were together all the husband did was to get out of bed (they had twin beds), put the light out and kiss her goodnight and get into his own bed and go to sleep. It does not seem to me to be the conduct of a normal man on his honeymoon.

It does not really rest there in deciding which of the two stories is true, because as soon as the wife got back to Germany

she wrote a most indignant letter to her husband, just the kind of letter you would expect a wife to write who had been treated in that way, it may be and probably was, through no fault of the husband. She said that she was going to get the marriage annulled, that it had never been a normal marriage, and she charged him with marrying her under false pretences: "You are "impotent and cannot complete the marriage." She said: "Can "a woman's feelings be hurt and insulted more than on this last "night?"—the night in London—"I put every hope to make a "success of our marriage but it showed me you only want a wife "as a housekeeper, and you cannot and did not think of building "up a family. If I had known this before, I would never have "married you. I think it is most cruel to go through a married "life without sex and the hope of children. You must have "known your impotence before you married me. I can never "forgive you for not telling me. I was so disgusted, upset and "insulted on Thursday night and Friday morning, you must have "noticed I hardly spoke a word, I felt too ill to discuss it with "you."

How does the husband write back? He might have apologized for having only had sexual intercourse on the one occasion. That is his case now, that the marriage was consummated on the first night. He said this, in a letter full of apology. [His Lordship read the extracts given above, and continued:] He is nowhere saying that this marriage was consummated on the first night. All he is complaining of is that a week is not long enough. "You "ought to give me longer to see if I can really do something "about it."

On that evidence I unhesitatingly accept the wife's evidence wherever it is in conflict with that of the husband. I think that she has told me the true story, and undoubtedly the marriage was not consummated.

The next question is: Was it due to the incapacity of the husband? Here, of course, I have to consider the time element. In the ecclesiastical courts a triennial cohabitation was insisted upon, but that has not been the law for a great number of years. Mr. Marshall-Reynolds referred me to *S*——. (*falsely called E*——.) v. *E*——.,[1] in which the court did not think, on the facts of that particular case, that three months was enough. Counsel for the wife referred me to two undefended cases tried by Bargrave Deane J. (*C.* v. *C.* (*orse. H.*)[2] and *F.* v. *P.* (*orse. F.*)[3]), in one of which they never lived together at all. On the facts of that case, he was prepared to infer incapacity on the part of the wife because of her absolute refusal to live with her husband. In the other undefended case, there was one attempt made by the husband during the daytime. The wife was hysterical. They never spent a night in the same room. And on the facts of that particular case the judge was prepared to infer

[1] (1863) 3 Sw. & Tr. 240.
[2] (1911) 27 T.L.R. 421.
[3] Ibid. 429.

1958

B.
(orse. S.)
v.
B.

Barnard J.

incapacity. But it really comes to this: You cannot lay down any particular time. It is a fact, though, to be considered, but the time must depend on the facts of each case.

If the husband in the present case had told me that he was suffering from some ill-health or other, and had not been given a fair chance, it might well be that I should have come to the conclusion that I could not infer incapacity, although I was satisfied that the marriage had not been consummated. But that is not the husband's case here at all. He has not told me the truth. All that he has done is to try to make this beer-drinking an excuse for not having any further sexual intercourse because he realized that, although he might be able to penetrate his wife, he would not be able to have an emission; and I understand from the medical evidence that that is possible.

I have come to the conclusion that he really put this forward as an excuse, and I must not only consider these seven days but what the wife told me as to what happened some two or three years before she went through the ceremony with her husband. She told me that when she was getting friendly with this sergeant, they went out together for a walk in the woods one day—the husband does not deny this—and then she told me how he took off his coat and put it on the ground and suggested that they should lie down, and then he attempted to have intercourse with her. But exactly the same thing happened as happened during the first three nights, according to the wife. She says that she was perfectly willing that he should have intercourse with her; and that fits in with the whole history of this case as to how she behaved with two other men of whom she was apparently fond; but that the husband was quite unable to penetrate her, and then he made some excuse that he had been drinking a lot of beer the day before. The husband would have me believe that the only reason he failed to have intercourse with her, was because the wife physically resisted him and he at once gave it up. I do not believe that. I think that the wife was telling the truth and therefore I do not rely on this.

What Lord Penzance said in *G.* v. *G.*[4] is really the guide to this sort of case. It is an old case, and of course for some time it was a little difficult to obtain an annulment of marriage unless you could prove a structural defect. He is to some extent dealing with that. He says[5]: "The invalidity of the marriage, "if it cannot be consummated on account of some structural "difficulty, is undoubted; but the basis of the interference of the "court is not the structural defect, but the impracticability of "consummation. If, therefore, a case presents itself involving "impracticability (although it may not arise from a structural "defect) the reason for the interference of the court arises."

I have come to the conclusion, on the evidence put before me, that no amount of time would help this marriage to be consummated. The husband had ample time during the seven days of

[4] (1871) L.R. 2 P. & D. 287. [5] Ibid. 291.

the honeymoon to consummate the marriage and he was unable to do it, and I do not think it would help the matter if he were given any further time. I am therefore prepared, on the evidence, to find that this marriage never was consummated, and that it was due to the incapacity of the husband. Therefore, the wife is entitled to a decree.

1958

B. (ORSE. S.) v. B.

Barnard J.

Decree nisi.

Solicitors: *Cardew-Smith & Ross; James & Charles Dodd.*

J. B. G.

[COURT OF APPEAL.]

* SAYERS v. HARLOW URBAN DISTRICT COUNCIL.

C. A.

1958 *May* 6, 7.

Lord Evershed M.R., Morris and Ormerod L.JJ.

[Plaint No. N. 2072.]

Negligence—Damages—Remoteness of damage—Novus actus interveniens—Woman locked in public lavatory—Injured while endeavouring to escape—Whether attempt to escape reasonable consequence of fault in lock.

The plaintiff visited a public lavatory owned by the defendants, and having put a penny in the slot she went in. The door having closed behind her she found that she could not get out, and for ten to fifteen minutes she tried to attract attention. She then thought that she could get out by climbing over the door and she stood with her right foot on the seat of the lavatory, holding with one hand a pipe and the other the top of the door, and put her left foot on the toilet roll and its attachment. Having got into this position she realized that she could not in fact get over the door, and in trying to get down she put some weight onto the toilet roll which revolved causing her to slip, fall and sustain injury. The county court judge found that the defendants had been negligent, but dismissed the plaintiff's claim on the ground that the damage to the plaintiff was too remote:—

Held, that, on the question of remoteness of damage, it was the duty of the court to balance the risk taken by the plaintiff against the consequences of the defendants' breach of duty; that the inconvenience caused to the plaintiff was appreciable, and that she had not taken any risk which was disproportionate to the necessities of her situation; and that, accordingly, she was entitled to succeed, but that she had, on the facts, been guilty of some contributory negligence and she must bear one quarter of the blame.

Adams v. *Lancashire and Yorkshire Railway Co.* (1869) L.R. 4 C.P. 739 distinguished.

APPEAL from Judge Lawson Campbell, sitting at Bishops Stortford County Court.

The plaintiff, Mrs. Eileen Sayers, on the morning of January 14, 1956, was at Stow Harlow, Essex, with her husband, and they were proposing to travel to London by omnibus leaving

C. A.
1958
Sayers
v.
Harlow
Urban
District
Council.

at 8.32 a.m. She left her husband in order to visit the public lavatory which was owned and operated by the defendants, the Harlow Urban District Council. Her husband went on to the omnibus stop. The plaintiff went to the furthest cubicle, and put a penny in the slot provided for the purpose, opened the door, went in, and found that the door had shut and left her with no means from the inside of reopening it. She spent some ten or fifteen minutes trying to attract attention orally and visually from the window in the lavatory; and, having failed, she tried to see if she could escape over the door, or make her presence known from over the door. She stood with her left foot on the seat of the lavatory. With her left hand she seized the pipe from the lavatory cistern. Her right hand she put on top of the door, and her right foot rested on the toilet roll and the small fixture in which it was inserted. She had got so far in the belief that she would be able by a feat not too acrobatic to get out over the door, which was 7 ft. high, with a space about 2 ft. 4 ins. between its top and the ceiling. Having arrived in that position, she decided that she would be unable to get out in that manner, and she started to climb down. She allowed some of her weight to be on the toilet roll, and her balance to depend upon it. The toilet roll rotated, which disturbed her equilibrium, and she fell and sustained injury.

In these proceedings the plaintiff claimed damages either on the ground that the defendants had warranted that the cubicle was safe or, in the alternative, on the ground of negligence.

The county court judge found that the defendants had been guilty of a breach of duty but he gave judgment for them on the ground that he had to apply a balance between the risks taken by the plaintiff and the consequences of the defendants' breach of duty, and that she had embarked on a dangerous manoeuvre for which she must bear the consequences. He held that the case was similar to *Adams* v. *Lancashire and Yorkshire Railway Co.*[1]

The plaintiff appealed.

James Davis for the plaintiff.
John Elton for the defendants.

The following cases and works were referred to in argument which are not mentioned in the judgment: *Clayards* v. *Dethwick and Davis*[2]; *Summers* v. *Salford Corporation*[3]; *Gee* v. *Metropolitan Railway Co.*[4]; *Lax* v. *Darlington Corporation*[5]; *Monarch Steamship Co. Ltd.* v. *A/B Karlshamns Oljefabriker*[6]; Charlesworth on Negligence, 3rd ed., pp. 542, 599, 600.

Lord Evershed M.R. stated the facts and continued: The plaintiff claimed that the damage which she had suffered was due

[1] (1869) L.R. 4 C.P. 739.
[2] (1848) 12 Q.B. 439.
[3] [1943] A.C. 283; 59 T.L.R. 78; [1943] 1 All E.R. 68.
[4] (1873) L.R. 8 Q.B. 161.
[5] (1879) L.R. 5 Ex.D. 28.
[6] [1949] A.C. 196; 65 T.L.R. 217; [1949] 1 All E.R. 1.

to the fault of the defendants, that fault being in the form of breach of the duty of care owed to her, whether or not arising under the implied contract when she made use of the lavatory. Nothing turns upon the foundation of liability, nor indeed upon the finding of the judge that the defendants were negligent; for there has been no appeal on the part of the defendants from that finding. The issue before us has been confined to the second part of the judge's conclusion, namely, that the damage suffered was in the circumstances too remote from the negligent act or omission of the defendants so as not to fall within the famous formula of being the natural and probable consequence of the wrongful act. In those circumstances, he dismissed the plaintiff's claim.

The questions, therefore, which have been presented on appeal can be stated thus: Was the damage suffered by the plaintiff too remote? Put otherwise, was her activity from which the damage ensued not a natural and probable consequence of the negligent act of the defendants within the formula in *Hadley* v. *Baxendale*? [1] Secondly, if it was not too remote, then was the plaintiff herself guilty of some degree of fault, of what is called contributory negligence, so as to reduce the total liability to her of the defendants?

[His Lordship reviewed the evidence and continued:] It seems from the evidence to follow that the plaintiff, acting quite calmly and on reflection, thought that she would, or at least might, be able to get out of this cubicle by climbing over the top of the door; that she achieved the first stage of that operation; and then, quite sensibly, and without trying anything hazardous or impossible, concluded that after all she was wrong, and that she could not do it. She thereupon proceeded to lower herself in order to regain the ground. It seems to me, therefore, that so far she must be taken as having acted entirely rationally. I cannot for my part think that she could be condemned for having failed to see from the start that the whole thing was impossible; and, secondly, it appeared to me to be quite clear that there was no damage suffered by her from anything that she did in what I call the first stage of the operation. In other words, the damage did not flow from attempting to do something which she could not do, and had no business to try to do. The damage was suffered by her after she had realized that the attempt could not be carried out, and while she was trying to return to the ground.

The findings of the judge upon this matter are expressed as follows. After stating his conclusion about the negligence, he said: "There is, however, a second question. The plaintiff had "left her husband ten minutes before, and he knew where she "was going, and that the bus was due to leave in twenty minutes. "She had been in the lavatory for ten minutes without avail "before she attempted to climb out, and the time for the bus "was approaching. What would have been a reasonable thing

[1] (1854) 9 Exch.Rep. 341.

C. A.
1958
SAYERS v. HARLOW URBAN DISTRICT COUNCIL.
Lord Evershed M.R.

"for her to do? To climb out was a very hazardous under-"taking. Mr. Davis says that it was perfectly reasonable for a "lady of thirty-six with skirts and, no doubt, high heels, to do it." He went on a little later: "The consequences might have been "very serious indeed. I think what she was undertaking was an "exceedingly perilous manoeuvre. It does not follow that a "person put in difficulty may not undertake a risk," and there is a reference to the stage coach case, *Jones* v. *Boyce*.[2] "I must "apply a balance between risk taken by the plaintiff against the "consequences of the defendants' breach of duty. The plaintiff "was not in any sort of danger, nor indeed in any real dis-"comfort. It was not as though it were late at night. She "knew or ought to have known that at 8.32 a.m. her husband "must come and find out what had happened to her. The "only consequence would have been the wrath of her husband, "and an hour's delay. She took an extremely dangerous course, "and I have to balance the inconvenience against the danger. I "feel this case is similar to *Adams* v. *Lancashire and Yorkshire* "*Ry. Co.*"[3]

With all respect to the judge I have formed a different view. I agree with him when he posed the question that it is the duty of the court to balance the risk taken against the consequences of the breach of duty; in other words, as was put in the argument, to weigh the degree of inconvenience to which the plaintiff had been subjected with the risks that she was taking in order to try and do something about it. But where I part company, if I may say so, with the judge is, first, that as I have read and understood the evidence, I do not think it true to say that the damage was suffered by the plaintiff in undertaking something very hazardous which, as a rational human being, she had no business to undertake. I further venture to think that the case is not in truth on all fours with or covered by *Adams's* case.[3]

The argument of the defendants, of course, is to the contrary effect; and Mr. Elton has contended, basing himself on the *Adams* case,[3] that the most the plaintiff was suffering was a minor inconvenience, and that she was not entitled to take a grave risk in an attempt to put an end to the inconvenience. In my view the adjectives are inappropriate. I cannot think that the inconvenience can be called minor in the sense in which the word is used in such a context; nor do I think the risk was grave. I think that here we have to apply the ordinary common sense tests. A woman goes to a public lavatory and finds that she is immured in it. She finds, after ten or fifteen minutes, that the obvious and proper means of attracting attention had been entirely without avail; shouting and waving through the window has produced no result at all. It is an extremely disagreeable situation in which to find oneself; and it seems to me to be asking too much of the so-called reasonable man or woman to suppose that he or she would just remain inactive until her husband, or

[2] (1816) 1 Stark. 493. [3] (1869) L.R. 4 C.P. 739.

someone else, chose to come and look for her and find her; and it is to be observed here that the attendant employed by the defendants was not in fact there at the time (and was not called as a witness).

However that may be, I think that, applying the ordinary tests of reasonableness, it was not either an unreasonable thing to do, nor was it indulging in grave risk for the plaintiff to see whether her first impression was right, namely, that by standing on the seat she might be able to hoist herself out over the door. But it also is to be observed that she quite properly and reasonably concluded, when she had got on the seat, that in truth the manoeuvre was beyond her capacity. Therefore I am unable to accept the view expressed by the judge that what she was doing was attempting a very hazardous undertaking in climbing out.

Secondly, however, it was put by Mr. Elton (and put with great force) that, while agreeing that this was a difficult matter and that a judge of fact or a court might well have held that what the plaintiff did was a natural and probable consequence of her being immured in the lavatory, and that therefore the damage flowed, or partly flowed, from the negligent act, this was a finding by the judge who saw all the witnesses in the case. He is a careful and experienced judge, and this court ought not to interfere with his conclusion. With that I should in the ordinary way be most sympathetic, and indeed I am not unsympathetic. But I have read the passage in his judgment, including particularly that in which the judge came to the conclusion that the case was similar to, and therefore covered by, the decision in *Adams* v. *Lancashire and Yorkshire Ry. Co.*[3]

That was a case in which a passenger was travelling by train operated by the Lancashire and Yorkshire Ry. Co. in July, 1868. The door of the carriage was faulty, and would not keep shut; and as the train proceeded on its journey it flew open three or four times. The plaintiff, having three times shut the door without any permanent result, made a fourth attempt in the course of which, from the facts found, it appears that he allowed the whole of his weight to rest against this door. The result was that the plaintiff was no more successful in making the door keep shut than he had been on the three previous occasions, and the door inevitably opening, he fell out and was injured, as the train was moving.

I have emphasized the date and the time first, because it was pointed out quite clearly that in truth the plaintiff was found not to have suffered any inconvenience at all. It might, no doubt, be irritating to see a door open; but it was summer, and it was not suggested that he was cold, or subjected to any draughts; and what is more, this train would, in the course of about three minutes, stop at a station. It follows, therefore, looking at the matter from the point of view of inconvenience, that the plaintiff's inconvenience or annoyance at seeing the door open is not really

[3] L.R. 4 C.P. 739.

C. A.
1958
Sayers v. Harlow Urban District Council.
Lord Evershed M.R.

comparable with what any ordinary person would feel at finding himself or herself incarcerated in a lavatory. Secondly, it is to be noted that this was a moving train; and it must, I should have thought, be quite plain to any intelligence that, if you put yourself in a position which involves you in the risk of falling out of a moving train, you are doing something hazardous in the extreme. There is finally a third point, which arises from the date when this case was decided, that is, long before the passing of the Law Reform (Contributory Negligence) Act, 1945; so that a finding of any degree of contributory negligence would be fatal to the plaintiff's claim; and when, moreover, as a consequence of the rule of law which I have just indicated, there was currently held, or apt to be applied, what is sometimes called the last opportunity principle. I mention that because it is, I think, fair to say, as Mr. Davis pointed out, that if you examine the judgments of the three judges of the Court of Common Pleas though two may well have decided the case on the ground that the damage was too remote from the negligent act in having an improperly working door, the third of them, Brett J.—who in fact had tried the case before the jury—based his opinion upon the contributory negligence point.

I do not propose to read all the judgments; but as the county court judge attached importance to the case, I should perhaps make two references, one to the judgment of Montague Smith J. and the other to that of Brett J. Montague Smith J. said[4]: "At "the time the plaintiff got up to shut the door he was in a position "of entire safety, and it is not even stated in the evidence that "he was suffering inconvenience from draughts or otherwise. "Such being the case, he voluntarily undertook to shut the door, "and, in doing so, used both hands, and did not hold on with "either of them. He was obviously doing that which was "dangerous, and the ground upon which the plaintiff puts his case "is, that it was necessary to do so to obviate the results of the "defendants' negligence. I quite agree that, if the negligence of "a railway company puts a passenger in a situation of alternative "danger, that is to say, if he will be in danger by remaining still, "and in danger if he attempts to escape, then, if he attempts "to escape, any injury that he may sustain in so doing is a conse-"quence of the company's negligence; but if he is only suffering "some inconvenience, and, to avoid that, he voluntarily runs "into danger, and injury ensues, that cannot be said to be the "result of the company's negligence. It is hardly necessary to "say, that though I use the words 'danger' and 'inconvenience,' "yet, if the inconvenience is very great and the danger run in "avoiding it very slight, it may not be unreasonable to incur that "danger." If I leave out the qualifying "very," I think that Montague Smith J.'s statement would be no less true: "It is "hardly necessary to say, that though I use the words 'danger' "and 'inconvenience,' yet, if the inconvenience is great and the

[4] L.R. 4 C.P. 739, 742.

"danger run in avoiding it slight, it may not be unreasonable to "incur that danger."

The following passage from the judgment of Brett J. is one which has later received much commendation[5]: "I think, if the "inconvenience is so great that it is reasonable to get rid of it by "an act not obviously dangerous, and executed without careless-"ness, the person causing the inconvenience by his negligence "would be liable for any injury that might result from an attempt "to avoid such inconvenience." I observe that the words "and "executed without carelessness" would not now be necessary, because if it were executed with some carelessness today, it would result not in a total failure of the plaintiff's claim but might lead to an apportionment of the damage. At the end of his judgment the judge said: "under these circumstances I think the "putting himself into peril was contributory negligence, and "that the case therefore ought not to have been left to the jury."

I now return to the first citation from Brett J. and the passage I have read from Montague Smith J. With all respect to the county court judge, it does not seem to me that you can say that those passages, in the light of the facts here, determine the case against this plaintiff as they did in the *Adams* case.[6] As I have already said, the inconvenience to the plaintiff was, to my mind, appreciable, if not substantial; and so would be, I think, to any ordinary person. I think she was not in truth engaged in a hazardous enterprise. She was doing something, as I venture to think, not at all unreasonable, and she did it up to the point where, quite properly, she reached the conclusion that the possibilities which the gap above the door of itself presented were not available to her. For those reasons, therefore, I think that the conclusion of the judge wholly adverse to the plaintiff ought not to stand.

But that is still not the end of the matter. In the passage which I read from Brett J. there occur the words "executed with-"out carelessness." Now what is the situation here? Mr. Elton did not really emphasize this aspect of the case much though, very properly and naturally, he claimed that if the activity of the plaintiff ought to be treated as the natural and probable consequence of her incarceration, still to some degree at least, to use the judge's own phrase, she was the author of her own calamity. I have given very careful thought to this aspect of the matter; and I think, in justice to the defendants, and in deference to the view the judge took of the plaintiff, it would not be right to say that the plaintiff was herself free from blame. I think that in getting to the position where she could see, and did see, that escape via the top of the door was impossible, she acted without carelessness. But I think it true to say, and fair and right to say—though it is, of course, one of those matters when, no doubt, it is being wise after the event—that in getting back to terra firma again she should have appreciated that she could not properly

[5] L.R. 4 C.P. 739, 744.

[6] L.R. 4 C.P. 739.

C. A.
1958
Sayers v. Harlow Urban District Council.
Lord Evershed M.R.

and ought not to allow her balance to depend upon anything so unstable as a toilet roll and a fixture of a somewhat slender kind. It was not a grave error, and I think the consequences were unduly unfortunate in the circumstances; but I think it is impossible to acquit the plaintiff altogether from some carelessness.

In these matters the apportionment must be largely a question of, I will not say hazard, but at any rate of doing the best one can in fractions; and applying myself to it in that way, and not desiring to do more than indicate that the plaintiff was, as I think, in some degree careless and in some degree, therefore, blameworthy, I would apportion the matter as to three-fourths liability to the defendants, and one-fourth to her. In other words, I think the plaintiff ought to recover from the defendants 75 per cent. or three-fourths of whatever be the appropriate measure of damage suffered.

Morris L.J. It was held by the judge in this case that there was a breach of duty on the part of the defendants. That finding is not, and I think could not be, challenged. The defendants provided conveniences for the use of the public. The plaintiff paid for admission to a cubicle. Its lock was defective in that there was no handle inside. From the outside there was no indication of such state of affairs. The result was that after the plaintiff had entered the cubicle, she was a prisoner therein. The cubicle was one which women members of the public were invited to use. It ought not to have been in use. There was no warning, and there was no attendant at the lavatory. The defendants were clearly responsible for the circumstance that the plaintiff was permitted to enter a cubicle from which there was no ordinary method of egress. The defendants should be responsible for the direct and natural consequence of their breach of duty.

It seems to me that the most natural and reasonable action on the part of someone who finds herself undesignedly confined is to seek the means of escape. Those who are responsible for the unjustifiable detention can hardly, either with good grace or with sound reason, be entitled to be astute in offering criticism of the actions of the unfortunate victim.

In *Robson* v. *North Eastern Railway Co.*[7] Field J., in giving the judgment of the court, used these words[8]: "it has been long "established that, if a person by a negligent breach of duty "expose the person towards whom the duty is contracted to "obvious peril, the act of the latter in endeavouring to escape "from the peril, although it may be the immediate cause of the "injury, is not the less to be regarded as the wrongful act of the "wrongdoer: *Jones* v. *Boyce*[9]; and this doctrine has, we think, "been rightly extended in more recent times to a 'grave incon-"'venience,' when the danger to which the passenger is exposed "is not in itself obvious. In *Adams* v. *Lancashire and Yorkshire*

[7] (1876) L.R. 10 Q.B. 271.
[8] Ibid. 274.
[9] 1 Stark. 493.

"*Railway Co.*,[10] the doctrine was accurately expressed by Brett "J., who said[11]: 'If the inconvenience is so great that it is "'reasonable to get rid of it by an act, not obviously dangerous, "'and executed without carelessness, the person causing the "'inconvenience by his negligence would be liable for any injury "'that might result from an attempt to avoid such inconve-"'nience.'"

But at the same time, even those in breach of duty are not to be held liable in respect of what cannot fairly and reasonably be regarded as a consequence of the breach. *Jones* v. *Boyce*,[12] in 1816, was the case in which an action was brought against a coach proprietor for so negligently conducting the coach that the plaintiff, who was an outside passenger, was obliged to jump off the coach, as a result of which his leg was broken. What had happened was that a coupling rein broke, and, one of the leading horses being ungovernable whilst the coach was on a descent, the coachman found it necessary to draw the coach to the side of the road where it came in contact with some piles, one of which it broke: afterwards the wheel was stopped by a post. The coupling rein was defective, and the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road.

In directing the jury in that case, Lord Ellenborough told them that there were two questions for their consideration, first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance; secondly, if they thought that he was, whether the default was conducive to the injury which the plaintiff sustained. Lord Ellenborough went on to direct the jury that it was sufficient if the plaintiff was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril. Lord Ellenborough went on to say, on the other hand, that if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained was to be attributed to rashness and imprudence, then he was not entitled to recover.

The conduct being examined has to be tested and considered in the light of all the circumstances. The question in the present case is whether the injury sustained by the plaintiff resulted either entirely or partly from the defendants' breach of duty. The defendants assert that as the plaintiff was in no danger, and was in no serious inconvenience, she acted unreasonably in doing what she did, so that she and she alone was the authoress of the injury that befell her.

I do not think that the plaintiff should be adjudged in all the circumstances to have acted unreasonably or rashly or stupidly. As to nearly everything that she did, in my judgment she acted carefully and prudently. Indeed, she showed a very considerable

[10] L.R. 4 C.P. 739.
[11] Ibid. 744.
[12] 1 Stark. 493.

C. A.
1958
Sayers v. Harlow Urban District Council.
Morris L.J.

measure of self-control. My Lord has fully recited the facts, and there is no need for me to refer to them again. The judge has found them carefully, and the only advantage that he has over us is that he actually saw the plaintiff herself. Subject to that advantage which, in the present case is comparatively slight, we are in as good a position as the judge to determine this matter.

What did the plaintiff do? First of all, she did her best to operate the lock. She tried with her finger to see whether there was any way of making it work. There was not. She then tried to get her hand through the window. She was unable to do that. She then banged on the door. Nobody came. She shouted. There was no response. Ten or fifteen minutes went by. The situation could not have been an agreeable one. What did she then do? It appears to me on the evidence that what she did was to explore the possibility of climbing over the door. That I cannot think was unwise or imprudent, or rash or stupid. I have therefore come to the same conclusion as that expressed by my Lord. But, like my Lord, I feel that the plaintiff cannot entirely be absolved from some measure of fault—the fault described by my Lord—and I am in agreement that that measure should be marked by depriving her of one part of that to which she would otherwise be entitled.

I consider that the appeal should be allowed to the extent that my Lord has indicated.

Ormerod L.J. I agree that this appeal should be allowed. The case depends very largely on the view to be taken and the inferences to be drawn from the evidence of the plaintiff herself, evidence which the judge quite clearly has accepted as being an accurate recollection of the facts as they took place. But the judge appears to have based his judgment on the finding that, at the time of the accident, the plaintiff was actually attempting to climb over the door of the cubicle, and that this was, to use his words, "an exceedingly perilous manoeuvre," the risks of which were not warranted by the situation in which the plaintiff found herself.

I am not satisfied that that view is in accordance with the evidence. The situation, as I see it, appears to be, as has been stated by the Master of the Rolls and my brother Morris, that the plaintiff, finding that her efforts to draw attention to her plight were unavailing, decided to try to climb over the door, or at least to explore the possibility of escape by that means. She said in her evidence that she was confident she could do it, and that, no doubt, is the opinion which she formed when she was considering, apparently quite collectedly, the situation in which she found herself. She then stood on the seat of the lavatory, holding the pipe running from the cistern in her left hand, and the top of the door with her right hand. Up to that time I do not think anyone could say that she had done anything unreasonable, or run any unusual or improper risk. Indeed, Mr. Elton agreed that had

she slipped and been injured in getting down from that position, he would have been unable to resist a claim for damages. However, the plaintiff went a little further than that. She put her right foot on the toilet roll which has been described, and the position of which was some 3 ft. from on the ground on the wall on her right hand side. Having put her foot on the toilet roll, she kept her left foot on the lavatory seat, still grasping the water pipe and the top of the door with her hands in the way described. She appears to have put her foot on the toilet roll with the object of exploring the possibility of getting enough leverage, as she described it, to enable her to pull herself up to the top of the door; and, as might be expected, having got into that position, she realized that she would not have enough leverage, and decided to give up the attempt. It was in trying to get down from that position that she had the misfortune to slip and sustain the injuries.

Apart from the question of contributory negligence, it does not appear to me that at that stage the plaintiff had taken any risk which was in any way disproportionate to the necessities of her situation, or which could have been regarded as unreasonable in the circumstances in which she found herself. She was locked in the lavatory. She had been unable to attract attention, and she therefore investigated the possibility of climbing up as she described, but decided on such investigation that she was unable to do it. Had she decided to continue with her attempt to get out by using the toilet roll as a foothold, she would, in my judgment, have been taking risks not justified by the circumstances; but she gave up the attempt before reaching that stage; and in these circumstances the plaintiff, in my judgment, was behaving in a way which was reasonable and, indeed, which was foreseeable, having regard to the defendants' breach of duty. I agree, therefore, that she is entitled to succeed.

I agree, however, with my brethren that it is impossible in the circumstances to acquit the plaintiff of some carelessness in putting her right foot, as she did, on the toilet roll, and that she should bear one-quarter of the blame.

Appeal allowed.
Judgment below set aside and judgment entered for plaintiff for three-fourths of the total amount of plaintiff's damages with costs.

Solicitors: *Bailey, Breeze & Wyles; Van Sommer, Chillcott, Kitcat & Clark for Trotter, Chapman & Whisker, Epping.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

1958
April 22.

Lord Goddard C.J., Hilbery and Donovan JJ.

* FYSON *v.* BUCKINGHAMSHIRE COUNTY COUNCIL. METAL RECOVERY & STORAGE CO. LTD. *v.* SAME.

Town and Country Planning—Development—Discontinuance—Resumption of former user of land after non-user—Justices finding that resumption not a material change of user—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 23.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether user changed.

Between 1943 and 1949 certain land had been used for the storage of materials. From 1949 until 1956, the land stood vacant and was not used for any purpose. In 1956 the land was again used for purposes of storage. The local planning authority served an enforcement notice, pursuant to section 23 of the Town and Country Planning Act, 1947, on the owner of the land requiring him to discontinue the use, on the ground that there had been a material change in the use of the land, alleging that the resumption of the use of the land for storage purposes constituted a new use for which no planning permission had been obtained. On an appeal by the owner of the land under section 23 (4) of the Act of 1947, the justices found that there had been no material change of use of the land since the appointed day and that, therefore, no permission was required:—

Held, that the question was not whether there had been a discontinuance of a particular use, but whether there had been a material change in the use of the land within section 12 of the Act of 1947,[1] and, on the facts, the justices were entitled to come to the decision to which they did.

Postill v. *East Riding County Council* [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685 distinguished.

CASES STATED by Amersham justices.

On June 18, 1957, the appellant, John Russell Fyson, appealed pursuant to section 23 (4) of the Town and Country Planning Act, 1947, by complaint from an enforcement notice dated May 27, 1957, issued by the Amersham District Council on behalf of the respondents, the Buckinghamshire County Council. On the same day a similar complaint against the same form of notice was duly made on behalf of Metal Recovery and Storage Co. Ltd. The enforcement notice alleged that the use of land at Copperkins Lane, Amersham, was a material change in the use within the meaning of the Act of 1947 and constituted development which had been carried out without the grant of planning permission. The notice required the discontinuance of the use of the land

[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to the "provisions of this section and to the "following provisions of this Act, "permission shall be required under "this Part of this Act in respect of "any development of land which is "carried out after the appointed day. "(2) In this Act, except where the "context otherwise requires, the "expression 'development' means "the carrying out of building, en-"gineering, mining or other opera-"tions in, on, over or under land, or "the making of any material change "in the use of any buildings or other "land."

and the buildings erected thereon for industrial purposes, namely, metal recovery storage, and was served on the appellant Fyson as owner and on the appellant company as occupiers respectively. The two appeals were heard together and the following facts relevant to this report were found by the justices.

The land comprised about 2½ acres. In 1943 it was requisitioned by the Ministry of Works on behalf of the Ministry of Supply, and continued under requisition until December 1, 1950. During requisition buildings were erected on the land and a variety of chemicals and other war stores including scrap metal were brought onto the site and stored in the open. In 1950, when the land was derequisitioned, it was purchased by Fyson. From May, 1949, to June, 1956, the land was unoccupied save that a few items of equipment and stores were left on the site, and from December, 1953, to March, 1954, Fyson used the land for the reception and dispatch of starch. Since 1956, the land had been occupied by the appellant company who had used it for the receipt and storage of materials including metals, timber and machinery. None of these purposes was different from the user during requisition. In so far as it was a finding of fact the justices found that there had been no material change in the use of the land since July 1, 1948 (the appointed day under the Act of 1947).

It was contended on behalf of the appellants that the enforcement notice must be read as alleging development by making a material change of the use since the appointed day; that the uses complained of were within the existing use at the appointed day; that any development had taken place before the appointed day under previous control and therefore no permission was required; accordingly, the enforcement notice should be quashed under section 23 (4) (*a*) of the Act; that if, in respect of any part of the appeal site, the justices were not satisfied within the meaning of section 23 (4) (*a*), they should vary the notice so as to refer only to that part, as mentioned in section 23 (4) (*b*); that the justices were not bound to assume that the development alleged in the enforcement notice had taken place.

The respondents contended, inter alia, that the use of the land for the storage of materials having ceased in May, 1949, it was not open to the respondents to serve an enforcement notice thereafter as such notice would have had to require the discontinuance of a use which had already ceased. That if and so far as mere cesser might not immediately amount to discontinuance, the continued cesser of the user from May, 1949, amounted to a discontinuance. Once the use, for which it was admitted no permission existed under any of the Town and Country Planning Acts, was discontinued, it ceased to have any effect for the purposes of these Acts, in the same way as would have been the case had it been discontinued pursuant to a notice, and the use of the premises from December, 1953, to March, 1954, constituted development for which planning permission was necessary. Similarly, on the cesser and discontinuance of this use in March,

1958

Fyson v. Buckinghamshire County Council.

1954, it was not open to the respondents to serve any enforcement notice, and this unauthorized use ceased to be of any effect, in the same way as would have been the case had it been discontinued pursuant to a notice. The use commenced by the appellant company in 1956, accordingly, constituted development under the Act for which planning permission was required but had not been obtained. A mere transitory unauthorized use of a few months discontinued before service of a notice could not preclude a local planning authority from ever thereafter serving an enforcement notice if the premises were again used after a lapse of four or more years for the same or similar purposes.

The justices were of opinion that the appeals depended on a determination of October 4, 1952, under the Building Restrictions (War Time Contraventions) Act, 1946, to the effect that "The buildings and uses fail to comply with planning control"; that Fyson should have pursued his remedy by appeal to the Minister, but had allowed the appeal to lapse. But for that opinion, the justices would have quashed the enforcement notice on the grounds that there had been no material change of use since the appointed day. In the result they dismissed the appeals.

J. D. James and *H. H. Sebag-Montefiore* for the appellants.
J. S. Daniel for the local authority.

No cases other than that cited in the judgment were referred to in argument.

No argument was addressed to the point subsequently decided in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[2] that the justices had no jurisdiction under section 23 (4) to determine whether development had taken place.

Lord Goddard C.J. I will ask Donovan J. to give the judgment of the court.

Donovan J. These two appeals by way of case stated from a decision of the Amersham justices raise—at considerable length—a short question under the Town and Country Planning Act, 1947. An enforcement notice having been served on the appellants under section 23 of the Act in relation to the use of certain land at Amersham, they appealed to the justices and contended that there had been no material change of use since the appointed day, July 1, 1948, and that therefore under the terms of section 12 (1) no permission was required. The justices found that there was indeed no such material change, but nevertheless they dismissed the appeals on the strength of an abstruse argument based on the terms of the Building Restrictions (War Time Contraventions) Act, 1946, and a determination made thereunder by the planning authority in October, 1952.

To the relief of all concerned, this argument was not pursued before us, it being conceded by everybody that it is misconceived, and cannot in any way justify the decision now appealed from.

[2] [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

But it is said for the present respondents that the decision is right for another reason. This particular land had been used for the storage of materials ever since 1943, when it was requisitioned for the Ministry of Supply. But it was derequisitioned in 1950, and from the preceding year, 1949, down to 1956, the land was not so used, except for four months from December, 1953, to March, 1954. On the other hand it was not put to any different use.

The respondents argue that in this state of affairs a new use was begun in 1956 when once more the land was used for storing purposes. It is said that the previous use was discontinued and a new use begun. The justices, however, found expressly against this contention, and their finding, being one of fact, it is conceded that it must prevail unless it is one to which the justices could not reasonably come. I think it is impossible to say that. Reliance is placed on the decision in *Postill* v. *East Riding County Council*,[1] where this court held that an itinerant circus discontinued the use of someone's land for the circus when it departed at the end of the season, and therefore complied with a discontinuance condition in an enforcement notice, albeit that the circus came back the next year. The difference in the facts is obvious. In the present case the land has been in Fyson's ownership since 1951, and there never has been any use of the land since 1943 by anyone except for the purpose of storage of materials. All that has happened is a rather long interruption of that use, but without any change of use. Indeed the question here is not, as it was in the *Postill* case, has a particular use been discontinued, but, to use the language of section 12, has there been since July 1, 1948, a material change in the use of the land? To my mind there clearly has not—even though for some years the land was put to no use. I think the justices were fully entitled to come to the decision which they did. It is said that certain provisions of the Act, notably section 12 (5) and proviso (*c*) thereto will not make sense unless the decision of the justices in this respect is reversed. If that be so, it is a matter for Parliament. Problems under this Act would become even more difficult than they are already, and perhaps even insoluble, if each time a construction had to be sought which would resolve all discord into song. I think we simply have here a question of fact whether the justices were entitled to decide as they did, and that therefore both appeals should be allowed.

Appeals allowed.

Solicitors: *Mills, Lockyer & Co. for Blaser, Mills & Lewis, Chesham; R. E. Millard, Clerk, Bucks County Council.*

J. D. P.

[1] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.

[LEICESTER ASSIZE.]

1958
Jan. 31.

Paull J.

* REGINA *v.* POTTER AND ANOTHER.

Criminal Law—False pretences—Procuring delivery of chattel with intent to defraud—Impersonation at driving test in order to obtain certificate of competence to drive to enable another person to obtain driving licence—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

Criminal Law—Forgery—False document—Signature on certificate of competence to drive—Signature in driving examiner's journal—Impersonation at driving test to enable another person to obtain driving licence—Forgery Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 1—*Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 35 (1).

The defendants W. and A. were brothers. An appointment was made by A. to take a driving test on July 15, 1957. It was agreed between A. and W. that the latter, who was already qualified to drive motor-vehicles, should attend to take the test instead of A. On July 15 W. attended to take the driving test. He produced A.'s appointment card, told the examiner that he was A. and signed the driving examiner's journal in the name of A. W. then took and passed the test and was given by the examiner a certificate of competence to drive which W. also signed in the name of A. W. subsequently handed the certificate to A. who presented it together with the appropriate fee and a completed form of application for a driving licence to the licensing authority who thereupon issued to A. a driving licence.

The defendants were charged on indictment as follows: 1. That both defendants had conspired together to procure the issue to W. in the name of A. of a certificate of competence to drive by means of W. impersonating A. during the driving test. 2. That both defendants on July 15, by falsely pretending that W. was A. procured the delivery to W. for the use of A. a certificate of competence to drive. 3. That both defendants by falsely pretending that the certificate of competence to drive was a valid certificate procured the issue to A. of a driving licence. 4. That W. forged an entry in the driving examiner's journal. 5. That W. forged an entry in the certificate of competence to drive. 6. That A. uttered the certificate of competence to drive knowing it to be forged. Both defendants pleaded guilty to the first count; to each of the other counts they pleaded not guilty and it was submitted that these counts did not lie. The facts were admitted:—

Held, (1) that the second count was good in law (a) because W. had procured the certificate of competence to drive for the use or benefit of himself within the meaning of section 32 (1) of the Larceny Act, 1916, in that having procured it he could do with it whatever he wished, and further, it was procured in the knowledge that it was ultimately to be applied for A.'s use or benefit in obtaining a driving licence, and (b) because there was also present an intent to defraud in that the defendants intended to induce by their deceit a course of conduct on the part of the licensing authority; the same points being taken in respect of the third count, similar considerations applied and it also was good in law.

Rex v. *Bassey* (1931) 22 Cr.App.R. 160; 47 T.L.R. 222 applied.

(2) That the fourth and fifth counts were also good in law because W. in signing A.'s name in the driving examiner's journal

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

and in the certificate of competence to drive, had made false documents within the meaning of section 35 (1) of the Criminal Justice Act, 1925, and with intent to defraud.

(3) That the sixth count was good in law because A., in presenting the certificate of competence to drive to the licensing authority, was uttering a forged document.

TRIAL ON INDICTMENT.

The following facts contained in the depositions were admitted to be correct. The defendants Alan Frederick Potter and William Potter were brothers. Alan made an appointment to undergo on July 15, 1957, a test of competence to drive motor-vehicles, under the provisions of the Road Traffic Act, 1934. William was already qualified to drive motor-vehicles. Before July 15 the two defendants agreed that William should attend to undergo the test instead of Alan and the latter then handed to William the card containing official notice of the appointment. On July 15 William attended to take the driving test. He produced Alan's appointment card, told the examiner that he was Alan Frederick Potter and signed the driving examiner's journal in Alan's name. William then took and passed the test and was given by the examiner a document certifying that Alan Frederick Potter had been examined and had passed the test of competence to drive. In the presence of the examiner William signed that certificate of competence in the name of Alan. Subsequently William handed the certificate of competence to drive to Alan who, on September 11, 1957, presented it together with the appropriate fee and a completed form of application for a driving licence at the motor taxation office in Leicester where there was issued to him a driving licence.

The defendants were charged on an indictment containing six counts as follows: 1. That both defendants on a day unknown between July 1 and July 15, 1957, conspired together to procure the issue to William Potter in the name of Alan Frederick Potter of a certificate of competence to drive certain groups of motor-vehicles by means of the said William Potter impersonating the said Alan Frederick Potter during the test of competence held under the provisions of the Road Traffic Act, 1934. 2. That both defendants on July 15, 1957, by falsely pretending that William Potter was Alan Frederick Potter with intent to defraud procured to be delivered to the said William Potter for the use of the said Alan Frederick Potter a certificate certifying that the said Alan Frederick Potter had been examined and had passed a test of competence to drive the said motor-vehicles that were prescribed under the Road Traffic Acts, 1930 to 1934. 3. That both defendants on September 11, 1957, by falsely pretending that a certificate certifying that Alan Frederick Potter had been examined and had passed the test to drive motor-vehicles was a valid certificate and properly issued to Alan Frederick Potter with intent to defraud procured to be delivered

1958

REGINA
v.
POTTER.

to the said Alan Frederick Potter for his use and benefit a licence licensing him to drive certain motor-vehicles. 4. That William Potter on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely a driving examiner's journal purporting to contain the signature of Alan Frederick Potter. 5. That William Potter on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely, a certificate of competence to drive, purporting to contain the signature of Alan Frederick Potter. 6. That Alan Frederick Potter on September 11, 1957, uttered a certain document, namely a certificate of competence to drive, purporting to contain the signature of the said Alan Frederick Potter, knowing such document to be forged and with intent to defraud. Both defendants pleaded guilty to the first count; both pleaded not guilty to the second and third counts; William pleaded not guilty to the fourth and fifth counts and Alan pleaded not guilty to the sixth count. It was submitted by counsel for the defence that counts 2, 3, 4, 5 and 6 of the indictment did not lie.

J. A. Grieves for the Crown.

E. M. Ling Mallison for the defendant Alan Frederick Potter.

A. J. H. Morrison for the defendant William Potter.

No cases other than those referred to in the judgment were cited in argument.

PAULL J. stated the contents of the indictment and the pleas entered to the various counts and continued: Those pleas having been made, I drew the attention of counsel to the fact that it seemed to me that for the purposes of sentence, the first count was quite sufficient. Quite clearly if both prisoners conspired to procure the issue to William Potter in the name of Alan Frederick Potter a certificate of competence to drive by impersonation it follows almost as the night follows the day, that in fact William Potter would obtain from the examiner a document which it was necessary for him to have in his hand in order to obtain a driving licence and that he would sign that document since that document is required to be signed by the person who has been examined. There is no dispute in this case, but that, that having taken place, in fact Alan Frederick Potter presented that certificate to the proper authorities and in fact obtained a driving licence by such presentation. I therefore suggested that it was quite sufficient to accept the plea of guilty on the first count. I was urged, however, not to take that course. Counsel for the prosecution, Mr. Grieves, told me that the authorities responsible for the prosecution were very anxious to obtain a decision as to whether counts 2, 3, 4, 5 and 6 were good counts in law; I was informed by counsel for the defence that they desired to contend that as a matter of law those counts did

not lie although the facts underlying those counts were agreed and admitted.

I then pointed out to counsel that whichever course I took would make no difference whatsoever to the sentence and that any sentence which I imposed with regard to counts 2 to 6, would be sentences which would not in fact increase whatever I decided was the proper sentence to pronounce on count 1.

I was still pressed by counsel for the prosecution to take the course of deciding whether counts 2 to 6 lay. I acceded to his request and suggested that possibly the best course to take would be for counsel for the defence to raise the points of law at once before the jury were sworn. I would then decide the points of law which were raised. It was agreed by counsel on both sides that if I decided those points of law in favour of the defence the prosecution would withdraw counts 2 to 6 and, on the other hand, if I decided the law in favour of the prosecution, counsel for the defence could either accept my findings of law and advise his clients to plead guilty or, if his clients desired to go on and contest the matter, then they were at liberty to have the case tried by a jury. It therefore falls to me now to decide the points of law raised and I am going to do that by taking the counts one by one and consider the points that have been raised before me in regard to each count.

In count 2 the statement of offence is procuring a certificate by false pretences contrary to section 32 (1) of the Larceny Act, 1916. The wording of that section is: "Every person who "by any false pretence—(1) with intent to defraud, obtains from "any other person any chattel, money, or valuable security, or "causes or procures any money to be paid, or any chattel or "valuable security to be delivered to himself or to any other "person for the use or benefit or on account of himself or any "other person," shall be guilty of the offence.

Mr. Ling Mallison, on behalf of the defendants, argued that before there could be a conviction under that section it was necessary to obtain the chattel, money or valuable security, He cited *Reg.* v. *Kilham*,[1] in which it was held that the word "obtained" was not covered if all that the prisoner did was to obtain the loan of property. Mr. Grieves, however, submitted that the second half of section 32 (1) makes the offence proved if the prisoner procures any chattel to be delivered to him for the use or benefit of himself. He also referred me to *Rex* v. *Chapman*,[2] where it was held that an offence had been committed under that Act if the person in fact obtained a railway ticket although normally that railway ticket would be returned to the railway company at the end of the journey. I do not think that the point raised by the defendants' counsel is a good one. To begin with, in so far as it is for me to draw any inference of fact, I should say the only inference that could

[1] (1870) L.R. 1 C.C.R. 261. [2] (1910) 4 Cr.App.R. 276.

1958

REGINA
v.
POTTER.

Paull J.

be drawn from the fact that the examiner handed over the certificate to William Potter on July 15 was that at that moment William Potter could do what he pleased with that certificate. If he desired to obtain a driving licence he had to take it to the authorities in order that they might take it back and issue a driving licence; but as I see it there would be nothing against William Potter, having obtained that certificate, putting it on the fire. He would not have got his driving licence but circumstances may alter and he might change his mind. At any rate I am quite satisfied that whether that inference of fact be true or not this case comes within the Larceny Act, 1916, s. 32, because he procured a chattel—which was the piece of paper upon which appeared these words: Mr. Alan Frederick Potter has been examined and has passed the test of competence to drive Group A—and having obtained it he did so for the use or benefit of himself in the sense that he desired that paper in order to hand it over to his brother. Indeed, the section says "or any other person." William well knew when he obtained that certificate that Alan's intention was to use it as though it were a certificate obtained by him. I hold that the point taken by the defence fails.

The second point taken by Mr. Mallison is that there was no intent to defraud because in fact nothing of any value was obtained by the deceit that was practised and nothing was done which turned the deceit into an intent to defraud. I am content so far as that is concerned to rely upon the words of Swift J. in *Rex* v. *Bassey*.[3] In that case the prisoner had induced the Benchers of the Inner Temple to admit him to the Bar by furnishing the Treasury Office with forged documents, and the point was taken that the words "intent to defraud" were not fulfilled in such a case. Swift J. said[4]: "It was argued on "behalf of the appellant that, as the Benchers had lost no money "by his act, there was no evidence of any intent to defraud. "It was contended that there was at most evidence of an "intent to deceive. The distinction between the two intents "was mentioned by Buckley J. in *London and Globe Finance* "*Corporation, In re*[5]: 'To deceive is, I apprehend, to induce "'a man to believe that a thing is true which is false, and "'which the person practising the deceit knows or believes to "'be false. To defraud is to deprive by deceit: it is by deceit "'to induce a man to act to his injury. More tersely it may "'be put, that to deceive is by falsehood to induce a state of "'mind; to defraud is by deceit to induce a course of action.' "In this case there was, in the opinion of this court, evidence "on which the jury might properly say that, in making these "forged documents and in subsequently uttering them, the "appellant intended to defraud, because he intended to induce

[3] (1931) 22 Cr.App.R. 160; 47 T.L.R. 222.

[4] (1931) 22 Cr.App.R. 160, 162.

[5] [1903] 1 Ch. 728, 732; 19 T.L.R. 314.

"the Benchers to act to their injury in admitting as a student "a person whom, if they had known the true facts, it was "not only their right, but also their duty, to exclude."

I think those words can be applied to this case. There was an intention here of using this document, which was obtained by William Potter pretending that he was Alan Potter, in order that Alan Potter might obtain a driving licence. It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right but their duty not to take if they had known the true facts. Moreover, if one may state another ground, it was obtained to induce the county council to part with a chattel, namely, a piece of paper (the driving licence) upon which there was a certain printing and certain statements, and I cannot see why that is not quite sufficient in order to form a basis for this charge. They were induced to part with the certificate in those circumstances and induced to hand it over so that it became the property of Alan Frederick Potter. Those are the two points that are taken with regard to the second count and, as I have indicated, I find that the count is a true count in law upon the facts which are admitted in this case.

I should add this, that of course count 2 is against both defendants and the way in which it is put against Alan Potter is that he was an accessory before the fact. He took the necessary step of handing over a form to his brother so that his brother might produce that form to the examiner and he gave the form to his brother for the express purpose of his brother deceiving the examiner. That seems to me to be a perfectly good charge and as he would be an accessory before the fact he may be charged as a principal in the same way as if he had done the act himself. I therefore hold that the second count is a good count on the assumption that the facts in the depositions are proved.

Then we come to count 3, concerning the procuring of the licence to drive. Count 2 is in respect of the certificate given for securing the licence, whereas count 3 is in respect of the licence itself. Precisely the same points were taken on that count and I need say nothing more. As I find those points fail, count 3, in my judgment, is a good count.

Count 5 is a count against William Potter and it is under section 4 (2) of the Forgery Act of 1913, which reads as follows: "Forgery of any public document which is not made felony under "this or any other statute for the time being in force, if com-"mitted with intent to defraud or deceive, shall be a misdemean-"our and punishable with imprisonment." I have held that there was here an intent to defraud so the only other question is: was this a forgery? Counsel for the defence submits that this is not a forgery because it does not come under section 1 of the Forgery Act. Section 1 (1) of the Forgery Act contains these words: "For the purposes of this Act, forgery is the

1958

REGINA
v.
POTTER.

Paull J.

"making of a false document in order that it may be used "as genuine. . . ." Was this the making of a false document? Subsection (2) sets out certain cases in which the document is to be deemed to be false and it starts with the words: "A "document is false within the meaning of this Act if" and then it sets out different requirements. If I were bound by subsection (2) I should not find that this was a forgery. I do not think that this document comes within any of the provisions of subsection (2), but the Criminal Justice Act, 1925, s. 35 (1), reads: "For the purpose of removing doubts, it is hereby "declared that a document may be a false document for the "purposes of the Forgery Act, 1913, notwithstanding that it is "not false in any such manner as is described in subsection (2) of "section 1 of that Act."

I am not limited to the cases set out in subsection (2) and I have to ask myself the simple question: was this made a false document when William Potter put on the piece of paper the signature which represented the signature of his brother? I think it is necessary to look carefully at that document. It is a document which is made under the Road Traffic Acts, 1930 to 1947. It is clearly issued by the county council in order that they may see that before a driving licence is issued the person to whom the driving licence is issued has duly passed his test for driving a motor-vehicle. It is described as a certificate of passing a test of competence to drive. It is a document which came into existence as a complete document after the driving test had been held. Once a person has passed the driving test the examiner fills in the successful candidate's name, fills in the group for which he was tested and signs his name. This was filled in with the name of Alan Frederick Potter, 98 Tudor Road, Leicester. There is no doubt that when the examiner passed that document over to William Potter he thought he was passing it over to Alan Frederick Potter, and William Potter well knew that that was what the examiner thought. William Potter well knew that he was at that moment falsely pretending that he was his brother Alan Potter. On the back of that form are the words: "This is not a licence to drive. Do not lose this certificate "which must be taken or sent to your county or county borough "council with your application for a driving licence. If you "lose this form, a duplicate may be obtained from the super-"vising examiner of your traffic area on giving four days' notice "and payment of 1s. The successful candidate must duly sign "this form below in ink or in indelible pencil in the presence "of the examiner who carried out the test." There is no dispute in this case but that William Potter well knew when he was putting the signature of A. F. Potter on that document that he was purporting to put that signature on the document in the pretence of himself being in fact Alan Frederick Potter. It was necessary for him to sign it in the presence of the examiner. He did so and he deceived the examiner. He made

it possible for his brother to take that document to the authority and obtain a driving licence. He made it possible for his brother therefore to deceive the authority into thinking that he Alan Frederick Potter had passed the test. I ask myself this simple question: when he put that signature upon that document was that document then made a genuine document or a false document? I hold that it was made a false document. It was a false document because it was falsely filled in. It was falsely filled in because William Potter knew that he had no right to fill it in; he knew that in filling it in in the name of A. F. Potter he was doing something to deceive and he knew that he did that with intent that his brother could defraud. I hold, therefore, that it is a forgery. That being so, in my judgment, the fifth count is a good count.

So far as count 4 is concerned, relating to the driving examiner's journal, it seems to me that that was equally false and for the same reasons as the certificate of competence to drive. I do not think I need add anything further on that count.

Count 6 is against Alan Frederick Potter alleging that he uttered a forged document—the forged document is the certificate with which I have dealt under count 5—and there is no doubt that Alan Frederick Potter used it, in other words uttered it, handed it across the counter to an official on the other side of the counter, well knowing it was forged. That being so, in my judgment, these counts are good counts in law on the assumption that the facts which are in the depositions, the facts to which I have alluded in my judgment, are true facts.

[The defendants then pleaded guilty to each of the counts to which they had previously pleaded not guilty. Each defendant was fined £25 to be paid at the rate of £2 per week and in default of payment was sentenced to 2 months' imprisonment.]

Solicitors: *Chapman & Goddard, Leicester; Herbert Simpson, Son & Bennett, Leicester; Sawday, Wright & Co., Leicester.*

[COURT OF APPEAL.]

* BOSLEY *v.* BOSLEY.

C. A.
1958
March 18.
Hodson, Morris and Pearce L.JJ.

Husband and Wife—Desertion—Separation agreement—Consensual oral separation—Written agreement for maintenance—No term in agreement defining period of separation—Subsequent offer by wife to return rejected by husband—Whether husband in desertion—Copies of agreement dated and exchanged after rejection of wife's offer—Whether consensual separation revived.

In April, 1951, a widower married a widow who was at the time in receipt of widow's pensions totalling £4 13s. a week, which she

C. A.

1958

Bosley
v.
Bosley.

lost on her remarriage. In December, 1951, the parties orally agreed to separate, and the wife left on December 15. The husband, in order to compensate her for the loss of her pensions, entered into a written agreement to pay her £4 13s. a week during their joint lives and for so long after his death as she should remain a widow and lead a chaste life. Clause 4 provided that the agreement should be void "if at any future time the husband and wife shall come "together and cohabit. . . ." Each party signed a copy of that agreement at the time of the parting, but the exchange of documents was held up pending the conclusion of other financial negotiations.

On December 30, 1951, the wife wrote asking her husband to take her back. On January 2, 1952, he replied, refusing to do so; and he also rejected an oral offer made by her on January 4. The financial negotiations were thereupon resumed and concluded, and copies of the December agreement were finally exchanged on February 26, 1952, the agreement bearing that date.

In July, 1956, the husband presented a petition for divorce on the ground of his wife's desertion of him on December 15, 1951. The wife by her answer alleged that the parting on that date was with his consent; and she cross-prayed for divorce on the ground that after his rejection of her genuine offer to return he was himself in desertion of her:—

Held (Morris L.J. dubitante) that though the original parting was consensual, the written agreement was not a separation agreement such as to preclude either spouse thereafter from asking to return to cohabitation, for it contained no term defining the period of separation; and the court would be slow to imply such a term. Further, on the facts of this case, the circumstances in which the agreements were finally exchanged did not have the effect of reviving the original consensual separation which had been brought to an end by the wife's conduct in asking to return. Accordingly, the husband was in desertion and the wife was entitled to a decree on that ground.

Pardy v. *Pardy* [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779 distinguished.

Appeal from Mr. Commissioner Bush James.

The parties were married in 1951, when the husband was a widower of 51 with a daughter aged about 15, and the wife a widow of 31, with a small boy aged about two. Before the marriage, the wife had been in receipt of an Indian Army pension and a widow's pension amounting to £4 13s. a week, and lived with her parents, contributing to payments on the house they occupied. On her remarriage she lost her pensions.

Though the parties had known each other for some time, the marriage was not a success and lasted a very short time, for in December, 1951—the year in which they had been married—they separated. The wife made up her mind to leave permanently and the husband made no attempt to dissuade her. Before she left she wrote to him a letter in which she humbled herself and tried to express by words her desire to behave properly towards him again, admitting that she had not done so in the past; but she was already making plans to leave, told her husband that she was going, went to say goodbye to his sister, telling her that the marriage was at an end and that she was leaving; and on December 15, 1951, she left the matrimonial home.

The husband recognized that his wife had lost her widow's pension by marrying him, and regarded it as a matter of honour that if they separated he should put that right. He therefore saw his solicitors and a document was drawn up which provided, so far as relevant, that: "Whereas unhappy differences have "arisen between the husband and the wife by reason whereof they "have agreed to enter into the arrangements hereinafter con-"tained. . . . Now it is hereby agreed . . . (1) The husband will "pay to the wife for her support and maintenance the weekly "sum of £4 13s. during the joint lives of the husband and wife "and for so long after the death of the husband as the wife shall "remain his widow and so long as she shall lead a chaste life, "the first payment to be made hereunder on December 22 "next . . . "; and, by clause 4: "If at any future time the "husband and wife shall come together and cohabit with each "other or if their marriage shall be dissolved or they shall be "judicially separated then . . . all agreements and provisions "herein contained shall become void. . . ."

That agreement was signed by the husband before the wife left the home, and by the wife a little before December 19, after it had been explained to her by her own solicitors; but it was dated February 26, 1952, the final exchange of documents being delayed pending the outcome of negotiations between the parties about a sum of money—£1,750—which the husband at the beginning of the marriage had lent to the wife or her family in connexion with the house occupied by them.

After the parting, the wife, on December 30, 1951, wrote a letter to her husband, again in terms of humility, in which she made it quite clear that she wanted him to take her back. She wrote: "Will you have me back, Gordon? It is not easy to have "to say this but I guess life is not easy and anything that is really "worth while has to be fought for." The husband thought over the matter carefully, but on January 2, 1952, he replied at length saying that he could not take her back; and that there was only one answer to the problem, which was that he should find a housekeeper as soon as possible. On January 4, the wife visited the matrimonial home and again sought to persuade her husband to take her back; but he refused to do so.

Following that, negotiations continued with regard to the conclusion of the agreement for maintenance and the recovery of the loan of £1,750. For the wife it was at first sought to say that that amount had been a gift on marriage, but the husband's view that it was a loan was accepted, and he also made a generous offer to forgo some £250 of the total amount, later increasing that offer to £300; and eventually on February 26, 1952, a compromise for the repayment of £1,450 in full settlement of the loan was reached, and, accordingly, the signed copies of the agreement (supra) were exchanged, the agreement being dated—as stated above—February 26, 1952.

C. A.
1958
Bosley
v.
Bosley.

On July 16, 1956, the husband filed a petition for divorce on the ground that his wife had deserted him without cause. The particulars alleged that she had left him on December 15, 1951, and that the offers to return were not bona fide or sincere. By her answer the wife denied the desertion. She admitted that she had left the home on December 15, but said that she did so with the full consent of her husband; and that, if she had deserted him, that desertion had been terminated by her bona fide offers to return. She cross-prayed for divorce on the ground that he had deserted her.

At the hearing before the commissioner, the husband gave evidence of the circumstances of the parting in December, 1951. He was asked: "You had, before she left on December 15, agreed "with her that that was the only answer, to break up the "marriage?" and replied: "Absolutely." When asked: "Did "you or did you not mutually agree to separate?" he replied: "I did agree that my wife should leave the home."

The commissioner in his judgment on October 11, 1957, found that the arrangement made by the husband to give his wife an allowance was in no sense an agreement entered into by way of separation; that the wife had made up her mind to leave permanently; and that by the letter of December 30, 1951, and the visit of January 4, 1952, she had done her best to persuade her husband to take her back. He continued: "He was not having "any; he did not believe that her offer was a genuine one and "he did not believe that there was any possibility of any "happiness with this woman and he determined that the position "was to remain as it was, he content to support his wife but in no "sense desiring to have her back." Despite that finding, the commissioner concluded his judgment by holding that he had not the slighest doubt that the husband had established his contention that his wife had deserted him since December 15, 1951, and there being no agreement to separate, the wife's cross-prayer must be rejected and a decree granted to the husband.

The wife appealed.

J. G. Leach for the wife.
Percy R. Hollins for the husband.

The case of *Pardy* v. *Pardy*,[1] which was cited in the argument, is referred to in the judgment.

Hodson L.J. stated the facts set out above and continued: The agreement was (as the commissioner stated) an agreement for maintenance. It was not, on the face of it, an agreement between these two people to live apart for joint lives or for any other period: it was a provision for the payment of maintenance during the joint lives of the husband and wife and for so long after the death of the husband as the wife should remain a widow

[1] [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

and lead a chaste life. The agreement was dated back to December 22, 1951, which was a few days after the actual parting. The agreement is so drawn as to suggest, without saying, that it was an agreement for separation, because it refers in clause 4 to the parties coming together again, which obviously implies that they are at the time of the execution of the agreement apart. But, nevertheless, it still remains true to say that it was an agreement merely to maintain the wife and not an agreement that the parties should live apart for any particular period or at all. As the husband put it in his evidence, the door was left open.

The actual parting in December was, according to the husband's evidence, really a consensual parting: it was not at all a parting against his will. He was dissatisfied with the way things had turned out; he thought things never could be right between him and his wife, and when she suggested that she should go he agreed to it. Even if he could be said to have had the agreement rather forced on him by his wife's behaviour, and by her showing her determination to go, nevertheless his evidence was clear enough that he did agree to her going. When he was asked a question about this by counsel in this way—" You had, before " she left on December 15, agreed with her that that was the " only answer, to break up the marriage? ", his answer was " Absolutely." So far as I can see that was the general drift of the evidence.

The commissioner does not find in his judgment that the marriage was brought to an end without agreement. All he says is: " I have no doubt that she had made up her mind to leave, " and to leave permanently "; and when he refers to the agreement he is referring to the financial agreement which I have mentioned. For my part, I should have thought it was tolerably clear on the husband's evidence that the parting in the middle of December was a parting by consent.

After the parting the position was that the wife wrote her husband a letter on December 30, asking him to see her, and he refused to do so. In that letter (which again was in terms of humility) she made it quite clear that she wanted her husband to have her back. [His Lordship read passages from the wife's letter to her husband, and his reply stating that he could not have her back; and continued:] The commissioner did not in any sense find—and I do not see how he could have found—that the wife's letter to the husband was not genuine and that she was not really trying to get back. Indeed, the husband was not really saying that she was not genuine in that sense. All he was saying was that he was quite sure, having regard to the past history of the case, that it would not work. He was saying in effect that the leopard cannot change his spots, and that if she was a bad wife before she would be a bad wife in the future; and he was not prepared to change his mind.

C. A.
1958
Bosley
v.
Bosley.
Hodson L.J.

On that state of the evidence, the only answer must be (subject to a matter to which I shall have to refer) that from January 2, when the husband wrote to the wife refusing to have her back, he was in desertion, and that that desertion subsisted for three years immediately preceding the presentation of the answer, because the answer was not presented until 1956.

Counsel has suggested that there may be a difficulty in the way of finding the husband to be a deserter, because the original parting appears to have been consensual. In that connexion reference was made to *Pardy* v. *Pardy*,[1] one of those cases where there was in existence a deed of separation which presumably contained the ordinary term, common in those deeds, that the parties were covenanting to live apart during joint lives, so that the husband who was sued for divorce could always say, or the court could say for him: "There is no desertion because there is an "agreement to live apart." To my mind, that case and the authorities (of which there are many) dealing with these separations for joint lives have no application to the present position, where there was not such a contract but merely at most an agreement to part for an indefinite period. No doubt the husband at any rate thought that so far as he was concerned he would never have his wife back at all. That the wife did not think so is quite clear from her subsequent action, because she very soon went to him to ask if she might come back. But on any view of the matter, the agreement was not to live apart for any definite period at all, and such an oral agreement cannot, I think, be understood as carrying with it a promise to live apart for joint lives, or—to use the words which I suppose come more naturally to two people talking together—"for ever"; and, if it cannot be so construed, the wife was not in breach of any agreement when she wrote him a letter and came to her husband asking if she could come back. She was quite entitled to do it, and she was not prevented by any contract from so doing.

If, therefore, the matter rested merely on the agreement to live apart for an indefinite period which these parties appear to have entered into in December, 1951, followed by a request by the wife to the husband to let her come back, and his refusal to do so, there would, I think, be a clear case of desertion on the part of the husband.

There is, however, a further matter to be considered here which has caused the court some anxiety, because the document, which came into existence and was signed by both parties in the previous December at the time when this agreement to separate came about, is now dated February 26, 1952. If the agreement of February, 1952, is to be read as controlled by the circumstances in which the parties originally separated, then it would be true to say that in February, after the wife's offer to return had been refused, there was a further agreement by the parties to live apart, or, to put it more accurately, the wife accepted the position and

[1] [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

went back to the terms of the agreement to which she had come originally when she and her husband parted. But I do not think that that is the true position. After the separation in December the wife, by writing to her husband (as she was entitled to do) and going to see him as she did on January 4, and asking him to take her back, put an end to the consensual agreement because she was no longer willing to abide by it. As I have indicated, she was quite entitled to do so; and the mere fact that the financial provision for her which this man out of his generosity was prepared to make was completed in February, 1952, does not mean that from that point they were again agreeing to live apart by consent. The document—the maintenance agreement, as it is called—of February 26 is entered into by a man who is willing to make payments to his wife, and, as he is prima facie under an obligation to support his wife—whether he is in desertion or not—there is ample consideration for the promise to pay; and it does not depend for its efficacy on whether the parties were living apart by consent or whether the husband was in fact in the position of a deserter.

It is said that here was a generous man entering into an agreement with his wife for maintenance, having previously agreed to part from her, and that it seems rather hard to saddle him with an accusation of desertion which would not be present to his mind when he handed over the document on February 26. I confess that I am not impressed by that consideration, because the fact is that before he handed over that document, his wife had been to see him. She was his wife; he had married her, whether they had agreed to part or not; and she had tried to get back to him. It does not seem to me that that matter can possibly have been absent from his mind when he went on with the financial provision for her maintenance which he had previously agreed to make.

The commissioner was, I think, in error in ignoring the letters which the wife wrote to her husband and the offers which she made to return and in treating them as if they did not exist. It is thus impossible to sustain his finding that the wife was a deserter. In my judgment, on the true view of the facts of this case, supported, where there are findings, by the findings of the commissioner, the only conclusion which can properly be reached is that the husband is the deserter: therefore the appeal ought to be allowed, the prayer of the petition rejected, and a decree pronounced on the prayer in the answer, on the ground of desertion.

MORRIS L.J. I think that this is not only a somewhat sad case, but also one which, from the legal point of view and on an examination of the facts, presents certain difficulties. I have experienced doubts which have not been shared by my Lords, but I think that it is my duty to indicate the line of those doubts. It seems to me that the position was that by the month of December both parties realized that there were difficulties which they could not overcome. The suggestion that the wife should leave came

C. A.
1958
BOSLEY
v.
BOSLEY.
Morris L.J.

from her; but the evidence shows that the husband accepted that suggestion: indeed, I think he says so in so many words. He regarded the marriage as having finally broken down. He said that it was quite final, that she would not come back to him, that she had no wish to come back to him. He looked on it as quite final that he could not live again with her. It was put that the finality was on the wife's side, but I think that a fair reading of the husband's evidence shows that he accepted, or at least recognized, that there was finality on his side as well. It was, to use his words, "quite final."

That was a very sad state of affairs; and I think that the husband was disposed to behave extremely well. He realized that his wife had had a pension during her widowhood which she had lost on her marriage to him, and very generously, and guided by decent motives, he was agreeable to pay the amount of that pension. He had also at the start of the marriage lent a sum of £1,750; and again I think he behaved very well over that. But the effect of his evidence, as I read it, was that the parting between him and his wife was really a parting mutually agreed to. He was asked: "Did you or did you not mutually agree to "separate?" He said "I did agree that my wife should leave "the home." A fair reading of his evidence shows that, though the suggestion came from her, they both realized that the marriage was not being a success, and would not be made a success, and they both concurred in the suggestion which she had made that they should part. His feeling further was that that represented so settled a view on the part of both of them that he could not think that there could be a change within a fortnight; and that led the husband to take the view that the advance made by the wife at the end of December and at the beginning of January was an advance that he could not himself regard as genuine. The commissioner has found that the wife was perfectly genuine at that time. But I think that that was the state of affairs; and in that state of affairs they had gone to solicitors, and a maintenance agreement had been drawn up under which the amount to be furnished by the husband was the amount which the wife was receiving prior to her marriage by way of pension. She did not sign the maintenance agreement, merely because she had been so advised by her father; but her husband did sign it. Then there was the parting on December 15. She went to solicitors who wrote on December 19, saying that they had explained to their client the purpose of the maintenance agreement and that she had then signed it and had it witnessed; so that the only matter remaining was to exchange the documents. The husband had signed his copy by that time and the wife had signed hers before December 19.

Then there came this approach by the wife, by her letter and by her visit, and the commissioner held in favour of the wife that it would be incorrect to say that she was not genuine. But her effort failed. The position then was that a doubt had arisen

in regard to the £1,750. [His Lordship stated the facts with regard to that amount, set out above, and continued:] The difference about this led to the passing of a considerable period of time; but finally the husband's suggestion was accepted, namely, that he would have the £1,500, forgoing the £250, less the £50, and that the amount due if the maintenance agreement became effective should be deducted from the £1,450. So the solicitors for the wife wrote on February 19 and asked whether there could be completion.

It is at this stage that the difficulties that I have felt occur. It seems to me that the position was that after the wife had made her approach, and after the husband had taken the view that the position could not be so soon changed, the wife recognized that, and did not thereafter proceed on the basis that she was dealing with a deserting husband: nor did her solicitors proceed on that basis; but recognizing the husband's position, they proceeded on the basis of resuming negotiations where they had been left off in December; and in December all that was left was the exchange of documents already signed. Now that the matter of the £1,750 was adjusted and out of the way, all that remained was the exchange of the documents; and it seems to me that the wife proceeded, not on the basis that her husband was a deserting husband but on the basis of what had been arranged in December —that is, that both parties recognized that the marriage was not a success, that both parties recognized that there had to be a parting by agreement, and that both parties recognized that the husband was willing, on that parting by agreement, to make up to his wife what she had lost financially by marrying him. It was on the basis of a consensual separation that the agreements were finally exchanged, and on the basis of the financial arrangement made in December in consequence of a separation mutually agreed.

I have felt it right to express the view of the facts that appealed to me; but my Lords take a different view, and, therefore, I only express the doubts based on the view of the facts that I have formed.

Pearce L.J. I agree with what Hodson L.J. has said. The question: What are the terms of a mutual agreement to separate, is one of fact or of construction. Here there is no deed to construe. The question here is: Was the oral or implied agreement such that it precluded any future unilateral change of heart on the part of either party? Often, in the rather haphazard parting of husband and wife, the fact of a mutual agreement to separate has to be deduced from things done and things said in emotion and temper. The court should, I think, be slow to decide that there is imported a term that the separation shall be for ever and that there shall be no opportunity for any unilateral change of mind, no right ever to ask the other party to return to cohabitation. I see nothing on the facts of this case which prevented the wife from making an approach to the husband and

C. A.
1958
Bosley
v.
Bosley.
Pearce L.J.

asking for what is, prima facie, the right of any spouse—a return to cohabitation. That being so, on the facts with which Hodson L.J. has dealt, there was a desertion by the husband.

There arises the question of whether the exchange in February, 1952, of the maintenance agreements signed in December, 1951, in any way prevents the husband from being in desertion. It seems to me that that turns on this: Was the maintenance agreement referable only to a state of separation by consent? If it was equally referable to the position of a deserted wife, the concluding of it or the implementing of it by the exchange of signed copies and receiving arrears under it was not conclusive evidence of any assent by the wife to a separation or any reversion to the previous situation in which she was agreeing to the husband living apart from her. I find nothing in the agreement to make it referable only to separation by mutual consent. It was a piece of machinery to regulate the financial affairs of the parties. It did not purport to regulate their matrimonial position. It was in origin a by-product of an agreement to separate; but it was equally apt to be a by-product of desertion.

I would agree with the view taken by Morris L.J. if I thought that the facts showed that the husband went on with that maintenance agreement in the belief (to the wife's knowledge) that the wife's agreement to a separation still stood, and that had he not so believed he would not have gone on with the maintenance agreement. In that case it seems to me that the wife could not be heard to say that she had withdrawn her consent to their continued living apart. But I see nothing on the facts of this case to drive me to that conclusion.

For those reasons, I think that the exchange of signed copies of the maintenance agreement does not prevent desertion running against the husband.

Appeal allowed. Prayer of petition rejected. Decree nisi on prayer of wife's answer, on the ground of desertion.

Solicitors: *Burton, Yeates & Hart for Nye & Donne, Brighton; Gamlen, Bowerman & Forward for Morland & Son, Abingdon.*

M. M. H.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (ORIGINATING SUMMONS FOR FORECLOSURE).

1958
May 23.

Mortgage—Foreclosure—Default of appearance—Service of notices—R.S.C., Ord. 55, *r.* 5A.

The following Practice Directions are supplemental to the Practice Directions issued by the judges of the Chancery Division in relation to R.S.C., Ord. 55, r. 5A.[1]

1. Where a defendant is in default of appearance to an originating summons whereby a mortgagee is seeking an order for possession of the mortgaged property, service of the following notices shall, instead of being filed in default under Ord. 67, r. 4, be effected by sending the same by prepaid letter post addressed to the defendant at his last known address:

(i) Notice of an appointment for the further hearing of a summons which stands adjourned generally, and

(ii) Notice under Ord. 64, r. 13, of intention to proceed (when applicable).

2. Service of any such notices shall, unless the court or judge in any particular instance shall otherwise direct, be evidenced by a certificate of the plaintiff's solicitor endorsed upon any further affidavit intended to be used on the further hearing, or if there is no such affidavit, then by a separate certificate entitled in the proceedings. The certificate shall, with any necessary variations, be in the form specified in the existing Practice Directions under Ord. 55, r. 5A, in relation to default cases.

MAURICE WILLMOTT,
Chief Master,
Chancery Division.

May 23, 1958.

[1] Annual Practice (1958), p. 1504.

[CHANCERY DIVISION.]

* GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. *v.* LANCASHIRE BATTERIES LTD.

1958
May 2.

Upjohn J.

[1958 G. 430.]

Restrictive Practices—Conditions as to resale prices—Individual enforcement—Notice of restriction—Whether express notice of actual conditions essential—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 25.

[Reported by M. B. KELLY, ESQ., Barrister-at-Law.]

1958

Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

The plaintiffs, who were manufacturers of motor-car tyres, sought an interlocutory injunction to restrain the defendants from selling the plaintiffs' products at prices below those fixed by the plaintiffs' price list and contrary to the conditions of sale thereby imposed. The British Motor Trade Association circulated a large number of traders (amongst whom were the defendants) setting out first the general effect of section 25 of the Restrictive Trade Practices Act, 1956,[1] and secondly stating that certain manufacturers and concessionaires (among whom were the plaintiffs) supplied their products for resale subject to a condition that those products were sold at a certain price, details whereof might be obtained on application to the respective manufacturers and concessionaires. The defendants received one of these circulars on May 31, 1957, but did not have express notice of the conditions of sale as set out in the price list. In February, 1958, the defendants offered for sale some of the plaintiffs' products at a discount of 2s. in the pound. On a motion for an interlocutory injunction to restrain the defendants:—

Held, (1) that it was irrelevant that the tyres might have been manufactured and sold to some trader before May 31, 1957, when the defendants received the circular; but it was essential that the defendants should have received notice before they acquired the tyres.

(2) That the circular was not a notice of the conditions as to the price at which these goods might be resold within section 25; the section, on its true construction, requires an express notice of the actual terms and conditions sought to be enforced. Accordingly, the motion must be dismissed.

County Laboratories v. *J. Mindel Ltd.* [1957] Ch. 295; [1957] 2 W.L.R. 541 and 746n.; [1957] 1 All E.R. 806 and 861n. applied.

Motion for interlocutory injunction.

The defendants, Lancashire Batteries Ltd., were dealers in motor accessories and carried on business, among other places,

[1] Restrictive Trade Practices Act, 1956, s. 25: "(1) Where goods are "sold by a supplier subject to a "condition as to the price at which "those goods may be resold, either "generally or by or to a specified "class of person, that condition may, "subject to the provisions of this "section, be enforced by the supplier "against any person not party to the "sale who subsequently acquires the "goods with notice of the condition "as if he had been party thereto. "(2) A condition shall not be en-"forceable by virtue of this section "—(*a*) in respect of the resale of "any goods by a person who acquires "those goods otherwise than for the "purpose of resale in the course of "business, or by any person who "acquires them, whether immediately "or not, from such a person; (*b*) in "respect of the resale of any goods "pursuant to an order of any court, or "by way of execution or distress, or "by any person who acquires them, "whether immediately or not, after "such resale. (3) Nothing in this "section shall be construed as en-"abling any person to enforce a con-"dition imposed in pursuance of any "restriction which is declared by an "order of the Restrictive Practices "Court for the time being in force "under Part I of this Act to be con-"trary to the public interest. (4) "Without prejudice to any other relief "which may be granted in proceed-"ings against any person in respect "of a breach or apprehended breach "of a condition which is enforceable "against him by virtue of this sec-"tion, the court may, if it thinks fit, "upon proof that goods sold by the "plaintiff have been resold by the "defendant in breach of any such "condition, grant an injunction re-"straining the defendant from resell-"ing in breach of any such condition "any goods already sold or thereafter "to be sold by the plaintiff, whether "of the same description as the goods "proved to have been resold as afore-"said or of any other description."

in Accrington, Lancs, under the name of Tower Batteries. The plaintiff company were manufacturers of motor-car tyres, and in common with a number of other manufacturers had imposed a price restriction as part of the conditions of sale of their goods. The conditions of sale were contained in a trade price list and the relevant conditions were as follows: "(5) Price Maintenance. (a) No person shall sell or supply any "of the company's products to any trader at prices and/or "terms directly or indirectly higher or lower than the prices "specified in the company's current trade price lists and/or "the terms for the time being authorized by the company. "(b) No person shall sell or supply any of the company's products "to any commercial vehicle user (other than a commercial "vehicle user whose name and discount category appear in the "register of users approved by the company), or to any other "person whatsoever, except a trader, at prices and/or terms "directly or indirectly higher or lower than the prices specified "in the company's current retail price lists and/or the terms for "the time being authorized by the company. . . . (6) (a). No "person shall advertise or publicly offer for sale any of the com-"pany's products to any person whatsoever (including traders or "commercial vehicle users) at prices directly or indirectly higher "or lower than the company's current retail prices."

The British Motor Trade Association sent out circulars to a large number of traders including the defendant company and its headquarters in Darwen; these were received on May 31 and November 19, 1957, and by the Tower Battery Depot at Accrington on June 24 and November 25, 1957. For the purposes of the motion the defendants were treated as having received the document on May 31, 1957. The document in question, which was headed "Restrictive Trade Practices Act, 1956," read in so far as it is material, as follows: "Lists and addresses of manufacturers "and concessionaires who prescribe conditions as to price for "their respective specified products. Important notice under the "Restrictive Trade Practices Act, 1956. To: All traders in "motor goods take notice that . . ." [the document then set out the general effect of section 25 of the Act and continued:] "(2) The undermentioned manufacturers and concessionaires "have authorized the British Motor Trade Association to give "notice on their behalf that they each individually supply for "re-sale each of their new products of the kind or kinds specified "in the schedule subject to conditions as to prices including a "condition that they shall not be resold or offered for resale at "a price other than the appropriate price prescribed by the "manufacturer or concessionaire concerned, plus the actual "amount of purchase tax (if any) for which such products are "liable and such delivery charges as the manufacturer or con-"cessionaire may prescribe." Paragraph (3) pointed out that section 25 of the Act provided that action might be taken against those who infringed the price stipulations. "(4) Details of the

1958

GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. v. LANCASHIRE BATTERIES LTD.

"conditions as to price prescribed for any of the specified pro-"ducts may be obtained on application to the manufacturer or "concessionaire concerned, quoting details of the goods in "question." The schedule contained a long list both of tyre manufacturers (including the plaintiffs) and of manufacturers of motor-cars and motor accessories.

In February, 1958, the defendants offered for sale certain motor accessories at a discount of 2s. in the pound, and advertised the fact in the "Evening Telegraph" of February 12, 1958. The matter came to the notice of the plaintiffs, who thereupon communicated with the British Motor Trade Association, who sent an investigator to make a "trap order." In the events which happened the investigator purchased two Goodyear Suburbanite Ultra-grip tyres at a discount of 10 per cent. By their writ the plaintiffs claimed an injunction to restrain the defendants, whether acting by themselves or by their servants or agents from reselling or offering for resale any tyres, tubes or other goods manufactured and sold by the plaintiffs at prices other than the respective prices prescribed by the plaintiffs for the resale of such goods.

G. T. Aldous Q.C. and *S. J. Waldman* for the plaintiffs.
D. Mervyn Davies for the defendants.

All the cases cited in argument are referred to in the judgment.

UPJOHN J. stated the facts, read section 25 of the Restrictive Trade Practices Act, 1956, and continued: The question I have to determine is this: Are the conditions of section 25 satisfied in this case? The first condition is this: Goods have to be sold by the supplier subject to the condition "as to the price at which "those goods may be resold." In my judgment, at all events, for the purposes of this motion, that condition is satisfied because, although I have no particulars as to precisely whom these particular tyres were sold by the plaintiff company in the first place, the duly authorized representative has sworn that all tyres are sold subject to the conditions regulating the price at which they are to be sold. It was submitted to me, however, that there was no evidence upon this matter, namely, that the tyres might have been acquired by some person otherwise than for the purpose of resale in the course of business. If that were so, then under section 25 (2) (*a*) no injunction could be granted.

It is true that there is no evidence before me as to the exact chain of sales and purchases between the plaintiff company and the ultimate receipt in the hands of the defendants; but I am told the tyres were actually manufactured on January 19, 1958, and it seems to me that the inference which I must draw is this: these defendants, trading not very often in Goodyear tyres, but able to obtain them upon the request of a customer, purchased these tyres through normal trade channels; I do not think it

would be right for me to speculate that these tyres might at some stage in their passage from trader to trader, between the plaintiff company and the defendants, have passed through the hands of somebody of whom it could be predicated had bought them otherwise than for the purposes of resale in the ordinary course of business, there being no evidence whatever upon that matter. So far, therefore, the condition of the section is satisfied.

Then it is said in reliance upon a recent judgment of Harman J. in *County Laboratories Ltd.* v. *J. Mindel Ltd.*,[1] that the tyres might have been manufactured and sold to some trader, probably a wholesaler, before May 31, 1957, when the defendants first received notice of the restrictions, or at any rate received the circular to which I have already referred. In my judgment, that is not the relevant date to consider. All that has to be shown is a sale by the supplier subject to a condition as to price and the subsequent acquisition of those goods by a person with notice of those conditions. It does not seem to me to matter at all whether the notice was received by the person ultimately acquiring the goods before or after the goods started on their way through the chain of wholesalers and distributors to the defendant company's place of business. All that is essential, in my judgment, is that the person who is sought to be made subject to an injunction must have received the notice before he acquires the goods.

Reliance was placed upon the last sentence in the judgment of Harman J., where he said[2]: "They had not, nevertheless, "knowledge that this jar of 'Brylcreem' was necessarily manu-"factured subsequent to the notice." As the notice and the coming into force of the Act were both in the month of November, 1956, there was no real gap between the two, but I think it is plain, looking at the judgment of Harman J. as a whole, that he was really intending to refer to the coming into force of the Act. Then it was sought to say that these goods might have been purchased, or might have been manufactured, before the coming into force of the Act, but on the facts of this case I am not going to presume, certainly in the absence of any evidence on the part of the defendants, that any reasonable trader would have assumed that these tyres ordered in February, 1958, had been manufactured and originally sold before November 2, 1956 (when the Act came into force), or even before May 21, 1957, although I have already given my reasons for thinking that the latter date is not relevant.

The real point of difficulty in this case is a point which Mr. Mervyn Davies takes on behalf of the defendants, and it is this. He submits that the circular notice sent round by the British Motor Trade Association did not comply with the requirements of section 25, for it was not, for the purposes of that section, a notice of the condition as to price. It is common ground that

[1] [1957] Ch. 295; [1957] 2 W.L.R. 541 and 746n.; [1957] 1 All E.R. 806 and 861n.

[2] [1957] Ch. 295, 299.

1958

GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. v. LANCASHIRE BATTERIES LTD.

Upjohn J.

in the area of trading the doctrine of constructive notice as it is understood in law relating to the title of real estate has no place at all. If authority be wanted for that proposition it is to be found in *Manchester Trust* v. *Furness*,[3] in the judgment of Lindley L.J., and in the judgment of Harman J. in *County Laboratories Ltd.* v. *J. Mindel Ltd.*[4]

The question is: What notice is sufficient for the purposes of section 25? The section provides that the condition may be "enforced by the supplier against any person not party to the "sale who subsequently acquires the goods with notice of the "condition as if he had been party thereto." If the trader had been party to the original contract of sale, he would have had express notice of the actual terms of the restrictive condition. The section seems designed to put both parties in the same position. I have in mind and agree with the observation of Harman J. in *County Laboratories Ltd.* v. *J. Mindel Ltd.*[5] that this is "a section limiting the freedom of trade, and, therefore, "although I am bound to give it that effect which the language "of it expresses, I am not prepared to go beyond that and stretch "it so as to produce an effect which the express language does not "warrant."

Mr. Mervyn Davies submits that it is not sufficient merely to give notice that there is a condition restrictive of price, but you must give them actual express notice of the actual terms of the condition, and he submits that the Motor Trade Association's circular does not give notice of that restriction. It merely points out that there is a restriction precluding a resale at a price other than the appropriate price prescribed by the manufacturer, and that the details and conditions of price may be obtained on application to the manufacturer or concessionaire concerned. That he submits is akin to constructive notice and is not a proper compliance with the requirements of the section, that there must be an express notice of the actual terms. On the other hand, Mr. Aldous submits two points. He submits first that it is sufficient to bring to the attention of the trader concerned the fact that there is a restriction, and he draws my attention to the analogous case of a purchaser of a patented article with notice of a limited licence. At p. 264 of Terrell and Shelley on Patents, 9th ed., this is said: "It is not essential that the purchaser should "have notice of the precise restrictions concerned so long as he "has knowledge of their nature and existence and means of know-"ledge of their exact extent." He relies for that proposition on the authority which he quoted of *Columbia Graphophone Co. Ltd.* v. *Murray*.[6] But in truth this is a question of the exact construction of section 25. Secondly, he submits that in any event the notice given in fact is a substantial compliance with the terms of the section. It is to be observed that the condition imposed upon the trader at that time was under the conditions of sale, and it is

[3] [1895] 2 Q.B. 539, 545.
[4] [1957] Ch. 295, 297.
[5] Ibid. 299.
[6] (1922) 39 R.P.C. 239.

of those conditions that notice has to be given, and it is said to be contained in the circular. It is pointed out that in paragraph 2 of the circular there is only notice of a very general kind applying to a very large number of manufacturers who may have many different types of restriction. It has been pointed out, for instance, that it does not tell the person sought to be injuncted that he may sell without restriction to a commercial vehicle user providing his name and style and factory appear in a certain register. He has no notice of that. The circular again, it is said, does not tell him that he must not sell at prices indirectly higher or lower than the prices specified. Exactly for what purpose the word "indirectly" is used, I am not going to say. Whether it meant a sale in part exchange or not is a matter I need not decide. But Mr. Mervyn Davies uses these points to illustrate his proposition that in fact the circular does not give him notice of the actual terms of price restriction but only a general resumé of it.

In my judgment, as I have already said, the section must be strictly construed, and upon its true construction I come to the conclusion that it contemplates that no trader should be in a worse position than if he had been a party to the original contract of sale, and requires an express notice of the actual terms and conditions sought to be enforced. It does not seem to me that the notice issued gives such express notice of the actual terms, and, therefore, it appears to me that for the purposes of the section the defendants have not received the requisite notice. Accordingly, I dismiss the motion with costs.

Order accordingly.

Solicitors: *Osmond, Bard & Westbrook; Gregory, Rowcliffe & Co. for Read, Roper & Read, Manchester.*

[COURT OF APPEAL.]

*LONDON EXPORT CORPORATION LTD. *v.* JUBILEE COFFEE ROASTING CO. LTD.

C. A.

1958
May 8, 9.

Jenkins, Parker and Pearce L.JJ.

Arbitration—Arbitrator—Misconduct—Trade custom—Agreement to arbitrate according to rules of trade association—Alleged custom that umpire should remain with appeal board in the absence of parties—Communication by umpire to board—Provision in rules that umpire not to be member of board or to elect members of board—Whether adoption of custom contrary to natural justice—Whether custom excluded by implication from terms of arbitration agreement.

Contract—Custom or usage. Natural Justice—Arbitration.

A contract for the sale of groundnuts incorporated all the terms, conditions and rules of Contract Form No. 75 of the Incorporated Oil Seed Association [I.O.S.A.], which contract contained a clause

C. A.

1958

London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.

providing for arbitration according to the rules appended thereto. By those rules: "Any dispute arising out of a contract embodying "these rules shall be referred to arbitration in London, each party "appointing one arbitrator . . . and such arbitrators shall have "the power if and when they disagree to appoint an umpire," both arbitrators and umpire to "be a member of the association, "or a partner in a member's firm, or a director of a company "represented by a member." The rules also gave a right of appeal to a board of appeal consisting of four members of the association's committee of appeal and provided that "No member of the com-"mittee of appeal who has an interest in the matter in dispute, "or who has acted as arbitrator or umpire in the case and no "member of the same firm or company to which either of the "arbitrators or the umpire shall belong, shall vote on the question "of the appointment of members of the board of appeal or shall "be appointed a member of the board of appeal." The rule did not detail the procedure to be adopted at the hearing of an appeal. A dispute between the parties to the contract was referred to arbitration and an umpire was appointed in accordance with the rules. The umpire awarded in favour of the sellers and the buyers appealed to the board of appeal. Throughout the hearing by the board of appeal the umpire was present and at the conclusion of the hearing, at the request of the chairman and after protest by the buyers, he remained with the board. It was the customary practice in I.O.S.A. arbitrations, and had been so for about 50 years, for the umpire to remain with the board of appeal in the absence of the parties. After the parties had retired the chairman asked the umpire if the evidence and contentions put before the board differed from those before him; the umpire replied "No" and volunteered the information that he had taken a certain view of the contract. The board of appeal upheld the umpire's award. On a motion by the buyers that the award be set aside on the ground that the board of appeal had misconducted themselves in asking the umpire to remain and communicating with him in the absence of the parties, Diplock J. set aside the award. On appeal:—

Held, dismissing the appeal, (1) that an alleged custom could only be incorporated into a contract if there was nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and would only be so imported where it could be imported consistently with the tenor of the document as a whole.

Humfrey v. *Dale* (1857) 7 E. & B. 266, *Tucker* v. *Linger* (1883) 8 App.Cas. 508 and *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* [1916] 1 A.C. 314; 32 T.L.R. 115 applied.

(2) That the rules called for an arbitration in two stages, in the latter of which the umpire had become functus officio and was to have no influence on the proceedings; so that it was repugnant to introduce a third stage in which he conferred with the appeal board in the absence of the parties.

Per Jenkins L.J. The case was not really one in which it was sought to apply a trade custom; what was set up was rather a prescriptive right to commit an irregularity from arbitration to arbitration.

Decision of Diplock J. [1958] 1 W.L.R. 271; [1958] 1 All E.R. 494 affirmed.

Appeal from Diplock J.

By a contract in writing, dated April 3, 1957, sellers, the London Export Corporation Ltd., agreed to sell, and buyers, the Jubilee Coffee Roasting Co. Ltd., to buy, 10 long tons (5 per

cent. more or less) Chinese groundnuts in Shell H.P.s no count shipment from China Port during April/first half May, 1957, to London at £120 per long ton c.i.f. On May 6, 1957, an amendment to the contract was signed on behalf of both parties which provided "Shipment per s.s. *Ursula Rickerms* scheduled to sail "about May 18, 1957."

By the contract "All the terms, conditions and rules con- "tained in Contract Form No. 75 of the Incorporated Oil Seed "Association [I.O.S.A.] . . . shall . . . be deemed to be incor- "porated in and to form part of this contract note."

By clause 16 of the I.O.S.A. contract form No. 75: "All "disputes from time to time arising out of this contract, including "any question of law appearing in the proceedings . . . shall be "referred to arbitration according to the rules appended to this "contract . . ."

Rule 1 of the rules appended to the contract provided for reference to arbitration in London, each party to appoint one arbitrator "who shall be a member of the association, or a "partner in a member's firm, or a director of a company repre- "sented by a member, and such arbitrators shall have the power "if and when they disagree to appoint an umpire, who shall be "a member of the association, or a partner in a member's firm, "or a director of a company represented by a member, whose "decision is to be final." Rule 5 gave to a party dissatisfied with the award a right of appeal to the committee of the I.O.S.A. By rule 6: "The appeal shall be determined by a board of "appeal consisting of four members of the committee of appeal "of the association . . . No member of the committee of appeal "who has an interest in the matter in dispute or who has acted "as arbitrator or umpire in the case and no member of the same "firm or company to which either of the arbitrators or the umpire "shall belong, shall vote on the question of the appointment of "members of the board of appeal or shall be appointed a member "of the board of appeal." By rule 7: "The parties to an arbi- "tration or an appeal to the committee of appeal shall not be "represented or appear by counsel or solicitor on the hearing of "such arbitration or appeal unless in the sole discretion of the "arbitrators, or umpire, as the case may be, or board of appeal, "the case is of special importance or questions of law are likely "to arise upon which the opinion of the High Court of Justice "may be required." By rule 8: "The board of appeal shall "confirm the award appealed from unless not less than three "members of the board of appeal decide to vary such award . . ."

A dispute arose between the parties to the contract and the sellers claimed arbitration. The arbitrators were unable to agree and an umpire was appointed who made an award in favour of the sellers. The buyers appealed. At the hearing of the appeal representatives of both parties addressed the board of appeal, and at the conclusion of the hearing, when the parties were about to retire, the chairman asked the umpire, who had been present

C. A.
1958
LONDON EXPORT CORPORATION LTD. v. JUBILEE COFFEE ROASTING CO. LTD.

throughout the appeal, to remain with the board. In I.O.S.A. arbitrations it was the customary practice, and appeared to have been so for about 50 years, for the umpire to remain with the board of appeal in the absence of the parties, but the buyers' representative protested and asked permission to remain so as to hear what the umpire said. Permission was refused, and the buyers' representative left under protest. After the parties had retired the chairman asked the umpire whether the evidence and contentions before the board differed from those before him and the umpire replied "No," and volunteered the information that in making his award he had taken the view that the contract as amended was for shipment by a named steamer.

The board of appeal confirmed the award of the umpire in favour of the sellers. The buyers moved the court that the award of the board be set aside or remitted to a differently constituted board on the ground that the board of appeal misconducted themselves in that, after the close of the hearing and before making their determination, they held communication with the umpire and allowed or requested him to address them with reference to the appeal in the absence of the parties and without giving the parties the opportunity to comment on what was said.

Diplock J. held that the conduct of the board of appeal in allowing the umpire to remain and speak with them in the absence of the parties was contrary to the necessary implications of the rules relating to the conduct of arbitration proceedings, and set aside the award. The sellers appealed.

The facts are more fully stated in the judgment of Jenkins L.J.

John Donaldson and *C. S. Staughton* for the sellers.
H. Fisher for the buyers.

Cases cited in argument not referred to in the judgments: *Duke of Buccleuch* v. *Metropolitan Board of Works* [1]; *W. Naumann* v. *Edward Nathan & Co. Ltd.*[2]; *F. E. Hookway & Co.* v. *Alfred Isaacs & Sons* [3]; *Reg.* v. *Barry (Glamorgan) Justices, Ex parte Nagi Kashim.*[4]

Case not cited in argument referred to in the judgments: *Errington* v. *Minister of Health.*[5]

JENKINS L.J. This is an appeal from an order of Diplock J. dated February 10, 1958, whereby he set aside an award of the board of appeal of the Incorporated Oil Seed Association, acting as appellate arbitrators, in favour of the London Export Corporation Ltd., who were the sellers under the relevant contract.

The ground upon which the buyers, who were the Jubilee Coffee Roasting Co. Ltd., sought to have the award set aside was misconduct on the part of the board of appeal of the Incorporated Oil Seed Association in the course of the arbitration.

[1] (1872) L.R. 5 H.L. 418.
[2] (1930) 37 Ll.L.R. 249.
[3] [1954] 1 Lloyd's Rep. 491.
[4] [1953] 1 W.L.R. 1320; [1953] 2 All E.R. 1005.
[5] [1935] 1 K.B. 249; 51 T.L.R. 44.

"Misconduct" is, of course, used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort.

The present appellants, the London Export Corporation, were sellers of a quantity of Chinese groundnuts to the buyers, the Jubilee Coffee Roasting Co. Ltd. When the documents were tendered the buyers rejected them, I understand, because the goods had not been shipped in accordance with the contract. The contract was made on the Incorporated Oil Seed Association's standard form and it included provisions for arbitration of a type familiar in standard contracts such as this, which are well known in many different trades. The arbitration provisions were in the form that, in the event of dispute, each party was to appoint an arbitrator and, if the arbitrators were unable to agree, they were to appoint an umpire, who was to hear and determine the matter, and, in the event of either party being dissatisfied with the decision of the umpire, there was a right of appeal to the board of appeal under certain rules. The decision of the umpire in the present case was that the buyers were not entitled to reject the documents. The buyers being dissatisfied appealed from that decision to the board of appeal, who affirmed the umpire's award.

I think I should next refer to the relevant parts of the standard contract. The first page contains the provisions relating to the particular transaction. I do not think there is anything which requires notice until one comes to paragraph 16, which is the arbitration clause, and is in these terms: "All disputes from "time to time arising out of this contract, including any question "of law appearing in the proceedings, whether arising between "the parties hereto, or between one of the parties hereto, and "the trustee in bankruptcy of the other part, shall be referred "to arbitration according to the rules appended to this contract, "and this stipulation may be made a rule of any of the divisions "of Her Majesty's High Court of Justice in Ireland on the "application of either contracting party, for the purpose of "enforcing an award against a party residing or carrying on busi-"ness in Ireland. Neither buyers, sellers, trustee in bankruptcy, "nor any other person claiming under either of them, shall bring "any action against the other of them in respect of any such "dispute until such dispute has been settled by the arbitrators, "umpire, or committee or board of appeal, as the case may be, "and it is expressly agreed that the obtaining an award from "either tribunal, as the case may be, shall be a condition pre-"cedent to the right of either contracting party to take any legal "proceedings against the other in respect of any claim arising "out of this contract." I do not think I need read further. It is a quite familiar form of submission.

Then I come to the rules, and rule 1 is: "Any dispute arising out of a contract embodying these rules shall be referred to "arbitration in London, each party appointing one arbitrator, "who shall be a member of the association, or a partner in a

C. A.
1958
LONDON EXPORT CORPORATION LTD.
v.
JUBILEE COFFEE ROASTING CO. LTD.
Jenkins L.J.

"member's firm, or a director of a company represented by a "member, and such arbitrators shall have the power if and when "they disagree to appoint an umpire, who shall be a member of "the association, or a partner in a member's firm, or a director "of a company represented by a member, whose decision is to "be final."

Then there is a provision about fees and a provision dealing with the event of one of the parties refusing to appoint an arbitrator, which does not arise here.

Then rule 4 is: "All awards by arbitrators or an umpire shall "be in writing on an official form issued by the secretary of the "association and the arbitrators or umpire shall have the power "to award the costs of and connected with the reference, and "may assess the same at a fixed sum if they or he shall think "fit."

Then in rule 5 comes the right of appeal: "In case either "party shall be dissatisfied with the award a right of appeal shall "lie to the committee of appeal of the Incorporated Oil Seed "Association provided it be claimed by notice given to the secre-"tary of the association not later than 12 o'clock noon on the "28th day after the date of the award (Sundays and public "holidays during that period not to count) and provided also that "the appellant at the same time pays to the association as a fee "for the appeal"—and then there is a provision as to fees.

Rule 6 is: "The appeal shall be determined by a board of "appeal consisting of four members of the committee of appeal "of the association in accordance with the regulations of associa-"tion for the time being of the Incorporated Oil Seed Association, "and the rules of the executive committee for the time being in "force. No member of the committee of appeal who has an "interest in the matter in dispute or who has acted as arbitrator "or umpire in the case and no member of the same firm or "company to which either of the arbitrators or the umpire shall "belong, shall vote on the question of the appointment of mem-"bers of the board of appeal or shall be appointed a member of "the board of appeal. Neither the arbitrators nor the umpire "who have acted in a dispute on one portion of a parcel nor any "member of the same firm or company to which either of the "arbitrators or the umpire shall belong, shall be entitled to vote "for the election of a board of appeal or be eligible for appoint-"ment on a board of appeal dealing with questions arising on the "remainder of the parcel in the following cases: (a) in a dispute "as to quality when there is only one sample and analysis repre-"senting the entire quantity available; (b) in a dispute as to "matters other than quality when any of the questions arising "is similar to any of those arising in the case in which they have "already acted as arbitrators or umpire; but, save as in these "rules hereinbefore provided, any member of a board of appeal "which has dealt with one such case shall be eligible to vote for

"or serve on a board of appeal dealing with a subsequent case "arising on the remainder of the parcel."

Rule 7: "The parties to an arbitration or an appeal to the "committee of appeal shall not be represented or appear by "counsel or solicitor on the hearing of such arbitration or appeal "unless in the sole discretion of the arbitrators, or umpire, as "the case may be, or board of appeal, the case is of special "importance or questions of law are likely to arise upon which "the opinion of the High Court of Justice may be required."

Rule 8: "The board of appeal shall confirm the award "appealed from unless not less than three of the members of "the board of appeal decide to vary such award. The board of "appeal may award the payment of the costs and expenses of "and incidental to the appeal but the appeal fee shall follow the "award unless three of the members of the board of appeal shall "direct otherwise. The board of appeal shall have the power to "vary an award." I do not think I need read the rest of that rule.

Then there is a provision in rule 9 about withdrawing an appeal.

I do not think there is anything more of importance in the remaining rules. Those are the rules set out in the standard contract, in accordance with which any arbitration is to be heard and determined.

The nature of the misconduct complained of by the buyers was this. It appears that for a matter of 50 years on any appeal to the board of appeal it has been the practice for the parties or those representing them to withdraw at the end of the hearing but for the umpire to remain with the board if they request him to do so. It is said that the object of that arrangement is to enable the umpire to tell the board whether the contentions raised before the board were the same as those raised before him, and also to tell the board, as I understand, what were the reasons for his decision. In this particular case that practice was followed, and one Barry, a director of the buyers, who represented them in this matter, unsuccessfully protested. It is said that the conduct of the board in conferring with the umpire, otherwise than in the presence of the parties, was, in the technical sense, "miscon-"duct," and sufficed to invalidate the award. That contention commended itself to Diplock J.

I should perhaps next refer, but at no very great length, to the evidence which was given on affidavit, the first affidavit being that of Barry. He says that he is a director of the Jubilee Coffee Roasting Co. Ltd., and he sets out the history of the contract which gave rise to the dispute, and he refers to the fact that the contract was on the Incorporated Oil Seed Association's form. Then, after narrating the course of the matter and bringing the story of the arbitration down to the appeal, he says this in paragraphs 11 and 12: "On October 31, 1957, the board so chosen "met to hear the appeal. I was present and called evidence

C. A.
1958
London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.
Jenkins L.J.

"and addressed the board in support of the appeal on behalf of "buyers. Sellers were represented, and their representative "addressed the board on behalf of sellers. I then replied on "behalf of buyers. The umpire, Mr. B. J. Dixon, from whose "award the appeal was being brought, was present throughout "the hearing. At the close of the hearing, when the represen-"tatives of the parties were about to retire, I inquired whether "the umpire was going to remain with the board of appeal after "the parties had retired, and I asked that, if the umpire was "going to remain, I might have permission to stay so as to hear "what he said. Mr. Pearson, the chairman of the board, said: "'I do not permit that.' I replied, 'In that case I leave under "'protest.' Mr. Pearson said, 'A note will be taken of your "'protest.' I then left the room, and Mr. Dixon remained with "the board. I was later informed by Mr. Dixon that, in answer "to a question from the board as to his reasons for his award, he "had addressed the board."

Then there is an affidavit of one Parkes, who was appointed arbitrator for the London Export Corporation, the sellers, and who, I understand, argued the sellers' case before the board of appeal. I think I need only refer to paragraphs 6 and 7 of his affidavit. He says in paragraph 6: "Subsequent events were "substantially as set out in paragraphs 9 to 13 (inclusive) of "Mr. Barry's said affidavit. I was present at the hearing before "the board of appeal and presented the sellers' case. The case "for the buyers was presented in the greatest detail by Mr. Barry "who addressed the board for about 45 minutes. I addressed "the board for a much shorter period relying upon the contract "and submitting that, in accordance with established custom of "the trade, the bill of lading was a good tender." Paragraph 7: "Mr. Barry's protest to the board was a complete surprise to me "and I did not associate myself with his protest, for I know from "my experience as a member of the board and from appearing "before it that it is the invariable custom of the board to ask "the umpire to remain. It is part of the established procedure "for conducting appeals under the rules of the Incorporated Oil "Seed Association and in my opinion is, or should be, well known "to all members of the association and all who use its contract "forms. I know that a similar practice exists in the case of "appeals under the rules of the London Oil and Tallow Associa-"tion. I have been for at least 12 years and am still a member "of the appeal committee of that association."

Then Mr. Pearson, chairman of the appeal court in this case, said this in paragraph 4 of his affidavit: "With regard to para-"graph 12 of the said affidavit my recollection is as follows: "After Mr. Barry had replied on behalf of the buyers I asked the "two parties if they had concluded their respective cases. To "this both Mr. Parkes and Mr. Barry replied in the affirmative. "I then asked the parties to withdraw and at the same time "asked the umpire to remain. This was in accordance with the

"custom which has prevailed in the trade for many years and "which is well known to all persons in the trade. I am able to "speak of this of my own personal knowledge as I have been in "the trade for 67 years and have been a member of the committee of appeal from 1908 to the present time. I have also "acted as an arbitrator in the trade throughout the same period." Then paragraph 5 is: "When I asked Mr. Dixon the umpire to "remain, Mr. Barry then said that he wished to remain and to be "present while the board heard Mr. Dixon. As chairman of the "board I informed Mr. Barry that this could not be permitted. "It is the customary practice in the Incorporated Oil Seed "Association to ask the umpire to remain alone with the board of "appeal. Mr. Barry protested that he had a right to be present "and hear the umpire and left under protest." Paragraph 6: "After the parties had withdrawn I asked the umpire whether "the evidence and contentions put before the board differed from "those which had been put before him. The umpire replied in "the negative. This was the only question put to the umpire and "upon hearing this answer the board of appeal proceeded to "consider the case and decide upon their award." Paragraph 7: "I would emphasize that nothing was said by the umpire after "the parties had left which raised any new matter which had "not been discussed when they were present. Had the umpire "raised any such new matter it would have been necessary for "the board to consider whether or not the parties should be "given a further opportunity of addressing the board upon such "new matter. This question did not, however, arise in the "present case."

Then there is an affidavit by the umpire, who confirms the account given by the chairman and says in paragraph 3: "The "only additional matter that I remember is that after I had "answered the chairman's question in the negative I added of "my own volition that in making my award I had taken the "view that the contract as amended was simply for shipment "by a named steamer. This point had been fully argued by the "parties both in the course of the arbitration before me and also "at the hearing before the court of appeal at which hearing I "was present. I was not in the room after the parties had withdrawn for more than about five minutes." I do not think I need read any further.

Then there was an affidavit by Barry in reply, but I do not think it is necessary to look at that. I think I should, however, mention the letter of February 5, 1958, in which it is stated that the umpire did, in fact, make the further statement to which he refers. This is a letter written, I understand, on behalf of the chairman for the purpose of clearing up that point, so that it can be taken that the umpire was right in what he said in paragraph 3 of his affidavit.

Those are the facts, and the question is whether on those facts the judge was right in holding that the award should be set

C. A.
1958
London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.
Jenkins L.J.

aside. As to the law, one can start with the principle that in the absence of some agreement between the parties to a submission such as this, either express or implied, conduct such as the appeal board's conduct in the present case in giving private audience to the umpire, and conferring with him in the absence of the parties, would undoubtedly have amounted to misconduct and would have sufficed to invalidate the award. I think that has never been disputed.

But the argument put for the appellant sellers is to this effect. It is said that, although there is nothing in the actual printed terms of the arbitration rules to authorize conduct of the kind objected to, nevertheless there is a custom of the trade, which can and should be read into these rules, authorizing the appeal board, at the conclusion of their hearing of the parties to the submission, to see the umpire, as they did, in the absence of the parties, and confer with him. That submission is alleged to be made good by the evidence, which showed that this practice, now objected to, has, in fact, been followed in all arbitrations of this kind for very many years. The chairman, with his long experience of this association, put it, I think, at 50 years. Therefore, it is said, there is an invariable practice of the board of appeal which has been followed for 50 years without objection on anyone's part. Mr. Donaldson urges that this term should be read into the printed rules, so as to make the printed rules accord with the real agreement between the parties; with the printed rules as they actually stand, everyone, so he says, has allowed for the special custom.

Mr. Fisher attacked that argument on a large number of grounds. He said in effect that the custom could not be relied upon because it was contrary to natural justice, contrary to public policy and unreasonable—I am not sure he did not also say unlawful—and tended to produce an unfair result, and was inconsistent with the contract.

The judge rejected all Mr. Fisher's reasons except the last one, namely, the inconsistency of the custom with the actual terms of the contract into which it was sought to import the custom, and on that ground the judge set aside the award. Accordingly, it is only necessary for us for the purpose of disposing of the present appeal to deal with that ground, and I find it unnecessary to express any view one way or the other on the remaining contentions put forward by Mr. Fisher.

I should next refer to the judgment. Diplock J. said[1]: "The umpire, says Mr. Fisher, is at least in no better position "than a disinterested stranger, for having made his award he is "functus officio, and although not interested in any financial "sense he is not free of the natural human interest in being "shown to be right. In the absence of a proved custom or trade "practice to the contrary, I should have no hesitation in acceding

[1] [1958] 1 W.L.R. 271, 280; [1958] 1 All E.R. 494.

"to this argument; but the real strength of the sellers' case lies "in the 'custom,' for in agreeing to arbitration by arbitrators "and umpires who must be members of the I.O.S.A., with an "appeal to a board of appeal also members of the committee of "appeal of that body, there must be taken to be incorporated in "the arbitration agreement an agreement to accept the associa-"tion's customary procedure except in so far as such procedure "is unreasonable or conflicts with the written terms of the "agreement."

He later said this[2]: "But while I am not prepared to say "that the practice is unreasonable, there remains the question "whether it is inconsistent with the terms of the written agree-"ment; and although I have evidence that the practice has gone "on for very many years and has been adopted by another well-"known trade association, I have no information as to how long "the arbitration rules appended to the I.O.S.A. contract forms "have been in their present form or as to whether the arbitration "rules of the other association are in identical form. There is "no express term in the arbitration agreement forbidding the "practice; and Mr. Donaldson has argued in the first instance "that a proved custom can be excluded only if it is consistent "with an express term. I think, however, that this is not "the correct view, and that a custom or trade practice may be "excluded by the express terms of the contract or by necessary "implication from those express terms." In the passage I have just read, the words, "Mr. Donaldson has argued in the first "instance that a proved custom can be excluded only if it is "consistent with an express term," should, I think, read, "only "if it is inconsistent with an express term."

Resuming where I broke off, the judge says: "This seems to "me to be well established. See *Hutton* v. *Warren*[3]; *L. J.* "*Sutro & Co.* v. *Heilbut, Symons & Co.*[4]; and *Produce Brokers* "*Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.*,[5] to which Mr. "Fisher referred.

"It is here that rule 6 of the arbitration rule appended to "the contract is important. The parties have made it clear, "not only that the umpire is not to be a member of the board "of appeal which hears the appeal from his decision, but also "that he is to have no voice even in the selection of that board; "and these prohibitions apply not only to the umpire himself "but to any member of the firm or company to which he belongs. "This at least suggests that it was the intention of the parties "that the umpire, having made his award, had to have nothing "to do with any appeal from it.

"There are other considerations which support this conclusion. "One of the commonest types of arbitration contemplated by

[2] [1958] 1 W.L.R. 271, 282.
[3] (1836) 1 M. & W. 466.
[4] [1917] 2 K.B. 348; 33 T.L.R. 359.
[5] [1916] A.C. 314, 324; 32 T.L.R. 115.

C. A.
1958
London Export Corporation Ltd.
v.
Jubilee Coffee Roasting Co. Ltd.
Jenkins L.J.

"the arbitration agreement is a quality arbitration. In such an "arbitration the umpire is not merely weighing expert evidence "given before him which may be repeated before the appeal "board and on which they can form their own judgment, but is "entitled to exercise his own expertise; and if he communicates "to the appeal board the views that he has formed as a result of "such exercise this is in no different category from any other "expert evidence given at the hearing before the appeal board, "for the appeal board re-hears evidence de novo and does not "hear the evidence given before the umpire save in so far as "the parties choose to re-present it before them. By rule 6 the "parties have expressly confided the decision of any appeal to "an appeal board appointed in the manner there set out and to "no one else. They have expressly provided that the umpire "and any person closely connected with him in business shall not "be a member of that board or have any voice in its selection. "He, together with the arbitrators, is, of all members of the "committee of appeal of the association, to be a stranger to "the board of appeal's decision. I think that it is a necessary "implication from this that the umpire is to have no influence, "direct or indirect, upon the board of appeal in reaching its "decision, and that the board of appeal have no right to seek "any information, whether of fact or of opinion, from him in the "absence of the parties, or to allow him to attend their delibera-"tions after the conclusion of the hearing. If they do so, that "is contrary to the implied terms of the arbitration agreement, "and it matters not whether the information he gives them in "fact has influenced their decision, or indeed, if they allow him "to attend their deliberations after the hearing, whether they "in fact ask him for any information at all."

That is the view of the judge on the question of inconsistency and it is a view with which I would express my respectful concurrence. I think it is borne out by the various authorities to which we were referred. I might conveniently first mention the passage in Smith's Leading Cases, 13th ed., vol. 1, p. 604, where there is a quotation from the judgment of Parke B. in *Hutton* v. *Warren*, where he says this [6]: "It has long been settled that in "commercial transactions extrinsic evidence of custom and usage "is admissible to annex incidents to written contracts in matters "with respect to which they are silent. The same rule has also "been applied to contracts in other transactions of life, in which "known usages have been established and prevail; and this has "been done upon the principle or presumption, that in such "transactions the parties did not mean to express in writing the "whole of the contract by which they intended to be bound, but "a contract with reference to those known usages."

Then I think a more important passage comes on p. 606, where this occurs: "From the above luminous judgment of

[6] 1 M. & W. 466, 475.

"Parke B., it may be collected, that evidence of custom or usage "will be received to annex incidents to written contracts on "matters with respect to which they are silent: (1) in contracts "between landlord and tenant; (2) in commercial contracts; (3) in "contracts in other transactions of life, in which known usages "have been established and prevailed. But that such evidence "is only receivable when the incident which it is sought to import "into the contract is consistent with the terms of the written "instrument. If inconsistent the evidence is not receivable and "this inconsistency may be evidenced: (1) by the express terms "of the written instrument; (2) by implication therefrom." The text continues: "The above rules were cited with approval by "Blackburn J. in *Myers* v. *Sarl*[7] and by Bray J. in *In re Sutro* "*and Heilbut, Symons & Co.*[8]"

In *Myers* v. *Sarl*[7] Blackburn J. expressed his complete approval of the passage in Smith's Leading Cases to which I have just referred. Then we were also referred to *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.*[9] As appears from the headnote, the actual question in that case was this: "Under "a clause in a contract referring to arbitration any dispute arising "under the contract it is competent to the arbitrator finally to "determine the existence of a custom affecting the rights and "obligations of the parties under the contract, where such custom "is not inconsistent with the terms of the contract." I would refer to the speech of Lord Atkinson where he says[10]: "Parke B. "in *Metzner* v. *Bolton*[11] says: 'It is quite certain that general "'usages are tacitly annexed to all contracts relating to the "'business with reference to which they are made, unless the "'terms of such contracts expressly or implicitly exclude them.' "And Lord Blackburn, in *Tucker* v. *Linger*,[12] speaking of an "agricultural usage in reference to a lease of land, expresses "himself thus: 'Now is this custom excluded by the terms of "'the agreement? The custom, when proved, is to be con-"'sidered as part of the agreement; and if the agreement be in "'writing, though the custom is not written it is to be treated "'exactly as if that unwritten customary clause had been written "'out at length. But if upon the face of the written agreement "'there is some clause which expressly says, "We exclude the "'"unwritten customary incident," of course it is excluded; "'and if there is any written clause which is inconsistent with it "'to such an extent as impliedly to exclude it, then, too, the "'unwritten clause must yield to and is excluded by the written "'one.'"

Mr. Donaldson places great reliance on *Tucker* v. *Linger*,[13] and, I think, mainly on the passage I have just read from Lord Atkinson's speech, as indicating that there must be some

[7] (1860) 3 E. & E. 306.
[8] [1917] 2 K.B. 348, 366, C.A.
[9] [1916] 1 A.C. 314.
[10] Ibid. 324.
[11] (1854) 9 Ex. 518, 521.
[12] (1883) 8 App.Cas. 508, 511.
[13] Ibid.

C. A.
1958
LONDON EXPORT CORPORATION LTD. v. JUBILEE COFFEE ROASTING CO. LTD.
Jenkins L.J.

provision which is clearly inconsistent with the incorporation of the alleged custom in the contract.

Lord Parker in *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* says this [14]: "In the present case the submission "covers all disputes arising out of the contract, including disputes "on questions of law. Questions as to the true meaning and "effect of the contract, with the possible exception of questions "as to the ambit of the submission itself, are therefore left to "the arbitrator. In order to ascertain the meaning and effect "of the contract the arbitrator is bound to admit evidence of and "consider all relevant facts. The existence or non-existence of "any state of circumstances, which, if proved, would be relevant "on any issue as to the true meaning and effect of the contract, "must consequently be within the submission. Clearly mercan-"tile contracts, such as the one in question, fall to be interpreted "by the light of any custom prevailing in the trade." Then Lord Parker quotes from the judgment of Parke B. in *Hutton* v. *Warren* [15] the passage cited in Smith's Leading Cases to which I have already referred.

Then there is the case of *Palgrave, Brown & Son Ltd.* v. *Owners of S.S. Turid.*[16] I would refer to that for these passages from the speech of Lord Birkenhead, then Lord Chancellor: "In "*Humfrey* v. *Dale* [17] Lord Campbell C.J. states the rule of law "as to the admission of evidence of a custom to contradict or "qualify the tenor of the terms of a written contract. He says: "'Neither collateral evidence nor the evidence of a usage of "'trade is receivable to prove anything which contradicts the "'tenor of a written contract,' and on the next page he says: "'Whether this evidence be treated as explaining the language "'used, or adding a tacitly implied incident to the contract "'beyond those which are expressed, is not material. In either "'point of view, it will be admissible unless it labours under the "'objection of introducing something repugnant to or inconsistent "'with the tenor of the written instrument.'"

Mr. Donaldson referred us to the case of *Humfrey* v. *Dale* [18] itself and I understood him to suggest that Lord Campbell's judgment as a whole was more favourable to his case than would appear from the extracts given in Lord Birkenhead's speech. But I think that Lord Birkenhead included in his quotations all that is really material for the present purpose. After the passage to which I have referred he went on to quote the following from Lord Campbell [19]: "To fall within the exception, therefore, of "repugnancy, the incident must be such as, if expressed in the "written contract, would make it insensible or inconsistent." I might add the example given by Lord Campbell [20]: "Thus, to "warrant bacon to be 'prime singed' adding 'that is to say,

[14] [1916] 1 A.C. 314, 327.
[15] 1 M. & W. 466, 475.
[16] [1922] 1 A.C. 397, 406.
[17] (1857) 7 E. & B. 266.
[18] Ibid.
[19] Ibid. 275.
[20] Ibid.

"'slightly tainted' (*Yates* v. *Pym*[21]) or to insure all the boats "of a ship and add 'that is to say, all not slung in the quarter' "(*Blackett* v. *Royal Exchange Assurance Co.*[22]) and other cases "of the same sort, scattered through the books, would be "instances of contracts in which both the two parts could not "have full effect given to them if written down; and, therefore, "when one part only is expressed, it would be unreasonable to "suppose that the parties intended to include the other also. "Without repeating ourselves, it will be found that the same "reasoning applies where the evidence is used to explain a latent "ambiguity of language."

I do not think there are any other authorities to which I can usefully refer. It appears to me, when all have been looked at, that the relevant principle or law cannot be stated with any greater precision than this: that an alleged custom can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.

Applying those general tests to the present case, I think that the judge in this case came to a right conclusion. The rules as to arbitration here indicate a two-stage arbitration: first, by the arbitrators or, upon the arbitrators disagreeing, by an umpire; and, secondly, by the appeal board at the instance of the dissatisfied party. That is to be the course of the proceedings. The umpire having heard and determined the case is functus officio and if either party is dissatisfied the matter then goes to the board of appeal. The proceedings contemplated are proceedings in those two stages, and, in my view, it would be repugnant to introduce a third stage in the form of a conference between the appeal board and the umpire. I think that view is borne out by the provisions of rules 6 and 7, which I have already read, and the former of which is particularly observed upon by Diplock J. in his judgment. In my view, the provisions of the standard form of contract relating to arbitration contain upon their true construction sufficient indications to support the conclusion that the arbitration in this case was to be carried out, in each of its two stages, in accordance with the ordinary manner of carrying out formal arbitrations as distinct from references of a less formal nature.

The matter is not one which admits of any great elaboration; but, in my view, as I have said, I think that the judge was right in refusing to enforce the alleged custom by reading it into these rules.

It follows, in my opinion, that this appeal should be dismissed, but I would add this. Speaking for myself, I have had considerable difficulty in regarding this case as a case of trade custom. A typical case of that sort is one in which there is an existing

[21] (1816) 6 Taunt. 446. [22] (1832) 2 C. & J. 244.

C. A.
1958
London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.
Jenkins L.J.

custom of a given trade which is commonly recognized by persons engaged in the relevant trade in making their contracts. Then it may very well be that, subject to proper limits, the existing trade custom must be read into the contract concerned. Knowing of the existence of the custom, the parties may well be taken to have intended to incorporate that custom in the express terms of the contract. But, here, the language of the document with which we are concerned, as I understand the history of this matter, was settled many years ago, and at the time when it was settled there was no question of there being any custom of the trade involved at all. The rules were simply set out as appropriate rules for the conduct of the arbitration, and that is all. But, for reasons which seemed good to them, the board of appeal of this association consistently committed the irregularity now complained of. They did it as a regular practice and, apparently, nobody objected.

Now it is said that because this misconduct has been going on without objection for so many years a trade custom justifying that departure has grown up, and everyone who signs a contract on the association's form binds himself not merely to submit to arbitration in accordance with the rules as set out in the document but also in accordance with this alleged practice. Thus the parties for whose benefit the irregularity is likely to operate, namely, the parties successful before the umpire, can rely upon this alleged custom as having become a custom, as distinct from a mere abuse, by long usage. This does not seem to me to be applying a custom of the trade. It appears to me to be setting up, as it were, a prescriptive right to commit this irregularity from arbitration to arbitration. It seems to me that what is really said is that the practice of seeing the umpire alone is an irregular practice but it has gone on for so long that nobody can now complain of it, and the parties to each contract containing a submission to arbitration in accordance with the rules must be deemed to have contracted on the footing that this irregularity is to be continued. That appears to me to be the true nature of this case, and I should so regard it, speaking entirely for myself, rather than as a case of trade custom in an ordinary sense. In my view, it is very difficult to accede to the contention of a party to one of these arbitrations that this irregularity ought to be supported merely because it has continued for so long. I do not see that, in signing one of these contracts, the parties should necessarily be taken to acquiesce in such irregularity. But I need not pursue that aspect of the matter further.

For the reasons I have earlier endeavoured to state, I think this appeal fails.

Parker L.J. I have come to the same conclusion. It seems to me clear that, apart from any question of practice or custom, the procedure adopted by the board of appeal in this case would amount to an irregularity, and, therefore, misconduct, justifying

the setting aside of the award. The rules clearly provide for a hearing with the parties and their representatives present, but by their conduct the board were in effect continuing that hearing in private in the absence of the parties. To that extent, the position would be not unsimilar to that which arose in *Errington* v. *Minister of Health*.[23]

It could also be put somewhat differently: that, in fact, the decision in this case would not be a decision of the board of appeal but a decision of the board of appeal plus a stranger.

The appellants rely here—and, of course, this is the strength of their argument—on the undoubted practice which has been in force for long years. They contend that any person contracting on the basis of the printed rules contracts also on the basis of that practice. It is said that the contracting parties must be presumed to have consented to that practice.

I will assume that that is so, but, nevertheless, it must always be subject to this, that there is nothing in the written contract which expressly or by necessary implication excludes that custom or practice.

I need not refer to the authorities in detail—my Lord has done that—but I would only refer to two passages. First, the passage in the judgment of Lord Campbell in *Humfrey* v. *Dale* in 1857[24]: "Neither collateral evidence nor the evidence of a "usage of trade is receivable to prove anything which contra-"dicts the tenor of a written contract." Then later he says[25]: "Whether this evidence be treated as explaining the language "used, or adding a tacitly implied incident to the contract "beyond those which are expressed, is not material. In either "point of view, it will be admissible unless it labours under the "objection of introducing something repugnant to or inconsistent "with the tenor of the written instrument."

Lord Blackburn in *Tucker* v. *Linger*[26] says this: "The "custom, when proved, is to be considered as part of the agree-"ment; and if the agreement be in writing, though the custom "is not written it is to be treated exactly as if that unwritten "customary clause had been written out at length. But if upon "the face of the written agreement there is some clause which "expressly says, 'We exclude the unwritten customary incident,' "of course it is excluded; and if there is any written clause which "is inconsistent with it to such an extent as impliedly to exclude "it, then, too, the unwritten clause must yield to and is excluded "by the written one."

There is no question in this case of there being any rule which expressly excludes this practice. The real contest between the parties is whether if one does seek to read in that practice it is inconsistent, as Lord Campbell says, with the general tenor of the instrument, or, as Lord Blackburn says, is impliedly excluded by it. For my part, I do not think, on listening to the argument

[23] [1935] 1 K.B. 249; 51 T.L.R. 44.
[24] 7 E. & B. 266, 273.
[25] Ibid. 274.
[26] 8 App.Cas. 508, 511.

C. A.
1958
London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.
Parker L.J.

on each side, that there is any contest between the parties as to that. The real question is as to its application to the particular facts of this case. For my part, I confess I entirely agree with the judge when he says [27]: "I think it is a necessary implication "from this that the umpire is to have no influence, direct or "indirect, upon the board of appeal in reaching its decision, and "that the board of appeal have no right to seek any information, "whether of fact or of opinion, from him in the absence of the "parties, or to allow him to attend their deliberations after the "conclusion of the hearing."

Putting it in my own words, it seems to me that here you have printed rules which provide that the board of appeal is to be wholly impartial, and they are to arrive at their award after a hearing at which the parties or their representatives are present. It appears to me that those two rules taken together must exclude impliedly a provision which says that they may decide the matter after an additional private hearing without the parties being present.

I agree, accordingly, with the judge and would dismiss this appeal.

Pearce L.J. I agree.

Appeal dismissed.

Solicitors: *Gaster & Turner; Coward, Chance & Co.*

F. R. D.

[27] [1958] 1 W.L.R. 271, 283.

[PRIVY COUNCIL.]

J. C.†
1958
June 3.

*PERCY SIMONS Trading as Acme Credit Services . . . . . Appellant;

and

ANTHONY EUGENE MIDDLETON GALE . Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Insurance — Marine — Warranty — Construction — Carriage of cattle —All arrangements for conversion of vessel made "at inception of "this insurance"—Meaning—When insurance cover was obtained— "All arrangements"—Construction.

The appellant, who had been asked by a partnership to advance £A23,000—against repayment under a letter of credit—for the purchase by them of a vessel, then lying at Noumea, New Caledonia, which they proposed to have converted at Brisbane for carrying cattle from Townsville, in Queensland, to Manila, entered into negotiations for insurance cover, and a certificate dated December 13,

† *Present*: Viscount Kilmuir L.C., Viscount Simonds, Lord Morton of Henryton, Lord Tucker and Lord Clyde.

1955, was issued to him by his brokers certifying that he was insured with Lloyd's underwriters "to pay a total loss of £A29,000 in the "event of the vessel not completing loading Townsville within 90 "days from sailing from Noumea from any cause whatsoever," subject to the following warranties, which were contained in two policies of insurance issued on April 25, 1956: "Warranted animals "available for loading. Warranted all arrangements for conversion "made at inception of this insurance."

There was a failure of the venture—the vessel sailed from Noumea to Brisbane but was never converted and never sailed from there to Townsville—for which the appellant was in no way responsible, but in answer to his claim under the policies the underwriters repudiated liability on the ground of breach of warranty, alleging that all arrangements for conversion had not been made at the inception of the insurance:—

Held, (1) that as a matter of construction "inception of this "insurance" meant the moment of time when insurance cover was obtained and not the date when the vessel sailed from Noumea. The certificate and the correspondence relative to effecting the insurance justified the inference that cover had been secured by December 13, 1955, and that was the material date for the purpose of ascertaining whether there had been a breach of the warranty as to arrangements for conversion.

(2) That it was difficult to envisage what, short of a contractual arrangement, would be the minimum requirements to comply with the warranty "all arrangements for conversion" of the vessel made. The word "all" precluded a construction which would be satisfied by "some arrangement." On the facts the warranty had not been complied with at the decisive date, December 13, 1955. Further, if something less than a contractual arrangement would suffice, something more definite and precise than the tentative undertaking given by the Brisbane ship repairers—"we can fit the ship . . . [we] "do not give firm quotations as materials, wages, etc., vary"—would be required.

Judgment of the Supreme Court of New South Wales in Commercial Causes (Walsh J.) affirmed.

APPEAL (No. 2 of 1958), by leave of the Supreme Court of New South Wales, from a judgment of Walsh J. sitting as the Supreme Court in Commercial Causes in favour of the respondent (defendant) given on December 10, 1957.

The following facts are taken from the judgment of the Judicial Committee: The action was brought by the appellant under two policies of insurance dated April 25, 1956, for amounts of £A22,000 and £A7,000 respectively, subscribed by underwriting members of Lloyd's and members of the Institute of London Underwriters. One of the policies was subscribed by the respondent to the extent of his proportion and in accordance with the usual custom he was named by the respective underwriters as the person to be sued upon the policies.

The circumstances in which the policies were issued were as follows. One Salvador Brucelas, of Manila, and his partner Martinez were proposing to buy a vessel called the *Cap Tarifa* lying in the port of Noumea, New Caledonia, for the purpose of transporting cattle from Townsville, Queensland, to Manila. For that purpose an irrevocable letter of credit for 160,000 dollars had

J. C.
1958
Simons
v.
Gale.

been established by Brucelas in Sydney in favour of New Zealand Loan and Mercantile Agency Co. Ltd., who were to be the vendors of the cattle. Brucelas asked the appellant, through his secretary, Trevis, to advance him the sum of £A23,000 to purchase the vessel. That sum would be repayable out of the proceeds of the letter of credit. The vessel would require to be converted for the carriage of cattle. It was anticipated that the vessel would sail from Noumea about December 20, 1955, arrive in Brisbane about December 27, 1955, for conversion, sail from Brisbane on completion of conversion about January 11, 1956, arrive at Townsville about January 14, and, after loading the cargo of cattle, would sail for Manila about January 18, 1956. The appellant accordingly got in touch with insurance brokers in Sydney with a view to obtaining insurance cover to enable him to finance the venture. The cover required was in the following terms: "If in the event "of the ship not completing loading of cattle at Townsville within "90 days from sailing from Noumea from any cause whatsoever "that this company be paid an amount approximating £A27,000." This was subsequently increased to £A29,000. Cables passed between brokers in Sydney and London as a result of which it was ascertained that the insurance could be effected subject to the following warranties: "Warranted animals available loading, and "all arrangements for conversion vessel made at inception of this "insurance."

A certificate dated December 13, 1955, was issued to the appellant by Edward Lumley & Sons (N.S.W.) Pty. Ltd., the appellant's brokers, certifying that he was insured with Lloyd's underwriters "to pay a total loss of £A29,000 in the event of the "vessel not completing loading Townsville within 90 days from "sailing from Noumea from any cause whatsoever." Subject to the following condition: "Warranted animals available for loading "and all arrangements for conversion of vessel made at inception of this insurance." In the policies, issued on April 25, 1956, the warranties read as follows: "Warranted animals available for "loading. Warranted all arrangements for conversion made at "inception of this insurance."

The *Cap Tarifa* did not sail from Noumea until January 10, 1956; she berthed at Brisbane on January 16, 1956, but owing to differences of opinion between Brucelas and his partner the vessel was never converted and never proceeded to Townsville.

It was common ground that the appellant was in no way responsible for the failure of the venture and that but for the alleged breach of warranty upon which the respondent relied and subject to proof of his insurable interest at the date of loss he would be entitled to recover the full amount of the insurance.

The respondent repudiated liability on the ground that all arrangements for conversion had not been made at the inception of the insurance.

Walsh J. held that the appellant should recover nothing from the respondent.

1958. April 29, 30. *Sir Garfield Barwick Q.C.* (of Australia) and *Malcolm Hardwick* for the appellant.

John Megaw Q.C. and *C. T. Bailhache* for the respondent.

The following cases were referred to in argument: *Macaura* v. *Northern Assurance Co. Ltd.*[1]; *Walker* v. *Walker.*[2]

June 3. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: The ground of the respondent's repudiation raises three questions: (1) To what point of time do the words "at inception of this "insurance" refer? (2) What is the meaning of "all arrange-"ments"? (3) Upon the evidence was the trial judge right in holding that the appellant was in breach at the material date?

At the trial a further question was debated, viz., on whom lay the onus with regard to breach. It is not now, however, disputed that the judge was correct in holding that the onus was upon the respondent.

On the first point Walsh J. held that the inception of the insurance meant the moment of time when insurance cover was obtained and not, as contended by the appellant, the date when the vessel sailed. Their Lordships feel no doubt as a matter of construction that this is correct. The language is, in their view, quite inappropriate to describe "the date of sailing" which could and no doubt would have been the words used if this had been the date intended. In so deciding it is not necessary to express any opinion on the submission made by counsel for the respondent that on the language of these policies, and having regard to the nature of the insured venture, the risk attached from the moment the contract was made and not from the date of sailing.

With regard to the ascertainment of the precise date on which a contract of insurance was concluded the judge said, after considering the documentary evidence upon which the parties were content that this commercial case should be decided: "In my "opinion what the plaintiff warranted was that all arrangements "for conversion had been made at the time when the certificate "was issued. I think it is arguable that the reference was to an "earlier time, namely, the time when application for the insur-"ance was first made. This would be on or about December 7. "However, having regard to the views I have formed upon other "questions yet to be discussed it makes no practical difference "whether the critical date is December 7 or 14; and it is sufficient "for me to hold that the policy required that at the latest the "arrangements should have been made by December 14."

The material upon which the judge arrived at this conclusion consisted of the certificate given to the appellant by his brokers dated December 13 together with copies of cables passing between the brokers in Sydney and London. Counsel for the appellant

[1] [1925] A.C. 619; 41 T.L.R. 447. [2] (1937) 57 C.L.R.(Aus.) 630.

J. C.
1958
Simons
v.
Gale.

criticized the judge's conclusion on the ground that the certificate given by the brokers was not binding on the respondent and was not a cover note or equivalent thereto, and that the cables annexed thereto together with the dates appearing in the schedules to the policies showing the different proportions of the risk taken by the different underwriters were insufficient to warrant an inference that there was a concluded contract by December 13 or 14, 1955. It is clear from the judgment that the judge fully appreciated the nature of the certificate and merely regarded it as part of the material available to him from which he was entitled to draw an inference as to the date upon which insurance cover had been obtained. Looking at this material, and referring in particular to the last cable from London which is dated December 14, 1955, and reads "Captarifa arranged without additional exclusion advise "sailing date Noumea" and to the letter of the same date written by the appellant to the secretary of the Exchange Control in which he says "We have insured against loss from any cause "whatsoever should the cattle not be loaded within 90 days from "date of purchase of the boat" justifies the inference that cover had been secured by December 13, 1955, and that this was the material date for the purpose of ascertaining whether there had been a breach of the warranty.

Turning now to the meaning of the words "all arrangements "for conversion of vessel," their Lordships find great difficulty in envisaging what would be the minimum requirements to comply with this warranty short of a contractual arrangement. The word "all" is important and precludes a construction which would be satisfied by "some arrangement." This is the conclusion reached by the trial judge, who said: "The conclusion to "which this evidence brings me is that what took place on "December 14 was no more than exploratory of an arrangement "later intended to be made for the carrying out of the work. I "think it is clear that at that time neither party became con-"tractually bound to proceed with the transaction. It has been "submitted that the warranty does not require that there should "have been a binding contract for the doing of the work. Even "if this be so, in my opinion the warranty as to making "'all arrangements' for conversion required something more "definite and precise than the tentative undertaking given by "Brown and Broad Ltd. on December 14."

In arriving at this decision the judge had given careful consideration to the contemporary correspondence and certain statutory declarations which had been supplied to the respondent by the appellant before the trial and which were put in evidence by the respondent. These documents showed that by December 13 no arrangement of any kind had been made for the conversion of the ship, but that on December 14, Boal, on behalf of Brown and Broad Ltd., ship repairers of Brisbane, in answer to a telephone inquiry from Trevis on behalf of the appellant whether his company would fit the ship to carry cattle said: "We can fit

"the ship if it arrives about that time [i.e., the first week in "January]." Trevis said, "Can we have a quotation?" To which Boal replied: "Brown and Broad do not give firm quota-"tions as materials, wages, etc. vary." There the matter rested until December 23.

It is clear, therefore, that if, as their Lordships think, the decisive date was December 13, there can be no question but that the warranty had not at that date been complied with. If, however, the time be extended to December 14 it is equally clear that by then no contractual obligation had been incurred by either party. If something less than a contractual arrangement would suffice their Lordships would agree with the trial judge that something more definite and precise than the tentative undertaking given by Brown and Broad Ltd. would be required.

Their Lordships are accordingly in agreement with the conclusions reached by the trial judge on these issues.

It is in these circumstances unnecessary to express any opinion whether the appellant had discharged the burden of proving an insurable interest at the date of loss or whether in view of the course of the trial this was ever a live issue.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Botterell & Roche; Ince & Co.*

C. C.

[CHANCERY DIVISION.]

* *In re* FILBY BROS. (PROVENDER) LTD.

1958
May 12.
Roxburgh J.

[No. 00505, 1958.]

Company—Winding up—Petition—Petition presented in county court—Subsequent petition presented in High Court—Concurrent jurisdiction—Transfer of proceedings to High Court—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 219.

On April 14, 1958, the A Co. presented a creditor's petition to wind up Filby Bros. (Provender) Ltd. in the Colchester county court. The petition was ordered to be advertised on April 18, 1958, and to be heard on May 14, 1958. Several creditors gave notice to support the petition but no creditor gave notice to oppose. On April 16, the B Co. presented a creditor's petition to wind up Filby Bros. (Provender) Ltd. in the High Court. The A Co. then gave notice to the B Co. that they would appear and support the High Court petition subject to the county court petition, and filed an affidavit in the High Court setting out the facts concerning the county court petition.

On the hearing of the High Court petition on May 12, 1958, it was conceded that the county court had jurisdiction to wind up the company:—

1958

Filby Bros. (Provender) Ltd., *In re.*

Held, (1) that where two petitions were presented, one in the High Court and one in the county court, for winding up the same company, whichever petition was the earlier in date, the difficulty must be resolved in the High Court; that once the position was discovered, the proceedings should continue as to both petitions, and that provided the parties brought the facts to the notice of the High Court judge by affidavit, it was for him to decide what the next step in the proceeding under section 219 of the Companies Act, 1948,[1] should be.

(2) That in the present case the proceedings in the Colchester county court should be immediately transferred to the High Court.

Petition to wind up.

On April 14, 1958, the British Oil and Cake Mills Ltd., a judgment creditor in the sum of £622 4s. 8d. of Filby Bros. (Provender) Ltd., presented a petition in the Colchester county court to wind up the company. The petition was advertised on April 18, 1958, and was ordered to be heard on May 14, 1958. Several creditors of the company (whose debts in all amounted to some £1,817 6s. 2d.) gave notice to support the petition. No creditor of the company had by the date of hearing of the present case, i.e., May 12, 1958, given notice to oppose the petition. On April 16, 1958, the British Feeding Mills Co. Ltd., presented a creditor's petition to wind up Filby Bros. (Provender) Ltd. in the High Court. British Oil and Cake Mills Ltd. then served a notice on British Feeding Mills Co. Ltd. as follows: "Take notice that "the British Oil and Cake Mills Ltd., a creditor for £622 4s. 8d., "intend to appear on the hearing of the petition and support the "petition, subject to the petition of the Colchester petitioners "presented to the Colchester county court on April 14, 1958."

The High Court petition came on before Roxburgh J. on Monday, May 5, and he adjourned it for an affidavit to be filed on behalf of British Oil and Cake Mills Ltd. informing the court of all details concerning the Colchester petition, set out above.

Raymond Walton for the High Court petitioner.

Michael Wheeler for the county court petitioner.

[1] Companies Act, 1948, s. 219: "(1) The winding-up of a company "by the court in England or any "proceedings in the winding up may "at any time and at any stage, and "either with or without application "from any of the parties thereto, be "transferred from one court to "another court, or may be retained "in the court in which the proceed-"ings were commenced although it "may not be the court in which they "ought to have been commenced. (2) "The powers of transfer given by the "foregoing provisions of this section "may, subject to and in accordance "with general rules, be exercised by "the Lord Chancellor or by any "judge of the High Court having "jurisdiction under this Act, or as "regards any case within the juris-"diction of any other court, by the "judge of that court. (3) If any "question arises in any winding up "proceeding in a county court which "all the parties to the proceeding, or "which one of them and the judge "of the court, desire to have deter-"mined in the High Court, the judge "shall state the facts in the form of "a special case for the opinion of the "High Court, and thereupon the "special case and the proceedings or "such of them as may be required "shall be transmitted to the High "Court for the purposes of the "determination."

No cases were cited in argument.

ROXBURGH J. In this case it is common ground that the Colchester county court has jurisdiction to wind up Filby Bros. (Provender) Ltd., and on April 14, 1958, the British Oil and Cake Mills Ltd. presented such a petition in the Colchester county court. That petition was ordered to be advertised on April 18, 1958, and to be heard on May 14, 1958, that is to say, next Wednesday. May I say that everything which has been done in the Colchester county court appears to have been done in due order; amongst other things—and this is very important—a considerable number of creditors have given notice to support that petition. Fortunately for me, no creditor has given notice to oppose it so far in the Colchester county court, and though the list is not yet finally closed in that court, I have every reason to suppose that no such notice will be given. I am prepared, therefore, to take a certain risk, which should not be regarded as a precedent; I take it with a view to trying to save still further costs in this difficult and technical matter. No notice of opposition would be relevant in this particular case unless it was by a creditor whose debt exceeded the combined totals of the debts of all the creditors who support the petition. In the event of such a notice of opposition being given in the Colchester county court, an immediate application must be made to me, but I think it is such an unlikely event that I am prepared in this particular case to ignore the possibility. I want to make it quite plain, however, that it does not follow that such a possibility will be ignored in other cases.

That being so, on April 16, 1958, the petitioners in the High Court, British Feeding Mills Co. Ltd., presented the High Court petition; they did not in fact know, and they could not from any advertisement have known, of the Colchester petition because it was not advertised until two days later. It so happened that this petition came before me last week; that is to say, before the Colchester petition was due for hearing. That would not necessarily always be so, though it would generally be the case.

What the Colchester petitioner did was to serve a notice on the High Court petitioner in this form: "Take notice that the "British Oil and Cake Mills Ltd., a creditor for £622 4s. 8d., "intend to appear on the hearing of the petition and support "the petition, subject to the petition of the Colchester petitioners "presented to the Colchester county court on April 14, 1958." Although I am not in this case going to penalize them in regard to that, I am quite sure that, in the circumstances, that was not the proper notice to give. They did not in fact file any affidavit, and when the matter came before me I adjourned it for an affidavit. So far it seems to me that I must have been right, because, first of all, the High Court cannot take judicial notice of what is going on in the Colchester, or any other, county court; it has no means of informing itself of such matters; and, secondly,

1958

FILBY BROS. (PROVENDER) LTD., *In re.*

Roxburgh J.

as counsel was not himself present in the Colchester county court, he could only speak from hearsay and, of course, that is not a proper manner of putting evidence before the court. In those circumstances, therefore, it seems to me that anybody who is taking some part in a High Court petition, and who is aware of a county court petition, has the duty to put the facts in an affidavit. Moreover, he has a duty to make up his own mind as to what he wants, for it is quite clear that no court could sensibly allow both petitions to proceed in different courts. It is also clear that the only question which arises when such a conflict comes into existence is whether the county court proceedings are to be transferred to the High Court or whether the High Court proceedings are to be transferred to the county court, so that the matter can thenceforth proceed on both petitions in the same court. It is important always to bear in mind that the first petition to be presented—not the first to be heard—is in many respects the crucial petition because so many transactions are referred to that date for the commencement of the winding up. Therefore, it would never do to extinguish the earliest in date; the normally convenient course would be to keep both petitions alive but to deal with them as one as soon as the situation is revealed.

I have thought a good deal about what is the right procedure. Nothing is to be found, either in the Act or in the rules, which gives any real clue. One thing that is clear is that the question must be solved in the High Court and not in the county court, whichever be the earlier petition in date, because if I rightly read rule 46 of the Companies (Winding Up) Rules, 1949,[1] the county court judge cannot transfer the county court proceedings to the High Court, and per contra the High Court judge can either keep them or transfer them to the county court. In those circumstances, therefore, the only court in which this knotty problem can be adequately solved is the High Court. The difficulty, of course, is that when the petition comes before the court for the first time, not everybody may know anything about it. There may be people—and there were in this case—who gave notice in Colchester who had never heard of the High Court petition, and who did not appear before me in any sense last Monday. At one time I thought that there ought to be a duty on somebody to take out a summons for a transfer, but now I do not think so. I think that if and when this unusual situation arises, the judge himself must sort out the tangle at the first

[1] Companies (Winding Up) Rules, 1949, r. 45: "The judge of the High "Court may at any time, for good "cause shown, order proceedings in "any court other than the High "Court to be transferred to the High "Court, or any proceedings in the "High Court to be transferred from "the High Court to any other court."

R. 46: "The judge of any court, "other than the High Court or a "Palatine Court, may, at any time, "for good cause shown, order any "proceedings which have been com-"menced or are pending in his court "to be transferred to any court which "has jurisdiction to order the wind-"ing up of a company, not being the "High Court or a Palatine Court."

hearing at which the evidence is available—that is today in this case—in accordance with the circumstances before him.

Under section 219 of the Companies Act, 1948, it is plain that the judge can exercise this power without any application from any of the parties thereto, and I think it is for him to exercise his own discretion as to what, if any, steps ought to be taken to bring to the notice of the persons who have given notice in one or other of the courts, the situation which has in fact arisen. I think those steps may be expected to differ according to the circumstances of each particular case. Therefore, I do not propose to lay down any general proposition beyond this: that where this difficulty arises, once it is discovered, the proceedings should continue as to both petitions; secondly, that the difficulty must be resolved in the High Court, and thirdly, that provided the parties bring the facts to the notice of the judge by affidavit, it will be for him in the first instance to decide what shall be done next. There I leave the general proposition.

In this particular case the Colchester petitioners have not only put the facts on record, which they had to do, but they have done something very useful which perhaps they did not have to do; namely, they have succeeded in finding out the views of all the Colchester supporting creditors except one, who has not indicated any view, but he is certainly not one of the largest creditors. In those circumstances, therefore, I think it is safe for me in this particular case to act without further consultation with, or information to, the persons who have given notice in Colchester, and it so happens that nobody has given notice in London, except the Colchester petitioners. Therefore, I feel able to make an immediate order for transfer of the Colchester proceedings to London. The order will operate immediately and, as time is very short, I shall request the registrar to communicate at once with the registrar of the Colchester county court informing him that this has happened, and that in due course he will get a sealed copy of the order, as provided for by the rules. Also, notice must be given by somebody—I do not know by whom at the moment—to the Colchester supporting creditor, who has not communicated with the Colchester petitioner, of the change of venue. Thirdly, Mr. Wheeler will accept the obligation of informing the Colchester supporting creditors, who have been in contact with him. The company does not appear, and it is a plain case for a winding-up order, which I now make.

With reference to costs: It seems to me that on this occasion when nobody was at fault because the jurisdiction is concurrent and nobody acted with the knowledge of the other petitioner—both petitions were presented independently—and where the procedure is obscure, I must, up to the moment of this order (which is made on both petitions) give a double set of costs; that is to say, costs in the High Court in the usual form of order, and costs in the

1958

Filby Bros. (Provender) Ltd., *In re.*

Colchester county court in the usual form of order, to be paid out of the assets in the normal way.

Order accordingly.

Solicitors: *Cosmo Cran & Co.; Hatchett, Jones & Co. for Beaumont & Sansom, Colchester.*

P. P.

[CHANCERY DIVISION.]

1958 *May* 19.

Roxburgh J.

* *In re* CASTIGLIONE, ERSKINE & CO. LTD.

[No. 00327 of 1958.]

Company — Capital — Reduction — Conditional resolution — Resolutions that upon "reductions of capital taking effect" operations to take place not requiring sanction of court preceding operation requiring sanction of the court—All operations requiring sanction of the court to be treated as preceding conditional resolution—Not correct procedure when operations not requiring sanction of court part of scheme of reduction of capital—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 61, 66, 67, 69.

A petition for the confirmation of the reduction of the capital of a company from £25,000 to £4,750 which, by a special resolution of the company, was to be effected by: (a) repaying to the preference shareholders the whole of the capital paid up thereon and cancelling such preference shares; (b) paying to holders of the 18,520 issued ordinary shares capital paid up thereon to the extent of 15s. per share thereby reducing the nominal value of such shares to 5s. "and upon the foregoing reductions of capital "taking effect"; (c) subdividing each of the 480 unissued ordinary shares of £1 each in the capital of the company into 1,920 ordinary shares of 5s. each; and (d) cancelling and extinguishing 1,440 of the unissued ordinary shares of 5s. each resulting from the aforesaid subdivision; and (e) cancelling and extinguishing the 1,000 "A" shares numbered 1 to 1,000 both inclusive.

Operations under (a), (b) and (e) required the sanction of the court under section 68 of the Companies Act, 1948, while those under (c) and (d) could be carried out under section 61 of the Act [1] without the sanction of the court:—

Held, that since, by reason of section 69 (2), there was no reduction of capital until the order of the court and the minute embodying it were registered, the words in the resolution "and

[1] Companies Act, 1948, s. 61: "(1) A company limited by shares ". . . . and having a share capital, "if so authorised by its articles, may "alter the conditions of its memo- "randum as follows, that is to say, "it may . . . (*d*) subdivide its "shares . . . into shares of smaller "amount than is fixed by the memo- "randum . . . (*e*) cancel shares "which, at the date of the passing "of the resolution in that behalf, "have not been taken or agreed to "be taken by any person, and "diminish the amount of its share "capital by the amount of the shares "so cancelled. . . . (3) A cancellation "of shares in pursuance of this sec- "tion shall not be deemed to be a "reduction of share capital within "the meaning of this Act."

"upon the foregoing reductions of capital taking effect" was asking the court to sanction a conditional reduction by (e); and (e) should logically have followed (a) and (b), when those words preceding (c) and (d) would be normal and correct, but in the circumstances the resolution would be treated as having that effect to avoid the necessity for the company to pass a further resolution.

In re Salinas of Mexico [1919] W.N. 311 applied.

Per curiam: Where something which can be done without the sanction of the court under section 61 is part of a scheme for reduction of capital, it should be done as part of the scheme and not under section 61.

PETITION.

Castiglione, Erskine & Co. Ltd. by this petition asked the court to confirm a reduction of capital in accordance with a special resolution passed on April 11, 1958, under section 141 of the Companies Act, 1948, at an extraordinary general meeting of the company. The resolution was in the following terms: "That the "capital of the company be reduced from £25,000 divided into "5,000 preference shares of £1 each, 18,520 ordinary shares of "£1 each, 480 ordinary shares of £1 each and 1,000 'A' shares "of £1 each to £4,750 divided into 19,000 ordinary shares of 5s. "each and that such reduction be effected by: (a) repaying to the "holders of the preference shares the whole of the capital paid up "thereon and cancelling such preference shares upon terms that "the dividend thereon shall be payable down to the date of "repayment; and (b) paying to the holders of the 18,520 issued "ordinary shares capital paid up thereon to the extent of 15s. "per share thereby reducing the nominal value of such shares to "5s. [these were the words on which the present question arose] "and upon the foregoing reductions of capital taking effect: "(c) subdividing each of the 480 unissued ordinary shares of £1 "each in the capital of the company into 1,920 ordinary shares of "5s. each; and (d) cancelling and extinguishing 1,440 of the "unissued ordinary shares of 5s. each resulting from the afore-"said subdivision; and (e) cancelling and extinguishing the 1,000 "'A' shares numbered 1 to 1,000 both inclusive now registered in "the name of Margareta Katherina Castiglione as nominee for "the company."

J. G. Monroe for the company.

The case referred to in argument is cited in the judgment.

ROXBURGH J. This petition has caused me some trouble on purely technical grounds, but they are, I think, of sufficient importance, being matters which quite often occur, for me to explain my difficulty and to suggest why I think this particular form of resolution is open to objection.

[His Lordship read the relevant resolution, and continued:] The point is this: sub-headings (c) and (d)—that is to say, the subdivision of the shares and the cancellation of unissued shares—are operations which the company can carry out under section 61

1958

CASTIGLIONE, ERSKINE & CO. LTD., *In re.*

Roxburgh J.

of the Companies Act, 1948, without confirmation of the court; and sub-heading (e), the cancellation and extinguishment of the 1,000 "A" shares registered in the name of Margareta, is an operation which cannot be carried out except by confirmation of the court. That is the point of the distinction, a point which, as far as I know, has always been observed in practice hitherto by the forms of orders which have been made.

The case at first sight appeared to raise a question whether the court could, and if it could, would, sanction a conditional reduction. That is certainly what the language of the resolution suggests, "upon the foregoing reductions of capital taking effect" cancelling the 1,000 "A" shares; but closer analysis has led me to the conclusion that that is not really the point at all; if it had been, I could not have confirmed this reduction, but the resolution is logically really incorrect. Though the Act uses some somewhat ambiguous language at times, I think that the true effect of sections 65 to 69 inclusive is that there is no reduction of capital until the registration of the approved minute, whereas, of course, a resolution (which is not subject to the reduction procedure) takes effect as soon as it is passed unless it in itself contains some language putting off its operation. If it contains such language, there is nothing invalid about that.

The point is not wholly clear, because section 66 (1) provides: "Subject to confirmation by the court, a company . . . may . . . "reduce its share capital," and therefore, prima facie, one would have thought that the reduction, if confirmed was made by the passing of the resolution; but, of course, that is not the whole story.

Section 67 begins with that conception, when it provides: "(1) "Where a company has passed a resolution for reducing share "capital, it may apply to the court for an order confirming the "reduction." That, of course, is consistent with the view that one would take of section 66, but from then on the Act departs to quite a new conception, because section 67 (2) speaks of "the "proposed reduction of share capital," and that, of course, is quite inconsistent with the view which I should have formed of sections 66 and 67 (1) in isolation.

Then section 68 might be thought to go back to the original conception, but section 69 is so clear as to be unambiguous: "(1) "The registrar of companies, on production to him of an order of "the court confirming the reduction of the share capital of a com-"pany, and the delivery to him of a copy of the order and of a "minute approved by the court . . . shall register the order "and minute." Subsection (2) provides: "On the registration "of the order and minute, and not before, the resolution for "reducing share capital as confirmed by the order so registered "shall take effect." There is really no ambiguity about that subsection, and, therefore, any reasoning which might be founded on the earlier subsections cannot possibly prevail in the light of that clear and relevant proposition.

That shows that this resolution in (e), qua the cancellation of the issued shares, is misconceived, because the position is this: there is no reduction until the order and the minute are registered, and therefore, if this reduction is to take effect at all, it must take effect precisely at the same moment as the reductions provided for in (a) and (b). I see no reason to introduce some artificial punctum temporis; I prefer the other phrase, uno ictu. Therefore, (e), which relates to the cancellation of the issued shares, should have followed (b) and preceded the words "and "upon the foregoing reductions of capital taking effect." On the other hand, when I consider the question of subdivision of shares and cancellation of unissued shares, those are matters which the company can do without the confirmation of the court, and therefore, the introductory words "upon the foregoing "reductions of capital taking effect" become apposite and normal. That is logically correct.

That situation and how to deal with it was present to the minds of Astbury J. and Lawrence L.J., because something like this point arose in *In re Salinas of Mexico*.[1] In that case a minute was approved which, having dealt with the actual reduction confirmed by the court, continued with these words: "A "special resolution of the company has been passed and con- "firmed [that related to the old procedure in relation to special "resolutions] to the effect that on such reduction taking effect the "capital of the company as so reduced be subdivided." There is no question there of cancelling unissued shares, but it deals with the precise point so far as subdivision is concerned, and that is logically right. It is perhaps an impertinence for me to say so when it was laid down in 1919 by two such eminent judges, and nobody has ever questioned it since. It is the practice which is nowadays invariably followed, and I hope may continue to be followed.

I do not find it necessary to send this back. What might have happened had I been disposed to reject reductions (a) and (b), I do not know; but I am not going to make any obiter dictum about what might have happened in hypothetical events. What is quite clear is that, as I am about to sanction (a) and (b), the intention of the resolution plainly was that I should also sanction (e), and I am not therefore going to put the company on this purely technical question to the expense of passing another resolution. On the other hand, I attach importance to the correct procedure being followed, and I am not sure that I shall be so indulgent if this point occurs again. That is why I have considered it at some length.

I think that there will have to be a new special form of order for this particular case, but I say this in amplification of what I have just said, before something special is done in this case; I have already said that the cancellation of the unissued shares can be done under section 61. When it is part of a scheme of

[1] [1919] W.N. 311.

1958

Castiglione, Erskine & Co. Ltd., *In re.*

Roxburgh J.

reduction which has to be sanctioned by the court, it is usual and convenient not to treat it as a separate matter being dealt with under section 61 but as part of the general scheme of reduction. I hope, therefore, that in future, even where it is a thing that can be done under section 61, it is not so done, but done as part of the general scheme of reduction, and that that practice will be followed.

There has to be a special form of order in this case. The difficulty is that the order normally states the result of the whole transaction, without explaining how it has come about. In the ordinary case the minute would show that the court had sanctioned a reduction to £4,750. In this case the order would only show a reduction to £5,110, which would be extremely misleading. Therefore, some recitals must be devised for the order so that it can be explained how the capital has got down to £4,750. That is not the usual way in which this is done, but I see no technical difficulty in making a special form of order for this case, whereas I do not think I can go so far as to jettison any more of the resolution which had been passed.

I think that the minute [2] must be brought into company chambers. I have no doubt it will be dealt with there. If there is any difficulty about it, it can be mentioned to me.

Order accordingly.

Solicitors: *Linklaters & Paines.*

I. G. R. M.

[2] The following minute was approved by the court: The capital of Castiglione, Erskine & Co. Ltd. was by virtue of a special resolution and with the sanction of an order of the High Court of Justice dated May 19, 1958, reduced from £25,000 divided into 5,000 preference shares, 19,000 ordinary shares and 1,000 "A" shares all of £1 each to £5,110 divided into 18,520 ordinary shares of 5s. each and 480 ordinary shares of £1 each. At the date of the registration of this minute all the said ordinary shares of 5s. each have been issued and are deemed to be fully paid up. The said special resolution provides that on such reduction of capital taking effect the capital is to be further reduced to £4,750 by the sub-division of the said 480 ordinary shares of £1 each into 1,920 ordinary shares of 5s. each and the cancellation of 1,440 of such shares. The capital of the company is accordingly on the registration of this minute £4,750 divided into 19,000 ordinary shares of 5s. each of which 18,520 have been issued and are deemed to be fully paid up and the remaining 480 are unissued.

[PROBATE, ETC., DIVISION.]
[SCARBOROUGH DISTRICT REGISTRY.]

* WARD *v.* WARD.

1957
Sept. 20.
1958
Feb. 10.

Mr. Commissioner McKee.

Husband and Wife—Cruelty—Intention to injure—Frigidity—Wife's deliberate refusal to have children ripening into complete refusal of sexual intercourse—Knowledge of injurious effect of refusal on husband.

The parties were married in 1953, the husband having made clear to the wife his desire to have children. After the marriage the wife constantly made excuses for not bearing children when the matter was raised by the husband, insisted on the use of contraceptives and only allowed sexual intercourse on rare occasions. In March, 1956, the husband wrote to the wife making it clear that he was very upset by her attitude and that her failure to have children was causing him frustration. In January, 1957, the wife told the husband that she had only married him to get away from home, that she had no real affection for him and that she was not prepared to enter into further sexual relations or bear children. In March, 1957, the parties visited a doctor who found the wife adamant in her attitude and the husband distressed and nervous. On the husband's petition for a decree of divorce on the ground of cruelty:—

Held, that, although the wife had no desire to injure the husband's health, since she had deliberately refused, over a number of years, to bear him children, and finally to enter into sexual relations, well knowing that her conduct caused him distress, and she was without affection for the husband and so selfish that she was prepared to cause injury to his health, which had, in fact, resulted, rather than give way herself, the husband was entitled to a decree.

Forbes v. *Forbes* (*No. 2*) [1956] P. 16; [1955] 1 W.L.R. 531; [1955] 2 All E.R. 311 applied.

The parties were married in April, 1953, the husband having previously made clear to the wife his desire to have children. The husband, who was a marine engineer continued to go to sea on the insistence of the wife and when he was on leave the parties lived together, at first in a flat belonging to an aunt of the wife, and, from 1955, in a house which the husband purchased. Throughout the marriage the husband was very anxious to have children but whenever he raised the subject the wife made excuses to the effect that the parties were not sufficiently established to start a family. She insisted upon the use of contraceptives and allowed sexual intercourse only on rare occasions, some twenty times in all in the course of the marriage.

In March, 1956, the wife persuaded the husband to take a long voyage. On returning to his ship from a leave taken prior to sailing he found that he was nervous, suffered from insomnia and was unable to take decisions. He wrote to the wife pointing out to her that he was very upset by her attitude and that his fondness for children was being entirely frustrated. In January, 1957, the husband returned home and after about a week the wife allowed him to have sexual intercourse. On his again raising the

1958

WARD
v.
WARD.

question of children her attitude hardened very considerably. She told him that she had only married him to get away from home, that she had no real affection for him and that she was not prepared to have sexual intercourse or to bear the husband any children. Thereafter she refused all sexual intercourse and slept in a separate bedroom.

The husband consulted a solicitor and on his advice the parties went to see a doctor who found the wife adamant in her refusal and the husband distressed and nervous. On March 11, 1957, the husband presented a petition alleging that the wife, by her persistent refusal to bear him a child well knowing that he desired a child and that her conduct was effecting his health, had treated him with cruelty and seeking a divorce.

On September 20, 1957, the matter came on for hearing as an undefended suit before His Honour Judge McKee sitting as a special commissioner in divorce at York, the husband's evidence being given by affidavit. At the conclusion of the hearing the commissioner adjourned the cause for argument by the Queen's Proctor. At the adjourned hearing on February 10, 1958, the husband was called in person and was cross-examined.

J. R. Cumming-Bruce for the Queen's Proctor. In order to constitute cruelty there must be actual or apprehended injury to health, *Russell* v. *Russell*.[1] Conduct which has that effect may either be accompanied by an actual intention to be cruel or consist of a series of intentional acts from which cruel intention may be inferred. It is open to a court to presume that a person intends the natural and probable consequences of his deliberate acts, although such a presumption is always rebuttable by evidence explaining the origin of the acts. In a case of gross brutality such a presumption will readily arise but where the conduct complained of consists of a refusal by one spouse to accept the obligations of matrimony it is more difficult for the court to determine what the natural and probable consequences of the conduct were likely to be and therefore to infer that they were intended by the refusing spouse. [*Jamieson* v. *Jamieson*,[2] *Kaslefsky* v. *Kaslefsky*,[3] *Squire* v. *Squire*,[4] *Fowler* v. *Fowler*,[5] *Lang* v. *Lang*,[6] *Waters* v. *Waters*,[7] *Ingram* v. *Ingram*[8] and *Knott* v. *Knott*[9] were referred to.] What one must search for is the actual intention as compared to the motive or desire. If it be found that conduct is not aimed at the other party that is not, as it used to be, the end of the matter. It only eliminates actual intention, as a matter of evidence as an ingredient. The facts in

[1] [1897] A.C. 395; 13 T.L.R. 516.
[2] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.
[3] [1951] P. 38; 66 Tl.R.R. (Pt. 2) 616; [1950] 2 All E.R. 398.
[4] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.
[5] [1952] 2 T.L.R. 143.
[6] [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.
[7] [1956] P. 344; [1956] 2 W.L.R. 661; [1956] 1 All E.R. 432.
[8] [1956] P. 390; [1956] 2 W.L.R. 782; [1956] 1 All E.R. 785.
[9] [1955] P. 249; [1955] 3 W.L.R. 162; [1955] 2 All E.R. 305.

Forbes v. *Forbes* (*No.* 2) [10] are similar to those in the present case save that the wife in that case had taunted the husband with his desire for children thus showing "deliberate malignity." The case is of great importance in its application to the present facts because it shows that the court will draw the inference of cruelty from a course of conduct which, at its inception, probably did not stem from any conscious wish to inflict misery. If it is found in the present case that the wife was wholly selfish in her determination to subject her husband to her personal wish not to have any children and not to indulge in normal intercourse, if that attitude was quite "unjustifiable" (see Lord Normand in *King* v. *King* [11]) and if this intentional attitude on the part of the wife did have the effect of seriously injuring the husband's health, then the court could infer an intention to be cruel and the husband would be entitled to a decree.

C. D. Chapman and *T. R. Nevin* for the husband. *Forbes* v. *Forbes* [12] is relied upon, it is submitted that the facts in the present case are substantially similar. *Fowler* v. *Fowler* [13] is distinguishable since the husband in the present case drew the wife's attention to the effect of her conduct upon him. The injury to the husband's health is attributable to the selfish conduct of the wife who must, in all the circumstances, be held to have intended the natural and probable consequences of her acts, *Squire* v. *Squire*.[14]

MR. COMMISSIONER MCKEE. When this matter was before me in York, I felt considerable doubt about it because the picture there presented to me was of a husband who spent long periods away from his very young wife, whose marriage, at its commencement, had been happy—although there had been some sexual difficulty—but that by the beginning of 1957 the wife was entirely refusing sexual intercourse and entirely refusing ever to bear children. Further at an interview with a doctor—which I then understood was an interview for the purpose of seeing if the wife could be persuaded to take a different view—the wife had said that her husband was away for long periods at sea, and she had completely lost all interest in him. She said the whole business of sexual relations was distasteful to her and she was utterly lacking in any interest in him. The picture I got was of a shy young wife who, as time went on, saw less and less of her husband, and who gradually "fell out of love" with him until he became repugnant to her and she ceased to have any desires of sexual intercourse with him.

In those circumstances, I found it extremely difficult to say that cruelty was proved, or to say exactly what the position was, and I asked for the assistance of the Queen's Proctor, which I have been given in full measure.

[10] [1956] P. 16; [1955] 1 W.L.R. 531; [1955] 2 All E.R. 311.

[11] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[12] [1956] P. 16.

[13] [1952] 2 T.L.R. 143.

[14] [1949] P. 51.

1958

WARD
v.
WARD.

Mr.
Commissioner
McKee.

Today, I have had the advantage of seeing the husband in person and hearing his evidence and I accept his evidence as being that of a truthful man. He was not hesitant to give answers that no doubt he felt might well have been against him, and I think he was completely truthful.

The picture that I have now got is, to my mind, a very different one from the picture that I had in York. [His Lordship then referred to the facts of the marriage until the date when the husband first consulted his solicitor and continued:] On the advice of the solicitor the parties went to see Dr. Ellison. I think the object of that visit was possibly two-fold. Primarily it was to let the doctor see the nervous state in which the husband then was, and to put before the doctor what he alleged was the cause of that state, namely, the wife's refusal to have intercourse or to bear children so that the doctor would be available to give evidence as to that. Secondly, I think there may have been some lingering hope in the husband's mind that it was just possible that his wife might, on seeing the doctor, change her mind. However, the doctor's description of her attitude was that she was adamant that she was not going to bear any children and she was not going to have any sexual intercourse. The doctor's evidence with regard to the husband was that he was distressed, that he was nervous, and that he was in a much worse state than the wife, who seemed upset, but not particularly distressed.

On the facts of the case, and applying the law as I understand it—and I entirely accept the law as submitted on behalf of the Queen's Proctor—I have to decide, first: Was the petitioner's health materially injured? I think it was. It struck me as very curious, when he gave his evidence, that he never complained that his health was affected while he was actually living with his wife, but that his health was affected when he got back to his ship. However, I think that may be accounted for in this way. His wife, at one time, rather softened towards him—I think it was on his second leave that she became more affectionate and had shown some warmth towards him. That had happened once while he was with her, and I have little doubt that he was a man of considerable patience, and he was hoping, all the time that he was with her, that once again that was going to happen. In fact, it did not, and it was when he got back to his ship and realized that, once again, his efforts had failed and that he was no better off as regards his relationship with his wife than he had been before, that the reaction came upon him.

That all built up until January, 1957, when, on coming home from a long voyage, no doubt hoping, as he had been for many months, that once again his wife would soften towards him and they could get together, he was met with what, in the circumstances, was really a cruel remark by his wife—the statement that she had no affection for him; that she had only married him to get away from home, and that sort of thing. Combined with absolute refusal to carry out two of the fundamental duties

of married life that was the final straw, and it accounted for his state when he appeared before Dr. Ellison. I think there was substantial injury to his health.

I have to consider what was the wife's intention in refusing to have intercourse with this man, and in refusing to bear his children. If one might use a vulgar phrase, I think it had been her intention, when marrying this man, to use him as a "meal ticket"—that here was someone who was prepared to support her, to look after her, to take her away from her home in which, apparently, she had not been very happy; and it was not her desire to drive him away. I have little doubt that it was not her desire to injure his health, but she, quite intentionally, refused to bear his children, and I think she knew that that was causing him distress, and had caused him distress over a number of years.

When he came back at the beginning of 1957, she added to that refusal, not taunts, as in the case of *Forbes* v. *Forbes*,[1] but what I have already described as cruel statements of her feelings towards him and of her motives in ever marrying him.

I am satisfied that those acts were deliberate. I am satisfied that she knew what she was doing; that she knew they caused distress to her husband, but that she was so selfish that she was quite prepared to cause injury to her husband rather than give way herself. If her statement was true, that the only reason she married this husband was because she wanted to get away from home and never had any affection for him, one can well understand how that attitude came about. Applying the law, as has been so ably put to me, to the facts of this case, I find that cruelty here is made out, and that the husband is entitled to his decree.

Decree nisi.

Solicitors: *Whitfield, Bell & Smith, Scarborough; The Queen's Proctor.*

E. J.

[1] [1956] P. 16; [1955] 1 W.L.R. 531; [1955] 2 All E.R. 311.

[COURT OF APPEAL.]

* GOLD *v.* PATMAN & FOTHERINGHAM LTD.

C. A.

1958
April 24, 25, 28; *May* 22.

Hodson, Romer and Sellers L.JJ.

[1956 G. No. 1631.]

Building—Contract—R.I.B.A. form—Insurance—Subsidence of adjoining properties—No negligence by contractor—Damage covered by insurance by contractor in respect of own liability—Whether contractor bound under contract also to cover building owner, by insurance, against claim by adjoining owners.

Insurance—Provision for, in contract—Whether interests of both parties to be covered—Building contract—R.I.B.A. form—Injury to adjoining properties—Whether contractor liable to cover by insurance liability of building owner as well as his own liability.

Contract—Uncertainty.

C. A.

1958

Gold
v.
Patman & Fotheringham Ltd.

The defendants, a firm of building contractors, contracted to erect a building on a site owned by the plaintiff. The contract was in the standard R.I.B.A. form, and the schedule of conditions provided by condition 14 (*b*) that the contractor should be liable for and should indemnify the employer against any loss, liability, claim or proceedings in respect of any injury or damage whatsoever to any property, real or personal, arising out of or in the course of the execution of the works, provided that the same was due to any negligence of the contractor.

By condition 15: "(*a*) Without prejudice to his liability to indemnify the employer under clause 14 hereof, the contractor shall "effect . . . such insurances . . . as may be specifically required "by the bills of quantities . . ." In the bills of quantities it was provided that the contractor should insure or make payments in connexion with, inter alia, National Insurance Acts, Fatal Accidents Acts, and insurance of adjoining properties against subsidence or collapse.

In carrying out piling work on the instruction of the plaintiff or his architect the defendants (admittedly without negligence) caused damage by subsidence to adjoining properties, the owners of which issued claims against the plaintiff, who brought the present action against the defendants claiming damages for breach of contract on the ground that the defendants had only covered their own liability by insurance and not also that of the plaintiff.

Gorman J. allowed the plaintiff's claim and the defendants appealed:—

Held, that, on construction of the conditions, insurance was only required to be effected by the contractor for himself and not for the building owner, and there was nothing in the bills of quantities which altered this situation; accordingly, the defendants were not liable to insure the plaintiff against the claim of the adjoining owners.

Decision of Gorman J. reversed.

Appeal from Gorman J.

By an agreement dated April 27, 1954, the plaintiff, Joseph Gold, contracted with the defendant builders, Patman & Fotheringham Ltd., for the erection of a building at 19, Buckingham Gate, London. The agreement, which was in writing, was in the standard R.I.B.A. form.

Condition 14 (*b*) provided that except for such loss or damage by fire as was at the risk of the employer, the contractor shall be liable for and shall indemnify the employer against any loss, liability, claim or proceedings in respect of any injury or damage whatsoever to any property, real or personal, which arises out of or in the course of the execution of the works, provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any sub-contractor.

The bills of quantities drew attention to the relevant provision in the scheduled conditions, as follows: "The contractor shall "insure or make payments in connexion with . . . National Insur-"ance Acts and National Insurance (Industrial Injuries) Acts; "Unemployment Insurance Acts; Fatal Accidents Acts; Insur-"ance against specific industrial diseases; Employers' liability, "common law, third party; Lord Campbell's Acts; Damage by "aircraft; Damage by storm, flood and tempest or lightning;

"Insurance of adjoining properties against subsidence or collapse
". . . Such insurance shall be with companies approved by the
"architect and the contractor shall deposit with him the policies
"including the fire policies within seven days of their respective
"issues, and receipts for premiums within seven days of their
"respective payments."

Piling operations carried on on the owner's land by the contractors, acting on the instructions of the owner or his architect, caused a subsidence of adjoining properties, and the plaintiff owner, having received a claim for damages from the adjoining owners, claimed to be indemnified by the contractors. He contended that the contractors were in breach of contract in that, although they had insured themselves in respect of any such claim from adjoining property owners, they had not also insured him, as building owner, against any such claim. The contractors denied that they were under any liability to insure the building owner.

The judge found for the building owner and the contractors appealed.

R. Stewart-Brown Q.C. and *I. D. Wallace* for the building contractors.

Gerald Gardiner Q.C. and *F. Hallis* for the building owner.

The following cases were cited in argument, in addition to the authorities referred to in the judgment: *Hillas & Co. Ltd.* v. *Arcos Ltd.*[1]; *May & Butcher Ltd.* v. *The King*[2]; *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*[3]; *Glynn* v. *Margetson & Co.*[4]; *Dalton* v. *Angus.*[5]

Cur. adv. vult.

May 22. HODSON L.J. delivered the following judgment of the court: This is an appeal from a judgment of Gorman J., dated October 11, 1957, by which he found the defendants, a firm of building contractors, in breach of contract for failing to insure the plaintiff, a building owner, against the claim of adjoining owners arising out of the collapse of adjoining property on either side of the plaintiff's property. The question for determination depends on the construction of the contract between the parties, the contract documents being in the first place an agreement in writing dated April 27, 1954, and in the second place drawings and bills of quantities therein referred to. The agreement is the standard form of agreement and schedule of Conditions of Building Contract issued under the sanction of the Royal Institute of British Architects, the National Federation of Building Trades Employers and the Royal Institution of Chartered Surveyors.

[1] (1932) 147 L.T. 503.
[2] [1934] 2 K.B. 17n.
[3] [1957] 2 W.L.R. 968; [1958] 1 All E.R. 725.
[4] [1893] A.C. 351.
[5] (1881) 6 App.Cas. 740.

C. A.
1958
GOLD
v.
PATMAN & FOTHERINGHAM LTD.

Condition 10, described "Bills of Quantities," reads as follows: "The quality and quantity of the work included in the "contract sum shall be deemed to be that which is set out in the "bills of quantities mentioned in clause 2 of these conditions "which bills, unless otherwise expressly stated, shall be deemed "to have been prepared in accordance with the principles of the "Standard Method of Measurement of Building Works last before "issued by the Royal Institution of Chartered Surveyors and the "National Federation of Building Trades Employers, but save as "aforesaid nothing contained in the said bills of quantities shall "override, modify or affect in any way whatsoever the application "or interpretation of that which is contained in these conditions. "Any error in description or in quantity in or omission of items "from the bills of quantities shall not vitiate this contract but "shall be rectified and treated as a variation."

Condition 14, described "Injury to persons and property," reads: "(*a*) Injury to Persons. The contractor shall be solely "liable for and shall indemnify the employer in respect of any "liability, loss, claim or proceedings whatsoever arising under any "statute or at common law in respect of personal injury to or "the death of any person whomsoever arising out of or in the "course of or caused by the execution of the works, unless due "to any act or neglect of the employer or of any person for whom "the employer is responsible. (*b*) Injury to Property. Except for "such loss or damage by fire as is at the risk of the employer "under clause 15 (*b*) [B] of these conditions the contractor shall "be liable for and shall indemnify the employer against any loss, "liability, claim or proceedings in respect of any injury or damage "whatsoever to any property real or personal in so far as such "injury or damage arises out of or in the course of or by reason "of the execution of the works, and provided always that the "same is due to any negligence, omission or default of the "contractor, his servants or agents or of any sub-contractor."

Condition 15, described "Insurance," provides: "(*a*) Without prejudice to his liability to indemnify the employer under "clause 14 hereof, the contractor shall effect or shall cause any "sub-contractor to effect such insurances (including insurance "against third party fire risk) as may be specifically required by "the bills of quantities and shall produce or cause such sub-"contractor to produce as the case may be the relevant policy "or policies and premium receipts as and when required by the "architect; should the contractor make default in so doing, the "employer may insure against any risk with respect to which "the default shall have occurred and may deduct the premiums "paid from any moneys due or to become due to the contractor. "(*b*) [A] The contractor shall in the joint names of the employer "and contractor insure against loss and damage by fire for the "full value thereof (plus 8½ per cent. to cover architect's and "surveyor's fees) all work executed and all unfixed materials and "goods upon the site but excluding plant, tools and equipment

" and shall keep such work, materials and goods so insured until " the works are delivered up; such insurance shall be with a " company or companies approved by the architect and the con- " tractor shall deposit with him the policies and premium receipts; " should the contractor make default the employer may insure " as aforesaid and deduct the premiums paid from any moneys " due or to become due to the contractor . . ."

The bills of quantities drew attention to the relevant provision in the conditions scheduled to the contract, and on page 6 there appears the following: " The contractor shall insure or make " payments in connexion with the following: National Insurance " Acts and National Insurance (Industrial Injuries) Acts; " Unemployment Insurance Acts; Fatal Accidents Acts; Insur- " ance against specific industrial diseases; Employers' liability, " common law, third party; Lord Campbell's Acts; Damage by " aircraft; Damage by storm, flood and tempest or lightning; " Insurance of adjoining properties against subsidence or " collapse. . . ."

Then follows: " Such insurance shall be with companies " approved by the architect and the contractor shall deposit with " him the policies including the fire policies within seven days " of their respective issues and receipts for premiums within " seven days of their respective payments." The paragraph last read, beginning with the words " Such insurance " purports to override the provisions as to insurance (save as to fire) contained in condition 15 and must therefore be disregarded, having regard to the language of condition 10. No further reference need, therefore, be made to this paragraph.

The plaintiff, having received a claim from the adjoining owners, claims damages for breach of contract by the defendants because, although the defendants, as building contractors, have insured themselves in respect of any such claims they may receive, they have not insured the plaintiff, the building owner, against any liability which he may have. He accordingly seeks to be indemnified against such claims.

It is to be observed that the liability to adjoining owners does not depend on negligence—no negligence is indeed being alleged on either side—but depends on the right to support which the adjoining owners have from the plaintiff's land: *Bower* v. *Peate*.[1] It is sufficient to say that subsidence on both sides of the owner's property appears to have been caused by piling operations carried on on the owner's land by the defendants, acting on his instructions or those of his architect. It is plain from the nature of the contract that there would be no objection to a provision for insuring the building owner by the contractor being included in the bill of quantities as an obligation of the contractor, since it may well be convenient for all outgoings in connexion with the building project to be included in one document which can contain all the items for which the building owner will ultimately have

[1] (1876) 1 Q.B.D. 321.

C. A.
1958
GOLD
v.
PATMAN &
FOTHERINGHAM LTD.

to pay. The remaining question is, what is meant by the language of the contract properly construed?

Mr. Stewart-Brown, for the defendants, has contended that the words under consideration are in any event uncertain, so that there is no contract capable of enforcement, relying in particular on the speeches in the House of Lords in *Scammell & Nephew Ltd.* v. *Ouston*,[2] where the words under discussion, "hire-"purchase terms," were treated as too vague to create an enforceable obligation. It is here conceded that the language of the passage read from the bill of quantities is severable so that the relevant passage can be read as follows: "The contractor shall "insure or make payments in connexion with the following . . . "Insurance of adjoining properties against subsidence or "collapse."

We reject the argument that the tautological use of the word "insurance" following "insure" presents any difficulty. No difficulty is presented by the words "or make payments," which are satisfied by the reference to National Insurance in the following list. The argument proceeds, however, that there is uncertainty as to who has to be insured and what is to be covered in particular: is it simply damage to the adjoining buildings themselves or consequential damage following thereupon? The question as to who is to be insured we must deal with separately, although it falls for consideration on the question of certainty; but, so far as the other matters are concerned, we agree with the learned judge that there is no uncertainty as to the risk to be covered by insurance. That which was to be insured against was the legal liability to adjoining owners arising out of the subsidence or collapse of the premises. It would be wholly wrong in our judgment to say in the language of Lord Wright[3] that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.

The only real difficulty which arises is as to the determination of the question who is to be covered by insurance, but the court ought not to be deterred by any difficulty of interpretation which can fairly be surmounted. Looking first at condition 14 of the contract dealing with (*a*) injury to persons and (*b*) injury to property, the contractor is bound to indemnify the owner against loss in the circumstances therein set out.

When one comes to condition 15, the contractor is thereby required to effect insurance or cause any sub-contractor to do so as may be specifically required by the bill of quantities. This condition, prima facie, refers to the indemnity required by condition 14, for it is introduced by the words "Without prejudice to "his liability to indemnify the employer under clause 14 hereof," which indicates plainly that the indemnity is to stand independently of the insurance and the contractor cannot claim to have fulfilled his obligation under the indemnity clause in respect of

[2] [1941] A.C. 251. [3] Ibid. 268.

injury to persons or property by effecting a policy or policies of insurance or causing any sub-contractor to do so. These policies and their premium receipts must be produced as and when required by the architect. Loss or damage by fire is dealt with in clause 15 (*b*) [A], and then in contrast to the policies referred to in 15 (*a*), the contractor must insure in the joint names of the owner and himself with a company or companies approved by the architect, and the contractor is obliged to deposit (not only produce when required) the policies and premium receipts with the architect. It would thus appear that there is a contrast between policies in which the contractor is insuring himself, no doubt for the additional security of the owner, and cases where the contractor is insuring in the joint names of the owner and himself. Thus when the contract requires the owner (described in the contract as the employer) to be insured by the contractor it is expressly so provided. Further, it would appear appropriate in cases where the insurance is for the benefit of the owner to require approval by his architect and deposit of the policy of insurance with him. Condition 25, headed "Fluctuations," refers also to the burden of insurance falling on the contractor under the heading of expenses including the cost of employers' liability and third party insurance, and lends support to the contention of the contractors that these are among the specific insurances contemplated by condition 15 (*a*) of the contract.

These considerations derived from the conditions in the main contract are persuasive to suggest that the insurances specifically required by the bill of quantities will be found to be insurances effected by the contractor for himself and not for the owner. When one turns to the bill of quantities itself we do not find anything to lead to a contrary conclusion. In construing the obligation beginning with the words "The contractor shall insure," one looks at the whole list of matters in respect of which he has to insure or make payments, and we find nothing in that list pointing to an obligation to insure anyone else but himself. We cannot find anything in the initial phrase or in the context to lead one to understand that the obligation is to insure, not the contractor alone but the owner, either in addition to the contractor or separately from him. The list following the initial phrase is not very illuminating and there is on any view some duplication, for Fatal Accidents Acts and Lord Campbell's Acts mean the same thing. All the items in the list would appear to be cases where the contractor must insure himself at least so far as they are intelligible, bearing in mind that "Unemployment Insurance "Acts" do not exist, and insurances against specific industrial diseases do not add anything to the words above, viz., "National "Insurance Acts and National Insurance (Industrial Injuries) "Acts."

Damage by storm, etc., would be the contractors' risk for him

C. A.
1958
Gold
v.
Patman & Fotheringham Ltd.

to cover, for he would not be relieved of his obligation by such damage: cf. *Appleby* v. *Myers*,[4] *per* Blackburn J.

We find no sufficient reason for thinking that when one comes to the last item, "Insurance of adjoining properties against subsidence or collapse," the obligation to insure is for the first time in the list an obligation to insure not the contractor himself but the owner. If there were to be a change of obligation, one would expect some words used to show that there is a change, and here there are none; nor would one expect to find such an obligation in this place, having regard to the words of condition 15 (*a*), where reference is made to the insurances to be effected as may be specifically required by the bill of quantities, such policies to be produced when required and not only to be approved by and deposited with the architect. It is true there is duplication, since the heading "Employers' liability, common law, third party" no doubt produces the same result; but duplication, as we have said, appears elsewhere in this miscellany and the last item is only a specific identification of one kind of third party risk.

Mr. Stewart-Brown, for the contractors, reinforced his argument by a contention that there would be grave difficulties in the way of a contractor knowing what to tender if he had to insure the building owner, for he would not survey the property before tendering, whereas in the case of insuring himself against the risk in question there is no practical difficulty because the premium is based on the contractor's past record and the number of men he employs. He sought in this connexion to rely on the oral evidence of an insurance expert to show the practical difficulties involved. We see no ground for admitting evidence of this character to show the surrounding circumstances of this particular contract. No trade custom was sought to be proved and it is not contended that both parties were contracting in the light of some special insurance background which could be established by evidence. In any event, we should not have been deterred by the difficulty of effecting an insurance from finding that the obligation to insure the owner had been placed on the contractor by the contract if the words used had produced that result. The evidence of the insurance expert could, one would assume (although no argument was addressed to the court on this aspect of his evidence), be used to show uncertainty if there were a latent ambiguity in the use of the word "insurance" in its context. We find nothing in his evidence which was read de bene esse to lead to the conclusion that the word "insurance" as here used is uncertain in its meaning.

In our opinion the defendants are right in their contention that the obligation to insure adjoining properties against subsidence

[4] (1867) L.R. 2 C.P. 651, 660.

or collapse is for the contractor to insure himself and not the owner. The appeal is accordingly allowed.

Appeal allowed.

Solicitors: *Masons; Eric H. Davis & Co.*

A. W. G.

C. A.
1958
GOLD v. PATMAN & FOTHERINGHAM LTD.

[COURT OF APPEAL.]

* RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES).

SAME *v.* INLAND REVENUE COMMISSIONERS.

YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD.

INLAND REVENUE COMMISSIONERS *v.* SAME.

C. A.
1958
April 21, 22, 23, 24; *May* 7.
Lord Evershed M.R., Morris and Ormerod L.JJ.

Revenue—Income tax—Expenses—Racecourse Betting Control Board—Operation of totalisator on racecourses—Totalisator fund—Expenditure prescribed by statute for benefit of owners of racecourses and racehorses—Board carrying on trade—Whether deductible expenses—"Working expenses"—Meaning—Racecourse Betting Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 41), *s.* 3—*Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 18 (5)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 137 (*a*) (*f*) (*g*).

The Racecourse Betting Control Board was a corporation set up under the Racecourse Betting Act, 1928, to operate a totalisator on approved racecourses. The board established the totalisator fund pursuant to section 3 (4) of the Act from a percentage of the moneys staked on the totalisator. Under section 3 (6) the board applied this fund in accordance with schemes prepared by them and approved by the Secretary of State for purposes conducive to the "improvement of breeds of horses or the sport of horse racing" but subject to the payment thereout of "all taxes, rates, charges, "and working expenses," and "the retention of . . . sums . . . "to meet contingencies. . . ."

The board included in their "working expenses" under section 3 (6) of the Act "runners' allowances"—sums paid to racehorse owners who ran horses at any racecourse with which the board was concerned.

The board paid from the totalisator fund sums to racecourse owners for use by them in improvements upon such racecourses, subject to a substantial measure of control or supervision by the board in each case, sums to owners and trainers towards their expenses in bringing racehorses to those racecourses, sums to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, sums to assist those responsible in discharging the expenses of point-to-point meetings, and sums to assist and encourage racing under the rules of the Pony Turf Club.

C. A.

1958

Racecourse Betting Control Board v. Young (Inspector of Taxes).

It was conceded that the board was carrying on the trade of totalisator operator. Upjohn J. held, overruling the special commissioners, that neither the runners' allowances nor the sums paid out of the totalisator fund were deductible as expenses laid out for the purposes of the board's trade as such totalisator operator within the meaning of section 137 (*a*) of the Income Tax Act, 1952. On appeal by the board:—

Held, (1) that the business of the board was the operation of totalisators and not the promoting, as such, of the breeds of horses;

(2) that in section 3 (6) of the Racecourse Betting Act, 1928, the phrase "working expenses" covered expenses incurred reasonably and properly in the working (that was the setting up, keeping and operating) of totalisators upon approved racecourses; but that the phrase was not limited to such expenditure as was wholly and exclusively laid out for the purposes of the board's business within section 137 (*a*) of the Income Tax Act, 1952;

(3) that the purposes which Parliament designated in section 3 (6) of the Act of 1928 as the purposes for which the board could apply the surplus of the totalisator fund were distinct from the business purposes of the board although the board had selected those purposes for the application of such surplus as were most calculated to promote its own business interests;

(4) that all the items, including the runners' allowance, failed to qualify as deductions for income tax purposes since they were laid out for purposes not exclusive to the board's trade as a totalisator operator.

Attorney-General v. *Racecourse Betting Control Board* [1935] Ch. 34; 51 T.L.R. 36 followed.

Semble, that an application of surplus moneys under section 3 (6) might be an application of moneys wholly and exclusively for the purposes of the board's trade.

The question whether the runners' allowance was ultra vires the board did not call for consideration, since this allowance was not exclusively laid out for the purpose of the board's trade.

Decision of Upjohn J. [1958] 1 W.L.R. 122; [1958] 1 All E.R. 274 affirmed.

Appeals from Upjohn J.[1]

The Racecourse Betting Control Board carried on the trade of running totalisators at a large number of racecourses in England pursuant to the Racecourse Betting Act, 1928.[2]

[1] Ante, p. 122; [1958] 1 All E.R. 274.

[2] Racecourse Betting Act, 1928, s. 1: "(1) Nothing contained in the "Betting Act, 1853, shall apply to "any approved racecourse . . . "(2) . . . it shall be lawful on any "approved racecourse . . . (*a*) for the "Racecourse Betting Control Board ". . . to set up and keep a totalisa- "tor; (*b*) for the Board . . . to "operate, . . . for the purposes of "effecting betting transactions on "horse races only, a totalisator. . . ."

S. 2: "(1) For the purposes of "this Act there shall be established a "Racecourse Betting Control Board ". . . (2) The board shall be a body "corporate. . . ."

S. 3: "The Racecourse Betting "Control Board—(1) may for the pur- "poses of this Act issue (subject to "such conditions as they may impose) "and at any time revoke certificates "of approval in respect of race- "courses and ground adjacent there- "to; (2) shall make it a condition "of the grant of a certificate of "approval of any racecourse that the "persons having the management of "such racecourse shall provide a "place, whether in a building or not ". . . where bookmakers may carry "on their business and to which the "public may resort for the purpose "of betting, and that the charge to a "bookmaker and to any assistant "accompanying him, for admission

The question which arose on these appeals was whether certain items of expenditure of the board were wholly and exclusively laid out or expended for the purposes of the trade, within the meaning of section 137 (*a*) of the Income Tax Act, 1952,[3] and secondly, whether such payments or any of them were of a capital nature whose deduction would be prohibited by sub-paragraphs (*f*) or (*g*) of the same section.

The special commissioners held that the disputed payments were made wholly and exclusively for the purpose of the board's trade, but that certain of the payments in question were reimbursements of expenditure upon the provision of certain physical installations on racecourses and since such installations were of enduring advantage to the board held that such payments

"to an enclosure on the racecourse "for the purpose of the bookmaker's "business shall, in the case of a "bookmaker, not exceed five times "the amount, and in the case of an "assistant not exceed the amount of "the highest charge made to mem-"bers of the public for admission to "the enclosure; (3) shall distribute "or cause to be distributed the whole "of the moneys staked by means of "a totalisator on any race among "the persons winning bets made by "means of the totalisator on that "race, after deducting or causing to "be deducted such percentage of "those moneys as the Board may "from time to time determine either "generally or with respect to any "particular racecourse; (4) shall "establish a fund known as the "totalisator fund, into which shall "be paid the percentage deducted as "aforesaid of moneys staked by "means of the totalisator, and any "other moneys received by the "Board; (5) may, for the purposes "of this Act, borrow money upon "the security of such fund or other-"wise, and lend money for the "purpose of setting up or operating "totalisators in accordance with the "provisions of this Act; (6) shall "(subject to the payment out of the "totalisator fund of all taxes, rates, "charges, and working expenses, "and to the retention of such sums "as they think fit to meet contingen-"cies, and to the payment out of "the said fund of such sums as they "think fit to charitable purposes) "apply the moneys from time to "time comprised in the totalisator "fund in accordance with a scheme "prepared by the Board and approved "by the Secretary of State for "purposes conducive to the improve-"ment of breeds of horses or the "sport of horse racing; (7) may do "all such things as are incidental to "the foregoing matters; (8) shall "submit annually to the Secretary "of State a report of their proceed-"ings, together with an account, in "such form as may be prescribed by "the Secretary of State, of the "moneys received and expended by "them during the year, and such "report and account shall be laid "by the Secretary of State before "both Houses of Parliament."

Betting and Lotteries Act, 1934, s. 18: "(5) The purposes for which "the Racecourse Betting Control "Board, acting under paragraph (6) "of section three of the Racecourse "Betting Act, 1928, may, in accord-"ance with a scheme approved by "the Secretary of State, apply "moneys comprised in the totalisa-"tor fund shall include purposes "conducive to the advancement and "encouragement of veterinary science "and education."

[3] Income Tax Act, 1952, s. 137: "Subject to the provisions of this "Act, in computing the amount of "the profits or gains to be charged "under Case I or Case II of "Schedule D, no sum shall be "deducted in respect of—(*a*) any "disbursement or expenses, not being "money wholly and exclusively laid "out or expended for the purposes "of the trade, profession or voca-"tion . . . (*f*) any capital withdrawn "from, or any sum employed or "intended to be employed as capital "in, such trade, profession or voca-"tion; (*g*) any capital employed in "improvement of premises occupied "for the purposes of the trade, "profession or vocation. . . ."

C. A.
1958
Racecourse Betting Control Board v. Young (Inspector of Taxes).

were of a capital nature and not proper deductions in arriving at the board's profits.

The case stated on the appeal from the decision of the commissioners is fully set out in the report below.[4]

Upjohn J. allowed the Crown's appeals from the decision of the commissioners and held that none of the items of expenditure were deductible as expenses laid out for the purposes of the board's trade. He further indicated that, if the question had to be decided, he would have held that the expenditure on the physical installations on the racecourses was not of a capital nature.

The board appealed. The Crown cross-appealed. Having regard to the fact that the board's appeal was dismissed, the Crown's cross-appeal did not arise for decision.

Heyworth Talbot Q.C. and *Desmond Miller* for the board.

F. N. Bucher Q.C. and *Alan Orr* and *H. H. Monroe* for the Crown.

The following cases were cited in argument but were not referred to in the judgments:—*Inland Revenue Commissioners* v. *Stonehaven Recreation Ground Trustees*[5]; *Morgan* v. *Tate & Lyle Ltd.*[6]; *Inland Revenue Commissioners* v. *Patrick Thomson Ltd.*[7]; *Usher's Wiltshire Brewery Ltd.* v. *Bruce*[8]; *Bentleys, Stokes & Lowless* v. *Beeson*[9]; *Collins* v. *Firth-Brearly Stainless Steel Syndicate Ltd.*[10]; *Mersey Docks and Harbour Board* v. *Lucas*[11]; *Last* v. *London Assurance Corporation*[12]; *Brighton College* v. *Marriott*[13]; *Birmingham Corporation* v. *Inland Revenue Commissioners*[14]; *Edwards* v. *Bairstow*[15]; *Smith* v. *Lion Brewery Co. Ltd.*[16]; *Coalville Urban District Council* v. *Boyce*[17]; *Bean* v. *Doncaster Amalgamated Collieries Ltd.*[18]; *Ounsworth* v. *Vickers Ltd.*[19]; *Bolam* v. *Regent Oil Co. Ltd.*[20]

Cur. adv. vult.

May 7. Lord Evershed M.R. read the following judgment: Two appeals by the Racecourse Betting Control Board (which I shall hereafter refer to as "the board"), and corresponding cross-appeals on the part of the Crown have been heard together. One appeal and the corresponding cross-appeal is concerned with the board's liability to income tax; the second appeal and cross-appeal relate to profits tax. It has been agreed before us that identical principles apply, so far as is relevant to these appeals, to both

[4] Ante, p. 122.
[5] (1929) 15 T.C. 419.
[6] [1955] A.C. 21; [1954] 3 W.L.R. 85; [1954] 2 All E.R. 413; 35 T.C. 367.
[7] (1956) 37 T.C. 145.
[8] (1914) 6 T.C. 399.
[9] [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82; 33 T.C. 491.
[10] (1925) 9 T.C. 520.
[11] (1883) 8 App.Cas. 891; 2 T.C. 25.
[12] 2 T.C. 100.
[13] [1926] A.C. 192; 10 T.C. 213.
[14] (1929) 15 T.C. 172.
[15] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 220.
[16] (1909) 5 T.C. 568.
[17] (1934) 18 T.C. 655.
[18] (1944) 27 T.C. 296; [1944] 2 All E.R. 279.
[19] (1915) 6 T.C. 671.
[20] (1956) 37 T.C. 56.

income tax and profits tax, so that the answer as regards the one necessarily involves the answer also as regards the other. In the circumstances I shall confine myself in this judgment to income tax.

The board has been assessed to income tax under Schedule D of the Income Tax Act, 1952, for the income tax years 1953–54 and 1954–55, in reference to its trade as a totalisator operator. Although Mr. Heyworth Talbot was not prepared unreservedly so to admit, it is, in my judgment, clear that the board is in fact carrying on such a "trade." In respect of these tax years, the board has claimed that certain payments made by it ought to be deducted from its taxable profits or gains as having been, within the terms of section 137 (*a*) of the Act, "wholly and exclusively "laid out or expended for the purposes of" its "trade." The facts as regards these payments have been fully recited in the case stated.* They were summarized also in the judgment appealed from of Upjohn J.† So far as necessary, I shall treat the case stated as incorporated in this judgment. It is a sufficient recapitulation for me to state that the sums in question have fallen under six heads, namely: (1) Runners' allowances, that is, sums paid to racehorse owners who run horses in any race at racecourses with which the board is concerned, at the rate of £1 for every runner. (2) Sums paid to "racecourse executives," that is, sums paid to racecourse owners for use by them in improvements upon the structures and amenities, etc., on racecourses (being racecourses used for horse races, and approved as such by the board). It is to be noted that the expenditure is in fact subject to a substantial measure of control or supervision by the board in each case. (3) Sums paid to owners and trainers towards their expenses in bringing racehorses to the racecourses, and therefore an encouragement to them so to do. It was clearly proved that the business done by the board varies in direct proportion to the number of runners in the races with which they are concerned, and that, without assistance, the owners and trainers in modern times have found the burden of these travelling expenses a serious financial strain. (4) Sums paid to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, which need no further exposition. (5) Sums paid to assist those responsible in discharging the expenses of point-to-point meetings. And (6) sums paid to assist and encourage racing under the rules of the Pony Turf Club.

The sums involved are large, amounting in each year to something over half a million pounds, but that figure is, in truth, only about 2½ per cent. of the total receipts of the board.

Of the six heads which I have above mentioned, there is a distinction for the purposes of the appeal between the first of them and the other five. The first, the runners' allowances, was

* Ante, p. 125 et seq.

† Ante, p. 131 et seq.

C. A.
1958
RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).
Lord Evershed M.R.

made by the board as being a working expense, that is, part of the financial obligations to be discharged by the board under the relevant Act regulating their activities, before arriving at what is called in the Act the surplus totalisator fund. The remaining five heads are applications of that surplus totalisator fund. There is evidence before us of correspondence between the board and the Home Secretary as regards this first head of payment, but, in my judgment, the correspondence is not relevant to the problem before us, and I do not further refer to it.

I must now make some reference to the Racecourse Betting Act, 1928, under which the board was constituted, but as the terms of the Act are conveniently and sufficiently summarized in the judgment from the case in 1935 of *Attorney-General* v. *Racecourse Betting Control Board*,[1] it will be sufficient for me now to make a somewhat fuller reference to section 3 than is found in the summaries mentioned. Section 3 is the section setting out the powers and duties of the board. [His Lordship read the relevant portions of section 3 and continued:] The problem presented in the appeal is: were the payments in question wholly and exclusively laid out for the purposes of the business of the board within the section of the Act? The authorities relating to the meaning of that phrase were considered by Upjohn J.,[2] and I need not add to what the judge said, because there was before us no doubt that the phrase means what the words indeed imply, that the payments in question, to qualify as proper deductions, must in truth as to all of them have been laid out exclusively for the purposes of the board's business.

As I have indicated, there are two categories of payment, namely, first, the runners' allowances under the first head above stated, which the board have said were part of their working expenses within section 3 (6) of the Act; and secondly, the remaining items, which were applications of the surplus of the totalisator fund, pursuant to the same subsection, after the discharge of rates, taxes, working expenses, etc.

The case of the board has been that all these six heads of payment were found in paragraph 7, and again in paragraph 12 (4) of the case stated, to have been wholly and exclusively laid out for the purposes of the board's business, and that that finding being a finding of fact is now conclusive.

Paragraph 7 of the case stated is in the following terms: "We "were satisfied on the evidence that all the payments set out in" the exhibits mentioned "were made by the board with the object "of increasing the receipts of its totalisators, although such pay-"ments might and in all cases did (in the words of section 3 (6) "of the Act of 1928) improve the breed of horses or the sport of "horse-racing, and although the increase in such receipts was not "in all cases expected to be exactly proportionate to the expendi-"ture." The other reference, in paragraph 12 (4) reads: "We "consider that in this as in other cases we have to determine

[1] [1935] Ch. 34.
[2] [1958] 1 W.L.R. 122, 135, 136.

"whether the disputed payments were made wholly and "exclusively for the purposes of the board's trade upon the "evidence of the witnesses called before us, and an examination "of the documents placed before us. Upon a full consideration "of such evidence and documents we find that all the [aforesaid "payments] were paid wholly and exclusively for the purposes of "such trade."

It will be noticed that in the second paragraph the commissioners adhere to the language of the section, whereas in the first paragraph they do not. This is a point to which I shall later again allude.

The board, however, have also said that if they were regarded as an ordinary trader, then all these payments would necessarily have been or be so allowable in the light of the findings which I have mentioned. In my judgment, however, this submission really carries the matter no further; for the fact is, that the board's trade and the board's powers are defined by, or are to be derived from the terms of the Act, upon which, in the end, the answer to the question must depend. In any event, the board's case, as will be seen, hangs upon the sanctity of the findings of the Special Commissioners.

The case of the Crown, on the other hand, is that, as regards the items other than the runners' allowances, the finding is, upon the face of it, not sacrosanct. The question whether payments were wholly and exclusively laid out for the purposes of the business of the board is not a mere question of fact. The Crown say that the purposes of the payments cannot be judged in disregard of the purposes imposed by section 3 (6), which are real and independent objectives. In any case, says the Crown, the terms of paragraph 7 of the case, which ought, in the light of the whole document, to be read as expository of paragraph 12 (4), do not come up to the standard of the phrase "wholly and "exclusively laid out," etc. That matter was put in the form of a dilemma by Mr. Orr: either, looking at paragraph 7, the language used by the commissioners means what it says, in which case it is not a finding of fact of sufficient precision; or, if paragraph 7 has to be expounded and explained, it is necessarily open in some degree to review.

As regards the first head of payment, the runners' allowances, the Crown have supported Upjohn J.'s view, and have said that the payment was ultra vires: but even if the payment were intra vires, the Crown says, still in essential quality the purposes of that payment are the same as the purposes of other payments, particularly the payment of travelling allowances. So much, indeed, was admitted by the board, and therefore, if the finding of the commissioners cannot stand as to the five heads relating to the surplus, it cannot stand either, the Crown say, as the first head, the runners' allowances.

It will be seen, therefore, that the two questions for the court may be formulated as follows: first, what is, in truth, the scope

C. A.
1958
Racecourse Betting Control Board v. Young (Inspector of Taxes).
Lord Evershed M.R.

of the board's business, and what are its powers? Put more precisely, what is the scope of the phrase "working expenses" in subsection (6), and what otherwise is the effect of that subsection? Secondly, and in the light of the answer to the first question, is the finding of the Special Commissioners conclusive, and, if it is not conclusive, is it right?

As to the first question, that of the scope and powers of the board, they are to be found in the first three sections of the Act. They are conveniently summarized in *Attorney-General* v. *Racecourse Betting Control Board.*[3] In that case the question was whether certain payments were intra vires the board, and I would therefore like to begin my citation (because it has a bearing upon the like question relating to runners' expenses) with a passage in the judgment of Romer L.J.[4]: "It is sufficient," said the Lord Justice, "to say that the test to be applied is whether the acts "in question of the board, which are nowhere expressly pro-"hibited, can fairly be regarded as incidental to or consequential "upon the exercise of the powers that the legislature has in "express terms conferred upon the board. In these circum-"stances the first thing to be ascertained is what those powers "are. Here, again, there is no room for dispute. They are to "be found expressed in unambiguous terms in the Racecourse "Betting Act, 1928. By section 1 (2), the board is given power "(amongst other things) to set up and keep a totalisator on any "approved racecourse (as defined in subsection (3)), and there to "operate the totalisator for the purpose of effecting betting trans-"actions on horse races only on days when horse races, but no "other races, take place on such racecourses. By section 3 (3) "it is provided that the board shall distribute or cause to be "distributed the whole of the moneys staked by means of a "totalisator on any race among the persons winning bets made "by means of the totalisator on that race after deducting a per-"centage, as therein mentioned, which we are told is in fact "10 per cent. Such percentage, as well as any other moneys "received by the board, are to be paid into a totalisator fund. "This fund is to be applied by the board in payment of all taxes, "rates," etc. Then the Lord Justice summarizes the other sub-sections of section 3.

Upon the question of vires, I make this reference to the judgment of Maugham L.J.[5] in the same case: "It follows "therefore," says he, "from the decisions of the House of Lords "in *Baroness Wenlock* v. *River Dee Co.*[6] and *Attorney-General* "v. *Great Eastern Railway Co.*,[7] that, on the one hand, the "powers of the corporation must either be expressly conferred by "or be derived by reasonable implication from provisions of the "Act of Parliament while, on the other hand, the doctrine ought "to be reasonably understood and applied and that whatever

[3] [1935] Ch. 34.
[4] Ibid. 54.
[5] Ibid. 59.
[6] (1884) 10 App.Cas. 354.
[7] (1880) 5 App.Cas. 473.

"may fairly be regarded as incidental to or consequential upon "the things which the legislature has authorized ought not in the "absence of express prohibition to be held to be ultra vires." The Lord Justice then [8] himself summarizes the effect of the provisions of the Act.

It will be observed that, whereas the trading purposes of the board are, as stated in those judgments, the operation of the totalisator, the purposes as stated in subsection (6) comprise (inter alia) the improvement of breeds of horses; and it is, no doubt, true that the two things are closely linked. If it is indeed permissible to make a reference from a living historian, Professor Brogan, I cite this passage from "An Introduction to American "Politics" (p. 153): "For although it is well-known that the "object of horse-racing is to improve the breeds of racehorses so "that they may run faster in other horse-races, this activity has "historically been associated with wagers upon the success of the "endeavours." But if the purposes are closely linked, it does not follow that they are the same.

I note that the Court of Appeal in the case that I have cited held that the payment of commissions to Tote Investors Ltd. was reasonably incidental to the powers of the board, as being directed to increasing the number of bets, and therefore, to promoting the business success of the board. The members of this court did not say that the commissions, which were held to be intra vires, must therefore be comprehended by the formula "working "expenses" in section 3 (6) of the Act. Still less did they indicate a view—and the point not being before them it was unnecessary that they should—whether the commissions were payments wholly and exclusively laid out for the purpose of the board's business. In my view, however, it is inevitable that such commissions and any other expenditure properly incurred by the board in the conduct of the business (as distinct from applications of the surplus of the totalisator fund, pursuant to the latter part of section 3 (6)) must be classed as "working expenses": for the directions contained in subsections (3), (4), (5) and (6) of section 3 appear to leave no scope for expenditure by the board (other than by way of payment to winning backers and of application of the surplus of the fund) save under one or other of the heads in the parenthesis in subsection (6); and of these heads "working expenses" is the only one relevant. It was, therefore, said that the phrase "working expenses" must be narrowly construed. But I am not, for my part, quite clear what precisely is thereby meant. Having regard to the presence of subsection (7) of section 3 and to the language which I have quoted from the judgments of Romer and Maugham L.JJ., the term "working expenses" must, at any rate, cover expenditure reasonably and properly incurred in the conduct of the business committed to the board by Parliament. I therefore prefer to attempt no further definition than to say that "working

[8] [1935] Ch. 34, 60, 61.

C. A.
1958
RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES).
Lord Evershed M.R.

"expenses" means what those two English words naturally signify, and that they cover the expenses incurred, reasonably and properly, in the "working" (that is, the setting up, keeping and operating) of totalisators upon approved racecourses; but that they are not limited to such expenditure only as is wholly and exclusively laid out for the purposes of the board's business.

Subject to what I have said, I for my part accept the Crown's argument, which I have above indicated. The business of the board is, as I have said, that of operating totalisators, and is not the promoting, as such, of the improvement of breeds of horses, and the like. More particularly, I accept the view of the Crown that the purposes to which the surplus can alone be applied are "independent objectives," and I, as did Upjohn J., reject the view that it is legitimate to disregard these purposes as regards any of the applications of the surplus, and that is nonetheless so, even though the procedure which was indicated in subsection (6) appears to have been somewhat departed from. By the express terms of subsection (6), the board is bound to apply the surplus moneys "in accordance with a scheme prepared by the board "and approved by the Secretary of State for purposes con-"ducive," etc. The phrasing seems, at first sight at any rate to me, to contemplate that there will be drawn up at some stage, though no doubt subject to later variation, a "scheme," in the sense in which that word is used familiarly, e.g., for administration of a charity. In truth, what appears to have happened is that no such formal scheme operative over a period has been drawn up. The board, at end of the year, put before the Secretary of State proposals for the application of the surplus, and those proposals are considered and approved, and then constitute the "scheme" for that year.

Nevertheless, in truth it seems to me that the matter cannot be put higher than this: out of the purposes which Parliament designated as those for which alone the surplus can be applied, and which, in my view, are essentially distinct from the business purposes of the board, the board has selected those most calculated to promote the board's own business interests. The result therefore, in my judgment, is that Upjohn J. was right in saying that the findings in this case were, upon their face, open to question, and ought not to be regarded as sacrosanct.

The judge said this [9]: "The appropriations are made and are "made only for the reason that they have to be so made pursuant "to section 3 (6) of the Act. They are made, not for the purposes "of trade but for public purposes conducive to the improvement "of breeding of horses and the sport of horseracing and the "advancement of veterinary science." And then, omitting a few lines, "True enough, the appropriations made coincide with the "trading desires of the board. My comment upon that is how "very fortunate it is for the board. But it cannot turn what "is, in essence, a statutory distribution in accordance with an

[9] [1958] 1 W.L.R. 122, 137.

"Act of Parliament of a surplus of a fund into a trading activity." The only qualification to what I have earlier said that I would venture to make is this, that it does not seem to me (though it is not strictly necessary for my judgment) that no application under section 3 (6) could, in any case, be one wholly and exclusively laid out for the purposes of the board's trade. But on the material before us it has not, in my judgment, been established that any such payments were of such a very special character that they should be rightly so described.

As regards the first head of expenses, the runners' allowances, I am not prepared, with all respect to him, to hold with Upjohn J. that these payments were ultra vires the board. In my judgment, it is not necessary to decide whether such payments were or were not ultra vires, because, assuming they were intra vires and must, therefore, be treated as working expenses, it does not follow, as I have earlier stated, that the payments were wholly and exclusively laid out for the purposes of the board's business. And, in my judgment, the sums paid for runners' allowances were not so wholly and exclusively laid out, notwithstanding the findings of the Special Commissioners. It is true that these sums, not having been applications of the surplus fund pursuant to the final part of the subsection, are not therefore of necessity impressed with the quality of being applied for one or other of the purposes for which alone such surplus is applicable. But it is, in my judgment, impossible to sever the commissioners' findings. The commissioners treated all the expenses with which we are concerned as having been incurred with like intent and for like purposes; and rightly so, for it has been conceded before us that the runners' allowances cannot in these respects be distinguishable from, for example, the travelling allowances. In my judgment, it follows that, if the commissioners' findings are open to challenge as to all the other expenses (as I think they are), they must inevitably be open to challenge as regards the runners' allowances, to which they directed no separate attention or conclusion. And if the findings are so open to challenge, then, in my judgment, the runners' allowances fail equally with the other expenses to qualify as deductions for income tax purposes, since they, like certain of the other expenses and particularly the travelling allowances, were laid out for purposes not exclusive to the board's business, but, to some real extent at least, for the purpose of assisting and promoting the interests of racehorse owners. For these reasons I would therefore prefer to leave entirely open the question of the vires of the payment of runners' allowances, and all the more so since I have no wish to add to the difficulties of the board in the discharge of their responsible statutory tasks, and since the point does not appear to have been taken before the commissioners, so that the materials before us, like the form of the proceedings itself, are not properly or sufficiently directed to the determination of the question.

In the course of presenting the case, Mr. Heyworth Talbot

C. A.
1958
Racecourse Betting Control Board v. Young (Inspector of Taxes).
Lord Evershed M.R.

propounded six propositions. They are: (1) Whatever the scope of the expression "working expenses" in section 3 (6), the expression does not, as a matter of law, constitute an exclusive definition of disbursements or expenses which are deductible in computing the profits of trade. (2) There is no reason in law why a disbursement made pursuant to a scheme prepared by the board and approved by the Home Secretary should not be a disbursement wholly and exclusively laid out for the purposes of the board's trade. (3) If the disbursement is of such a nature that it can, as a matter of law, have been made wholly or exclusively for the purposes of the trade, the question whether or not it was so made is one of fact. (4) Where it is found that the disbursement has been made by the trader "wholly and "exclusively," etc., the fact that the expense inures also for the benefit of a third party is nihil ad rem as a matter of law. (5) The payments of the runners' allowances were not ultra vires. And (6) if these propositions are well founded, there is no ground on which the decision of the Special Commissioners on the main part of the case can be disturbed.

In the result, I am prepared to accept numbers 1, 2 (with qualifications), 4 and 5, but not number 3. Number 6 does not arise. Accepting proposition number 2, I do so as constituting a general negative, as above indicated, but not in fact as governing this case.

In the circumstances, the cross-appeal does not now arise, but in case there is an appeal in this matter to the House of Lords, I am prepared to say that, as at present advised, I agree with Upjohn J. that none of the payments can be distinguished as creating some enduring asset in the business of the board within the meaning of the issue. In the circumstances, I would dismiss the appeal.

Morris L.J. I find myself in entire agreement with the reasoning and conclusion in the judgment that my Lord has delivered, and there is nothing that I desire to add.

Ormerod L.J. I agree also.

Appeals dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Simmons & Simmons; Solicitor of Inland Revenue*

B. A. B.

[QUEEN'S BENCH DIVISION.]

* L. E. CATTAN LTD. *v.* A. MICHAELIDES & CO. (TURKIE, THIRD PARTY, GEORGE (TRADING AS YARNS & FIBRES CO.) FOURTH PARTY.)

1958
March 26.

Diplock J.

Costs—Third party proceedings—Sale of goods—String contract—Claim for price of goods sold and delivered—Counterclaim by buyers that goods not of contract quality—Sellers joined suppliers as third party—Third party joined by fourth party—Failure of counterclaim—Sellers ordered to pay costs of third and fourth parties—Buyers ordered to pay sellers' own costs but not costs payable to third and fourth parties—Injudicial exercise of discretion.
Arbitration—Costs—Discretion of arbitrator.

The sellers of certain goods sued the buyers for the balance of the price. The buyers counterclaimed against the sellers, alleging that the goods were not in accordance with their description in the contract. The sellers, while denying a breach of contract, claimed an indemnity from the persons from whom they had purchased the goods, whom they joined as third party. The third party, in turn, joined their suppliers as fourth party. The dispute was referred to arbitration. The arbitrator found that there was no substance in the buyers' counterclaim, and that, accordingly, the question of an indemnity by the third party to the sellers and by the fourth party to the third party did not arise. The arbitrator ordered the third party to pay the fourth party's costs and the sellers to pay the third party's costs, including those of the fourth party; but he ordered the buyers to pay the costs of the sellers, excluding the costs payable by the sellers in respect of the third and fourth parties. On an application by the sellers to have the order as to costs set aside or remitted to the arbitrator for further consideration:—

Held, that in so far as the arbitrator had not ordered the buyers to pay the costs of the third and fourth parties, there appeared, on the face of the record, to be an injudicial exercise by the arbitrator of his discretion with regard to costs; and that that part of the claim which related to costs would be remitted to the arbitrator for further consideration.

Heaven & Kesterton Ltd. v. *Sven Widaeus A/B* [1958] 1 W.L.R. 248; [1958] 1 All E.R. 420 considered.

Per Diplock J.: "I think that I should make these observations "about the way in which the costs should be dealt with where "third, fourth, fifth or sixth parties have been brought in in these "string contract cases which are very common. . . . In the ordinary "way, where damages are claimed for breach of contract on one "contract in a string of contracts, and the seller brings in his "immediate seller as a third party, and that party brings in his "immediate seller as a fourth party, then, provided that the con-"tracts are the same, or substantially the same, . . . the defendant ". . . if successful should recover against the plaintiffs not only his "costs but any costs of the third party which he has been ordered to "pay; the third party in like manner should recover from the "defendant his own costs and any costs of the fourth party which "he has been compelled to pay, and so on down the string. . . . "In saying that I am not excluding the possibility that there may "be special reasons for departing from that normal practice."

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

1958

L. E. CATTAN LTD. v. A. MICHAELIDES & Co.

MOTION to set aside or remit an arbitrator's award.

By a specially endorsed writ the plaintiffs, who were cotton brokers, claimed from the defendants the balance of the price of a quantity of cotton yarn sold and delivered by the plaintiffs to the defendants. The defendants counterclaimed against the plaintiffs, alleging that the goods were not in accordance with their description in the contract. The plaintiffs, by way of defence to the counterclaim, denied a breach of contract. They also served a third party notice upon the persons from whom they had purchased the goods, claiming an indemnity in the event of their being found liable in damages to the defendants in respect of the counterclaim. The third party served a fourth party notice on their suppliers, claiming a similar indemnity. The dispute was referred to arbitration.

The arbitrator in making his award found that the defendants had failed to substantiate their allegations and that the counterclaim accordingly failed. Questions of indemnity between the third party and the plaintiffs and between the fourth party and the third did not therefore arise. Having made these "findings," the arbitrator went on to make an "award" in the following terms: "I award (i) that the counterclaim of the defendants be "wholly disallowed; . . . (iii) that the claim of the plaintiffs "against the third party be disallowed; (iv) that the claim of the "third party against the fourth party be disallowed; (v) that the "third party pay the fourth party's costs of and incidental to the "reference and to the said action; (vi) that the plaintiffs shall pay "the third party's costs of and incidental to this reference and "to the said action with the amount paid by the third party to "the fourth party under the preceding paragraph; (vii) that the "defendants shall pay the plaintiffs' costs of and incidental to "this reference and to the said action, but not including the "amount payable by the plaintiffs to the third party under the "last preceding paragraph; and (viii) that the fees and expenses "of the tribunal . . . shall be borne and paid by the defendants."

The plaintiffs moved to have that part of the award which related to costs set aside or remitted to the arbitrator for further consideration.

C. R. Beddington for the sellers, the plaintiffs.

Peter Pain for the buyers, the defendants.

C. L. Hawser for the plaintiffs' suppliers, the third party.

R. T. Monier-Williams for the third party's suppliers, the fourth party.

Apart from the case referred to in the judgment, the following cases were referred to in argument: *In re Salmon* [1]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 2)* [2]; *Lewis* v. *Haverfordwest Rural District Council.* [3]

[1] (1889) 42 Ch.D. 351; 5 T.L.R. 315.

[2] [1953] 1 W.L.R. 1481; [1953] 2 All E.R. 1588.

[3] [1953] 1 W.L.R. 1486; [1953] 2 All E.R. 1599.

DIPLOCK J. stated the facts and continued: Mr. Beddington, on behalf of the plaintiffs, says that this is a very odd order for costs. And the oddity is this: that whereas the third party has recovered his costs against the plaintiffs, and also the costs which the third party has been ordered to pay to the fourth party, the plaintiffs are not entitled to recover any of those costs against the defendants, who set the train of actions in motion. Mr. Beddington says that it may well be that in any particular case an arbitrator or a judge may say that the plaintiffs should not pay the costs of the defendants' third party proceedings on the ground that such proceedings ought not to have been brought for a variety of reasons or were unjustified for a number of reasons. But, he says, if that be right, it is wholly inconsistent with that that the plaintiffs in this case should be compelled to pay the costs of the fourth party, with whose bringing in he has had nothing to do.

I am bound to say that it does strike me as a very remarkable order as to costs. But it is urged on behalf of the defendants that my jurisdiction to remit the award to the arbitrator is limited to cases where I come to the conclusion that there can be no possible reason for an order in the form in which the arbitrator has made it. Mr. Pain, on behalf of the defendants, referred me to a recent judgment of mine in *Heaven & Kesterton* v. *Sven Widaeus A/B*,[1] and particularly to the paragraph which reads[2]: "The basis and utility of arbitration as a method of determining "disputes is that the parties select their own tribunal and agree "to be bound by its decision not only on fact but also, in so far "as they do not take advantage of the special remedies by way "of case stated, on law. In general, an award of an arbitrator "cannot be set aside for error, whether of fact or of law . . . It "seems to me that misconduct in that wide sense in which it is "used in relation to arbitration is also a ground on which the "court can interfere with the exercise by the arbitrator of his "discretion as to costs."

It is urged by the defendants and, indeed, by the third and fourth parties (who are quite happy with the award as it stands) that there is no material here on which I can say that the arbitrator has been guilty of misconduct.

I think this is a border-line case. But I think that it is a speaking award. The arbitrator has not limited himself to awarding that the counterclaim be disallowed and that the consequences as to costs follow, but has put forward, I think, the findings upon which his award is based, and in particular the finding that, consequent upon the finding that the counterclaim fails, the questions of indemnity by the third party to the plaintiffs and by the fourth party to the third party do not arise.

On that finding, which is the only finding in the case, it seems to me that the award as to costs quite clearly cannot stand. It

[1] [1958] 1 W.L.R. 248; [1958] 1 All E.R. 420.

[2] [1958] 1 W.L.R. 248, 254.

1958

L. E. CATTAN LTD. v. A. MICHAELIDES & Co.

Diplock J.

would be an injudicial exercise of discretion to award the third party's costs against the plaintiffs, including the costs of the fourth party, and not to award to the plaintiffs against the defendants their costs including the costs of the third and fourth party proceedings, which they have been compelled to pay. On that finding it is impossible, in my view, to draw the distinction which the arbitrator has drawn between the position of the third party and the plaintiffs as regards the costs of the further proceedings. I think, therefore, that that part of the award which deals with costs should be remitted to the arbitrator for his reconsideration. In remitting it, I think that I should make these observations about the way in which costs should be dealt with where third, fourth, fifth or sixth parties have been brought in in these string contract cases which are very common. In doing so, however, I want to make it clear that I am not seeking to substitute my discretion for that of the arbitrator, or to suggest that there may not be reasons in some circumstances for making a different order. But, in the ordinary way, where damages are claimed for breach of contract on one contract in a string of contracts, and the seller brings in his immediate seller as a third party, and that party brings in his immediate seller as a fourth party, then, provided that the contracts are the same, or substantially the same, so that the issue as to whether the goods comply with a description is the same, in the normal way the defendant—though in this case it was the plaintiffs, because it was a counterclaim—if successful should recover against the plaintiffs not only his costs but any costs of the third party which he has been ordered to pay; the third party in like manner should recover from the defendant his own costs and any costs of the fourth party which he has been compelled to pay, and so on down the string. That is the normal way in which costs should be dealt with in this kind of action where there is a string of contracts in substantially the same terms. In saying that I am not excluding the possibility that there may be special reasons for departing from that normal practice. Whether it was reasonable for the defendant to bring in a third party at all is always a question to be considered.

Why I think that it is plain in this case that the arbitrator cannot have applied the real principles is the fact that the award as to costs is inconsistent in that it has adopted one method towards the plaintiffs—who were the defendants to the counterclaim—and another method towards the third party.

I think, therefore, that this is a case where I should, in the exercise of my discretion under section 22 of the Arbitration Act, 1950, remit to the arbitrator for further consideration that part of his award which deals with costs. I do not think I should limit myself to remitting merely that part of the award which relates to the defendants' costs, because, as I say, there may be matters unknown to me which will affect the question of costs, or which he may think, in his discretion, should affect it. In saying that, I do not want to suggest for one moment that there

has been any indication or material before me that either the fourth parties or third parties should be deprived of their costs from someone.

Award remitted in part.

1958

L. E. CATTAN LTD. *v.* A. MICHAELIDES & CO.

Solicitors: *Birkbeck, Julius, Coburn & Board for A. L. Hamwee & Co., Manchester; Simmons & Simmons for March, Pearson & Green, Manchester; Barrow-Sicree & Co., Manchester; Sando, Parrott & Co. for Kirk Jackson & Co., Manchester.*

[COURT OF APPEAL.]

* HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* NORUM.

C. A.

1958 *May* 21, 22.

Lord Evershed M.R., Morris and Ormerod L.JJ.

[Plaint No. 697.]

Housing—Rent—Scheme by local authority—Differential rent scheme—Rebates lost if tenant's income increased—Duty to inform council of increase—Failure of tenant to inform council—Under-payments of tenant added to next year's rent—Tenancy determined—Whether tenant liable for rebates not refunded.

During the financial year which ended in April, 1955, the defendant was tenant of a dwelling-house owned by a local authority. Early in 1955 the local authority put into operation a differential rent scheme, and by letter dated February 5, 1955, the clerk to the council served notice to quit on the tenant and informed him that particulars of the council's new arrangements for letting their houses were to be found in a leaflet, which was enclosed, and on the back of rent cards, also enclosed. At the same time the tenant was offered a new tenancy at a weekly rent of 34s. 5d. (later reduced to 29s. 4d.) from which there would be deducted such amounts by way of rebate as he might be entitled to under the scheme. The leaflet provided by clause 4 that any increase or permanent decrease in gross income necessitating a reassessment of rent was to be notified immediately by the tenant. The tenant was entitled under the scheme to the maximum rebate of 12s. a week and from April, 1955, to April, 1956, he paid a rent which was calculated on that basis. In the summer of that year the tenant had by reason of overtime work so increased his income that he ceased to be entitled to the full rebate under the scheme and should have paid a rent increased by 10s. a week for some 25 weeks. When his rent was assessed for the year beginning April, 1956, the tenant agreed with the council to pay 10s. more a week as additional rent until he had repaid to the council the rent underpaid for the past year. The rent card was altered to read "Maximum net rent 29s. 4d. plus "10s." The tenant gave up his tenancy in October, 1956, having paid the rent due to that date but before he had recouped to the council the full amount it had been calculated he had underpaid in the previous year. The council in these proceedings claimed payment of the balance of the sum they had been underpaid as rent:—

Held, that the effect of the arrangement of the council with the tenant was that in lieu of any payment back by him of the excess

C. A.

1958

Havant and Waterloo Urban District Council v. Norum.

rebates he had been allowed, he should for the ensuing year pay an additional rent of 10s. a week until he had discharged such excess rebates; there was no reassessment of rent as contemplated by clause 4, and since at the date of the determination of the tenancy there was then no rent in arrear, the council's claim must fail.

Per curiam. It would need extremely clear and strong language to enable a landlord ex post facto and without the tenant's assent to alter the rent or contractual sum in consideration of which the tenant was entitled to enjoy the premises.

Appeal from Judge Tylor Q.C. sitting at Portsmouth County Court.

The plaintiff, the Havant and Waterloo Urban District Council, in these proceedings claimed against Arne Norum, a former tenant of theirs, the sum of £14 14s. 11d. alleged to be due for rent in respect of a dwelling house No. 61 Elizabeth Road, Waterlooville, Hants, which they had let to him. The county court judge dismissed their claim.

The council appealed.

The facts are fully stated in the judgment of Lord Evershed M.R.

R. E. Megarry Q.C. and *A. John Jenkins* for the council.

The tenant did not appear and was not represented on the appeal.

No cases were cited in argument.

Lord Evershed M.R. The claim in this action was £14 14s. 11d., claimed by Havant and Waterloo Urban District Council (to whom I will refer hereafter as " the council ") against the defendant, who has not attended the hearing of this appeal, but who was, at the relevant times, a tenant of the council at a house known as No. 61, Elizabeth Road, Waterlooville, being part of a property owned and managed by the council. Though the sum in question is small, the matter has raised questions of difficulty and importance. It will be seen from a recital of the defendant's occupancy of that house that the sum of £14 14s. 11d. in truth is made up of two distinct items.

During the financial year which ended in April, 1955, the defendant was a tenant of this house upon terms such that, like other tenants of the council, the rent payable was appreciably below the economic rent. In other words, the council found that they were having to subsidise out of their general rate fund the management and upkeep of this estate, and to do it to an appreciable extent. Averaged out over the whole of their 1,850 tenancies, the subsidy was equivalent to some 12s. per week. It seemed, therefore, to the council—who have, of course, a duty to all those who provide the rates—that they should try to introduce a scheme which would be less economically expensive. They therefore inaugurated a scheme, known as a differential rents scheme, its purpose being that the benefit of subsidised houses

should be enjoyed only by those whose means did not enable them to afford to pay a better rent. The difficulty has been due in large measure to the fact that the council—in struggling perhaps too much for perfection—have provided an undue complication.

In February, 1955, the defendant received a notice to quit together with a letter dated February 5 in which the clerk to the council gave the reason for the notice. The letter stated that the council had recently revised the terms on which they would let council houses, and that particulars of the new arrangements would be found in a leaflet which was enclosed. "The "information contained in the leaflet, together with the conditions "of tenancy which, for the sake of convenience, are already set "out on the backs of rent cards, will be made widely known, and "all new tenancies will be understood to be granted on this basis "without any formal tenancy agreement being entered into." It has been an important part of the argument of Mr. Megarry for the council that after April, 1955, the contract of tenancy was to be found not only in the rent cards, but also in this letter and the accompanying leaflet. I do not find it necessary to express a final view about that argument, but I observe, in some possible qualification of it, that the conditions of tenancy in the letter are stated as being then, for convenience, set out on the backs of the rent cards.

The letter then went on to say: "In order to bring the new "arrangements into being it is necessary to bring to an end "existing tenancies . . . but I am authorized to offer you a new "tenancy at a net weekly rent of 34s. 5d. from which, however, "there may be deducted such amounts by way of rebate as you "may from time to time be eligible for under the Subsidy Adjust-"ment Rents Scheme set out in the leaflet. To the net rent, "calculated in the way just explained, there will be added an "appropriate amount for rates," and then followed an intimation that by remaining in possession the defendant would be treated as accepting the new terms.

The accompanying leaflet is a document of some little length. It opens with this phrase: "The council have decided to operate, "as from April 4, 1955, a subsidy adjustment rent scheme which "entails the payment of a rent calculated by reference to the "following provisions." There followed in tabular form a statement which showed that if the tenant's gross income during the current financial year amounted to less than £620, the actual rent which he would be required to pay would be 34s. 5d. less an abatement which varied between a maximum figure of 12s. per week, and a minimum of 2s. a week. Paragraph 2 stated: "Gross "income is the combined income of the tenants and includes" various items, overtime being one of them, "and emoluments "received in the current financial year (April 6 to April 5) before "any deduction is made for income tax" and various allowances, and then there is a reference to family allowances. The next

C. A.
1958
Havant and Waterloo Urban District Council v. Norum.
Lord Evershed M.R.

paragraph instructed tenants that if they wished to get the advantage of the abatement or any of the abatements to which a tenant might be entitled, then he or she should apply personally to an officer of the council at stated times and places.

Paragraph 4 is of considerable importance. It is headed "Claims for alteration" and provides: "Any increase or decrease "in the gross income (see paragraph 2 above) necessitating a "reassessment of rent must be notified immediately by the tenant "or his agent calling at this office to complete the appropriate "forms, produce such documentary evidence as may be necessary "to substantiate a revision and leave the current rent card for "alteration. Alterations in rent will be operative: (*a*) From the "first rent collecting period after notification, as above, of any "change of financial circumstances requiring a decrease in rent. "(*b*) From the first rent collecting period after a change of "financial circumstances arose requiring an increase in rent."

It will be observed that there is a differential between cases for decrease and cases for increase, and the differential may be justified, as Mr. Megarry said, as being a stimulus to make prompt disclosure of changes. However that may be, if a tenant is qualified to have a decrease, then he gets the decrease only from the time that he gives the necessary notification. If, on the other hand, his case requires an increase, then that increase operates from the time of change of circumstances, which may plainly be a past date at the time of the notification.

The first question that arises, and upon which the judge expressed a view, was as regards the meaning of the formula "gross income during the current financial year." It was the view of the judge that that formula could only mean, sensibly, gross income for a year already completed, since if you were calculating anything by reference to a year's income, then you would have to wait until the year was over before you knew what the income in total was. But Mr. Megarry has put forward formidable arguments for the view that, in its context, "gross income during "the current financial year"—which was, in paragraph 1, divided into a weekly rate—was intended to be something which would be calculated, and may be recalculated, during the progress of any given financial year, so that it would at any point of time be in part an estimate only. Once more, I do not feel it necessary, in the view that I take, to express a final conclusion; but in fairness to the council, I ought to say that I must not be taken to be accepting the view the judge took that "gross income for the "current year" meant (and could only mean) gross income for a year already completed.

The significance of the other view—Mr. Megarry's view—emphasises the council's wish for perfection, for the point was that if during any year a man's income went substantially up or substantially down, then the change should be reflected virtually at once in his rent—that is, his actual payable rent—so that from

time to time his net rent would be properly related to his capacity to pay it.

In an ideal world that, I should think, would be the fairest thing; but there can be no doubt that in practice it is capable of creating very grave difficulties. It will be recalled that paragraph 4 uses the phrase: "Any increase" (and I emphasise the first word, "*any* increase") "or decrease in the gross income neces-"sitating a reassessment." Now many of the occupants of these houses are men or women whose wages or emoluments may vary quite appreciably. They may vary according to the season. They may (and this was the defendant's case) vary considerably if over a period a large amount of overtime is done; and, as my brother Ormerod pointed out during the argument, this phrase requires that a man should reach a conclusion (which may be difficult) whether the increase or decrease which he is enjoying or suffering is, looking a bit ahead, one which can be said to necessitate a reassessment.

But I do not propose to pursue that aspect of the matter further, save only to add this. It may be that as a result of these proceedings, and the attention which has been given to them, there will be some change in the formulation of this scheme; and I would venture to suggest for consideration the advantages of simplicity which might be linked with a system correlating the payable rent to some past period; you could have, perhaps, three-monthly or six-monthly periods, and let the rent for the next period be related to the experience of the past, with a general power to the council to deal always with hard cases. It is, perhaps, going outside my proper sphere to say more; but I make that suggestion because I cannot conceal that I have found very grave difficulty in construing some of the passages in these documents; and some of those who are tenants, I am sure, would find at any rate no less difficulty in construing them than I have.

The defendant, having received these documents, made the necessary call upon the officer of the council; and the consequence was that from the year which began on April 4, 1955, he continued to occupy his house on the terms that the actual amount of rent which he paid was, including rates, £1 10s. 2d. per week. That figure was arrived at by allowing him the full rebate of 12s. per week which, on the figures that he supplied, he had then justified. He was given a card, and on the face of it, after stating his name and address, there is inserted in ink: "Maximum net "rent 34s. 5d.," and then: "Rent £1 2s. 5d., Rates 7s. 9d., (total) £1 10s. 2d." At a later stage the council found it possible to make an overall reduction of 5s. 1d. in all rents. The result, so far as this card is concerned, was that the figure of 34s. 5d. was struck out, and 29s. 5d. was put in; and that, in parallel with the other figures I have cited, there was substituted a new sum of 17s. 4d. for rent, and 7s. 9d. for rates, making a total of £1 5s. 1d.

On the left-hand of this side of the card are set out: "Conditions of tenancy. (1) The house will be let by the week

C. A.
1958
Havant and Waterloo Urban District Council v. Norum.
Lord Evershed M.R.

"only and the tenancy may be determined by the council giving "to the tenant one week's notice in writing signed by the clerk "of the council or by the tenant," etc. There are then a number of provisions relating to the way in which the tenant must occupy. The last condition was: "In case of non-payment of rent "(whether legally demanded or not) or upon non-fulfilment or "breach of any of the conditions of tenancy then and in every "such case the council shall be at liberty to re-enter and take "possession of the premises without any liability to an action at "law for trespass or otherwise and with power to recover all "outstanding rent." The judge somewhat castigated the council for using the phrase "without any liability to an action at law for "trespass or otherwise" on the ground that it was directed to preventing a tenant from having access to the Queen's courts. With all respect to him, I think that was an unnecessarily harsh view of the phrase. I do not think it was so intended, and I am quite clear that it could not have that effect. Indeed, it may fairly be said (as Mr. Megarry conceded) that it has no effect whatever; and, if that is so, it might be desirable hereafter to omit it; and I only mention it because the council is naturally a little sensitive about what has been said in regard to this paragraph.

The defendant continued throughout the financial year April, 1955, to April, 1956, on the new terms, which may either be found alone in this rent card, or in the rent card plus the letter and the leaflet; and I think it matters not which. But on the other side of the card, as is commonly found, there is a record of the amounts paid for rent, and a column devoted to arrears. At the date when this card begins its record, April 4, 1955, it is said that the defendant was owing for rent under the old pre-scheme terms of occupation a figure of £4 11s. 9d. Part only of that sum, namely, £3 1s. 2d., is recorded opposite the opening entry as being arrears. The remaining £1 10s. 7d. appears to have been lost sight of. But looking at the record of payments, it is plain that by February 20, 1956, all arrears are recorded as having been discharged; and on March 19—which is the last rent payment recorded in this year—the defendant was up to date, according to the record, with rent.

Of the sum claimed in the action (£14 14s. 11d.) £4 11s. 9d. is alleged to be the old arrears from the pre-April, 1955, occupation. It was the judge's view that the subsequent conduct of the parties, including the records on this card, had extinguished any such arrears. I think the judge was plainly right so to hold; and Mr. Megarry has not thought it proper to take time further on that point, which, in any case, is not only trifling in its amount, but does not involve any matter of principle. For the rest, therefore, I shall treat the claim as being for £14 14s. 11d. minus £4 11s. 9d., which is £10 3s. 2d.

During the year in question (1955–56) it seems that the defendant in the summer-time did a good deal of overtime; and

the ultimate question arose whether his gross income for that "current year," within the meaning of the formula mentioned, had not increased to such an extent as had necessitated a reassessment, because it will be recalled that he had enjoyed the full abatement. In the end of all, it was concluded that that view was well founded.

The council claims that, by virtue of paragraph 4 of the leaflet (treating it as part of the contract), they were then entitled to reassess the actual rent which the defendant should have paid from the date of his change of circumstances; and, to put it into figures, that meant that he should, according to the council's view, have for some 25 weeks or so paid 10s. more per week than he had paid in fact. The way in which the matter in practice was worked out was this: When the rent card was made out for the next year (1956–57), in place of the figures which I have read from the front of the former card, you get first this: "Maximum "net rent 29s. 4d."—that, it will be recalled, is the overall maximum after the 5s. 1d. reduction—"plus 10s." Then against rent, rates and total are the respective figures £1 17s. 4d., 8s. 8d., £2 6s. The effect arithmetically of that arrangement was that in respect of the new financial year beginning April, 1956, the actual abatement which the defendant was getting was only the minimum of 2s. from the maximum overall rent of 29s. 4d.; but he was also paying another 10s. a week by way, so to speak, of recoupment to the council of what was said to have been an under-payment of actual rent during the previous year.

The question was considered by the judge whether the council was in any case competent so to arrange with the defendant. He drew attention to the fact that the "maximum net rent" (namely, 29s. 4d. plus 10s.) is stated at a figure appreciably above the real maximum net rent; and, furthermore, it is pointed out that the defendant was paying 8s. a week more than the 29s. 4d. The judge's view, in addition to that which he had expressed on the meaning of "gross income," was that the council had exceeded any powers that they had or might have, not having determined the defendant's tenancy, to impose or put forward those terms. But, again, I do not think that I need express any concluded view, because in truth the defendant accepted, obviously, what was suggested. He continued in occupation. He paid the added rent, and certainly (unless he raised some claim for recoupment, which he has not done) I do not think that we can be asked to express any view other than that the new rent card recorded in truth a bargain to which the defendant had, by necessary inference, become a party. It is for that reason, therefore, that I have not thought it necessary to express a view of my own on these matters of the meaning of "gross income for the current year," and so forth.

All might have gone well but for the fact that in October, 1956, the defendant—whose financial circumstances, so the judge said, no doubt quite rightly, had by no means flourished—made

C. A.
1958
Havant and Waterloo Urban District Council v. Norum.
Lord Evershed M.R.

up his mind to leave the premises, which he did, and that put an end to his tenancy of No. 61, Elizabeth Road. He did that at a time when he had not, by means of these additional sums of 10s. per week, discharged all that the council said constituted the sum of his under-payments during the previous year. The difference was £10 3s. 2d., and the council claims in the action to recover that as a debt, being rent in arrears.

In my judgment, the council are unable so to do; and, indeed, with all respect to Mr. Megarry, it seems to me that the argument to the contrary is wholly untenable. I doubt whether the terms of the contract at the time when the defendant left can be sought elsewhere than in his rent card, which states in terms the conditions of his tenancy. But, even if you can look at the leaflet and the letter, I am unable to agree that, in the circumstances, at the date when the defendant left, there was anything due from him to the council by way of money due for unpaid rent. There is no warrant whatever for such a proposition in the rent cards, which show that he paid the rent regularly, and was up to date in the end with all the payments due under the current arrangement.

I am inclined to think that whatever the council might have done, or say they could have done (as to which I express no view), what they did or purported to do in fact or in law was this: They made an arrangement with the defendant, to which he assented, that in lieu of any payment back by him of any overpaid rebates (if that is the right phrase) he should, for the then ensuing year, pay an added 10s. a week by way of net rent until he had discharged a sum equivalent to the excess rebates. That, of course, would have been all right had he gone on during the requisite time; but since he determined the tenancy (as he was entitled to do) that automatically, as it seems to me, ended the obligation. But, in any case, in my judgment, the true and short answer, and the clear answer, to the council's claim is that there were no arrears at the relevant date, and are not now any arrears of rent. I have referred to the cards, which show that there were none. There was in truth no reassessment of the rent as contemplated by paragraph 4 of the scheme. That paragraph, it will be recalled, contemplated that in the event happening of a relevant increase or decrease in gross income, the rent card would be altered, and the alterations in rent would be as there indicated. The rent cards were never altered.

I share the judge's view that it would at best need extremely clear and strong language to enable a landlord ex post facto, and without the tenant's assent, to alter the rent or contractual sum in consideration of which the tenant was entitled to enjoy the premises; and I am not satisfied—to put it no higher—that there is in these documents any sufficient warrant for such a power. But most certainly I do not find any warrant for any such power having been exercised; and therefore, without more, I conclude, without any hesitation, that the council are unable to

establish that at the relevant date when this summons was issued, or when the defendant left, there was anything due to them for rent in respect of these premises. If that is so, then the action rightly failed, and was dismissed. I would, accordingly, dismiss the appeal.

C. A.
1958
HAVANT AND WATERLOO URBAN DISTRICT COUNCIL v. NORUM.

MORRIS L.J. I agree so fully with all that my Lord has said that there is nothing that I desire to add.

ORMEROD L.J. I agree, and there is nothing I wish to add.

Appeal dismissed.

Solicitors: *A. F. & R. W. Tweedie.*

B. A. B.

[COURT OF APPEAL.]

* AIREY v. AIREY.

[1957 A. 754.]

C. A.
1958
Mar. 27, 28.
Diplock J.
May 9, 12, 13; *June* 13.
Jenkins, Parker and Pearce L.JJ.

Limitation of Action — Death of tortfeasor — Limitation applicable — Lapse of six years—Letters of administration taken out—Action brought within six months thereafter—Whether action statute-barred—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1), (3)—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 32.

On February 24, 1951, the driver of a motor-car was killed in an accident in which his passenger was injured. Letters of administration to the driver's estate were not taken out until March 18, 1957. On September 9, 1957, the passenger issued a writ against the administrator of the driver's estate, claiming damages for negligence in respect of the injuries which she had sustained in the accident. The defendant contended that the action was barred by section 2 of the Limitation Act, 1939 [1]:—

Held, by Diplock J., that the action was one for which a period of limitation was prescribed by the Law Reform (Miscellaneous Provisions) Act, 1934,[2] and, therefore, the Limitation Act, 1939, did

[1] Limitation Act, 1939, s. 2: "The following actions shall not be "brought after the expiration of six "years from the date on which the "cause of action accrued, that is to "say:—(*a*) actions founded on simple "contract or on tort; . . ."

S. 32: "This Act shall not apply "to any action or arbitration for "which a period of limitation is pre-"scribed by any other enactment, ". . ."

[By section 34 (4) and the Schedule, sections 3, 4 and 7 of the Limitation Act, 1623, were repealed.]

[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1): "Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all causes "of action subsisting against or "vested in him shall survive against, "or, as the case may be, for the "benefit of, his estate. . . . (3) No "proceedings shall be maintainable in "respect of a cause of action in tort "which by virtue of this section has "survived against the estate of a "deceased person, unless either—(*a*) "proceedings against him in respect "of that cause of action were pending "at the date of his death; or (*b*) [the "cause of action arose not earlier "than six months before his death

1958

AIREY
v.
AIREY.

not apply by virtue of section 32 of that Act; accordingly, since proceedings were taken within six months of taking out letters of administration the action fell within section 1 (3) of the Act of 1934 and was not barred.

On appeal:—

Held, by the Court of Appeal, (1) that the provision in section 1 (3) (*b*) of the Act of 1934, barring an action under the section unless brought within six months of the taking out of representation, constituted a period of limitation;

(2) (reversing Diplock J.) that in an action brought under the section against the estate of a deceased tortfeasor before the coming into force of the Act of 1939, the six months' period of limitation would have been the sole period applicable, so that the Act of 1939 did not alter the law in such a case;

(3) (affirming Diplock J.) that, as the action was one for which a period of limitation was prescribed by the Act of 1934, after the coming into force of the Act of 1939 the six years' period of limitation prescribed by section 2 was excluded by section 32.

Quaere: Whether, since the passing of the Law Reform (Limitation of Actions, etc.) Act, 1954, such an action which had become statute-barred in the lifetime of the tortfeasor could be maintainable after his death, provided that it was brought within six months of the taking out of representation.

Decision of Diplock J. affirmed in the result.

PRELIMINARY POINT OF LAW.

On February 24, 1951, Isaac Airey was the driver of a motor-car in which the plaintiff, Elizabeth Scott Airey, was a passenger. The motor-car became involved in an accident, as the result of which the driver was killed and the plaintiff injured. On March 18, 1957, letters of administration to the estate of Isaac Airey were taken out by the defendant, John Calvert Airey. On September 9, 1957, the plaintiff issued a writ against the defendant claiming damages for negligence in respect of the injuries which she had sustained in the accident of November 24, 1951. The defendant contended that since proceedings had not been commenced within six years of the alleged accrual of the action, such proceedings were barred by section 2 of the Limitation Act, 1939. On December 13, 1957, it was ordered that the point should be tried as a preliminary issue.

Roy Wilson Q.C. and *Paul Curtis-Bennett* for the plaintiff.
E. W. Eveleigh for the defendant.

"and] proceedings are taken in "respect thereof not later than six "months after his personal representative took out representation. "(4) Where damage has been "suffered by reason of any act or "omission in respect of which a cause "of action would have subsisted "against any person if that person "had not died before or at the same "time as the damage was suffered, "there shall be deemed, for the purposes of this Act, to have been "subsisting against him before his "death such cause of action in respect "of that act or omission as would "have subsisted if he had died after "the damage was suffered."

[Note: The words in square brackets were repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954.]

The following case was cited in argument: *Douglas* v. *Forrest*.[2a]

Cur. adv. vult.

March 28. DIPLOCK J. read the following judgment: In this case I have to decide, as a preliminary issue, a point of law raised on the pleadings in an action for damages for negligence brought against the administrator of the alleged tortfeasor. The alleged negligence, and the damage that it caused, took place on February 24, 1951. The alleged tortfeasor is dead. The writ was issued on September 9, 1957. That is more than six years after the act of negligence and the damage. The defendant relies upon section 2 of the Limitation Act, 1939. The sole question is whether that section applies to bar the action against the tortfeasor's administrator.

It does not appear upon the pleadings at what date letters of administration were taken out by the defendant, although it is common ground that they were in fact taken out on March 18, 1957, that is, within six months of the issue of the writ. This, however, is irrelevant to the point of law which I have to decide, namely, whether section 2 of the Limitation Act, 1939, bars the action.

The defendant submits that the action is one founded on tort, that the cause of action arose on February 24, 1951, when the damage was sustained as the result of the negligent act of the deceased, and that section 2 of the Limitation Act, 1939, applies, and that the action is accordingly barred after the expiration of six years from February 24, 1951. The Law Reform (Limitation of Actions, etc.) Act, 1954, can for this purpose be ignored, because the cause of action arose before the passing of the Act of 1954.

The plaintiff, while not conceding—on somewhat metaphysical grounds—that the cause of action necessarily arose on February 24, 1951, relies in the first place on the contention that, even if it did, this, being an action against the personal representative of a deceased tortfeasor, is an action in respect of which a period of limitation is prescribed by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, and that by virtue of section 32 of the Limitation Act, 1939, the latter Act does not apply to it.

Section 32 of the Limitation Act, 1939, so far as is relevant, is in the following terms: "This Act shall not apply to any action "... for which a period of limitation is prescribed by any other "enactment ..."

The short question of law is whether, upon the true construction of this section, the present action is one for which a period of limitation is prescribed by the Law Reform (Miscellaneous Provisions) Act, 1934. The relevant provisions of that Act are subsections (1) and (3) of section 1. [His Lordship read them,

[2a] (1828) 4 Bing. 686.

1958

AIREY
v.
AIREY.

Diplock J.

and continued:] This Act must, of course, be construed in the light of the law as it existed in 1934, at the time that the Act was passed. At that date the limitation period in respect of actions upon the case was prescribed by section 3 of the Limitation Act, 1623, as six years next after the cause of action. But while an action of debt, including assumpsit, that is, actions founded upon simple contract, for which a similar limitation was prescribed by the same section, survived against the personal representative of a deceased person, an action founded upon tort lapsed upon the death of the tortfeasor by the application of the rule actio personalis moritur cum persona. Section 1 (1) of the Act of 1934 abolished this rule (except as regards actions for defamation, seduction or enticement). It assimilated causes of action founded upon tort to causes of action founded upon simple contract. To the latter the limitation period laid down by the Act of 1623 had always applied irrespective of whether the action was brought against the original contractor or his personal representative; and, prima facie, there would seem no reason why any different rule should be applied to causes of action of tort which, by virtue of section 1 (1) of the Act of 1934, were made to survive against the personal representative of the deceased tortfeasor.

While section 1 (1) dealt with the survival of causes of action, section 1 (3) dealt with proceedings in respect of such causes of action. It laid down certain alternative conditions which must be fulfilled if such proceedings were to be maintained. The first condition contained in paragraph (*a*) was that proceedings against the deceased person should have been pending at the time of his death. In the case of actions where this condition was fulfilled, clearly the limitation period laid down in the Act of 1623 would apply.

The second condition contained in paragraph (*b*), which was alternative to the first, contained two elements: the first relating to the time when the cause of action arose, namely, it must have arisen not more than six months before the death of the tortfeasor; the second relating to the time when the action was started, namely, it must have been started within six months after his personal representative took out representation. Again, in the case of actions where this condition was fulfilled, I see no reason to exclude the application of the limitation period laid down in the Act of 1623.

At the date of the passing of the Limitation Act, 1939, therefore, I think that an action founded upon tort brought against the personal representative of a deceased tortfeasor was one for which a period of limitation was prescribed by the Act of 1623, and, where commenced against a personal representative, was also (to use a neutral expression) subject to two further conditions, one of which related to the time within which the action must be started.

The Limitation Act, 1939, repealed the Act of 1623, section 3 of which was replaced by section 2 of the Act of 1939. The Act of 1934 was neither repealed nor amended, and, for the purpose of

construing the Act of 1939, I can ignore the subsequent amendment to paragraph (*b*) of section 1 (3) of the Act of 1934 by the Law Reform (Limitation of Actions, etc.) Act, 1954.

I find it difficult to suppose that, when Parliament repealed section 3 of the Act of 1623, which, in my view, plainly applied to an action commenced against the personal representative of a deceased tortfeasor, and re-enacted the repealed section in words which, on the face of them, would apply to such an action, it nevertheless intended by section 32, which appears to be a mere saving section, to change the existing limitation period for an action of this kind. But Parliament's intention can only be judged by the words of the statute, and I am bound, I think, to hold that section 2 does not apply to this action if the Act of 1934 is an enactment " for which a period of limitation is prescribed " for an action commenced against the personal representative of a deceased tortfeasor.

I can find no escape from the conclusion that it is. A " period of limitation " means a period within which an action must be brought. Subsections (1) and (3) of section 1 of the Act of 1934 deal with different subject-matters; subsection (1) with *causes of action*, and subsection (3) with *actions* brought in respect of causes of action already dealt with by subsection (1). Subsection (3) deals with two categories of such actions; those commenced before the moment at which subsection (1) operates on the causes of action in respect of which they are brought, and those commenced after the moment at which subsection (1) operates on the causes of action in respect of which they are brought. As respects the latter category, it does two things: first, it enacts that only certain causes of action can form the subject-matter of an action, that is, those that arose not earlier than six months before the date of the death of the deceased person, and, secondly, it enacts that in respect of such causes of action the *action* must be brought not more than six months after his personal representative took out representation. It does, therefore, among other things, prescribe a period within which a particular class of action must be brought, namely, an action brought against the personal representative of a deceased person in respect of a cause of action which arose within six months before that person's death. An action which fell within that particular class was thus, in my view, at the time of the passing of the Limitation Act, 1939, an action for which a period of limitation was prescribed by some " other enactment " within the meaning of section 32 of that Act, with the consequence that section 2 does not apply to it. As this action falls within that particular class, I accordingly hold that it is not barred by section 2 of that Act.

The conclusion which I have reached would not have had any very startling practical consequences in 1939. The condition that the cause of action sued on must have arisen not more than six months before the death of the deceased would, save in the most

1958

AIREY
v.
AIREY.

Diplock J.

exceptional cases, have resulted in the limitation period prescribed by the Act of 1934 being shorter than the normal six years limitation period, which also applied. But in 1954, section 1 (3) of the Act of 1934 was amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, so as to remove that condition, and it is no longer necessary that the cause of action should have arisen within six months of the death. Furthermore, the general limitation period for actions for damages for personal injuries has been reduced to three years. It would seem, therefore, that today, although so long as a tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action arose, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative. A cause of action does not cease to exist because a limitation period has expired, and the original cause of action would therefore be one subsisting against the tortfeasor at the time of his death, and would survive against his estate by virtue of section 1 (1) of the Act of 1934. But the fact that amendments to the Act of 1934 made since 1939 give rise to some very surprising consequences cannot influence the construction of the Limitation Act, 1939, which must be construed in the light of the law as it was at the time that that Act was passed. Any remedy lies with Parliament, and not with the courts.

This decision which I have reached relieves me of the necessity—and deprives me of the pleasure—of dealing with various alternative arguments addressed to me by Mr. Wilson directed to showing that, upon certain hypotheses of fact consistent with, though not expressly alleged in, the pleadings, no cause of action accrued until the personal representative of the deceased was appointed. Since, in this event, there would have been no cause of action subsisting against the deceased at the time of his death on which section 1 of the Act of 1934 could operate, it is an interesting speculation as to what the cause of action against his personal representative could be. But this is a speculation which can be reserved to the judge at the trial of the action. It is one into which, not without regret, I refrain from entering.

The defendant appealed.

Patrick O'Connor and *E. W. Eveleigh* for the defendant.
Roy Wilson Q.C. and *Paul Curtis-Bennett* for the plaintiff.

The following cases were referred to in argument: *Murugiah* v. *Jainudeen* [3]; *Attorney-General* v. *Parsons* [4]; *Morelle Ltd.* v.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

[3] [1955] A.C. 145; [1954] 3 W.L.R. 682.

[4] [1956] A.C. 421; [1956] 2 W.L.R. 153; [1956] 1 All E.R. 65.

Wakeling[5]; *In re Bidie*[6]; *Bagettes Ltd.* v. *G. P. Estates Co. Ltd.*[7]; *Canada Sugar Refining Co. Ltd.* v. *The Queen*[8]; *Jay* v. *Jay*[9]; *British Electric Railway Co. Ltd.* v. *Gentile*[10]; *Venn* v. *Tedesco*[11]; *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury*[12]; *Heydon's Case*[13]; *Baxendale* v. *Great Eastern Railway Co.*[14]; *Douglas* v. *Forrest*[15]; *Murray* v. *East India Co.*[16]; *Rhodes* v. *Smethurst*[17]; *In re Russo-Asiatic Bank*[18]; *Rose* v. *Ford*[19]; *In re Simpson's Estate.*[20]

Cur. adv. vult.

June 13. JENKINS L.J. read the judgment of the court. This appeal arises in an action brought by Mrs. Elizabeth Scott Airey against her husband, John Calvert Airey, as administrator of the estate of their son, Isaac Airey, deceased, for damages for personal injuries sustained by the plaintiff in an accident brought about by the negligent driving by the son of a motor-car in which the plaintiff was a passenger. The son was unfortunately killed in the accident, and the plaintiff accordingly sued his administrator in reliance on section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934.

The accident happened on February 24, 1951. Letters of administration to the son's estate were granted to the defendant on March 18, 1957, and the writ in the action was issued on September 9, 1957, which date, it will be observed, was less than six months after the grant of representation but more than six years after the accident.

In these circumstances the defendant raised a defence to the effect that the action was statute-barred by virtue of section 2 of the Limitation Act, 1939, inasmuch as it had not been brought within the period of six years from the date on which the cause of action accrued.

This plea of limitation was set down for hearing as a preliminary point of law, and came before Diplock J. who, by his judgment dated March 28, 1958, rejected the defence based on section 2 of the Limitation Act, 1939. From that judgment the defendant (with the leave of the judge) now appeals to this court.

The question whether an action such as this is subject to the period of limitation (six years at the material time) imposed on actions in tort by section 2 of the Limitation Act, 1939, turns first on the provisions of section 1 of the Law Reform Act, 1934, by which the right to bring an action such as this was conferred,

[5] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708.
[6] [1949] Ch. 121 (C.A.); [1948] 2 All E.R. 995.
[7] [1956] Ch. 290; [1956] 2 W.L.R. 773; [1955] 3 All E.R. 451.
[8] [1898] A.C. 735; 14 T.L.R. 545.
[9] [1924] 1 K.B. 826.
[10] [1914] A.C. 1034; 30 T.L.R. 594.
[11] [1926] 2 K.B. 227; 42 T.L.R. 478.
[12] [1943] Ch. 104; 59 T.L.R. 121; [1943] 1 All E.R. 48.
[13] (1584) 3 Co.Rep. 76.
[14] (1869) L.R. 4 Q.B. 244.
[15] (1828) 4 Bing. 686.
[16] (1821) 5 B. & Ald. 204.
[17] (1840) 6 M. & W. 351.
[18] [1934] Ch. 720.
[19] [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359.
[20] [1936] P. 40; 52 T.L.R. 117.

C. A.
1958
AIREY
v.
AIREY.

and in particular the position in regard to limitation under those provisions and (if and so far as applicable) the provisions of the Limitation Act, 1623, as the law stood when the Act of 1934 came into force; and secondly, on the effect of certain provisions of the Act of 1939 on the position previously obtaining in regard to the limitation of an action such as this under the provisions of section 1 of the Act of 1934, and (if and so far as applicable) those of the Act of 1623.

The relevant provisions of the Act of 1934 are these: [His Lordship read section 1 (1), (3) and (4), and continued:] It should also be noticed that by section 1 (7), subsections (1), (2), (5) and (6) of the Administration of Estates Act, 1925, were repealed.

The relevant provisions of the Act of 1939 are these: [His Lordship read sections 2 (1) (*a*), 32 and 34 (4), and continued:] We need hardly say that the law as enacted by section 1 (1) of the Act of 1934 was not by any means wholly new. The subsection brings together all causes of action (whether in contract or in tort) subsisting against or vested in any person at the time of his death, and provides that (with certain specific exceptions not material for the present purpose) all such causes of action shall survive against or, as the case may be, for the benefit of his estate.

So far as causes of action in contract are concerned, this was merely declaratory of the existing law, inasmuch as the maxim actio personalis moritur cum persona had never been applicable to causes of action in contract. So far as causes of action in tort were concerned statutory provision had already been made for the survival against the estate of the deceased tortfeasor of causes of action in tort involving injury to property. To carry this aspect of the matter no further back, we would refer to section 2 of the Civil Procedure Act, 1833, which was repealed as regards deaths after 1925 by section 56 of the Administration of Estates Act, 1925, and the part of which here relevant was substantially re-enacted as regards such deaths by section 26 (5) of the same Act, which subsection was in turn repealed by section 1 (7) of the Act of 1934.

The substantial change in the law brought about by section 1 (1) of the Act of 1934 was the extension of the principle of survival to causes of action in tort involving personal injuries as in the present case.

Section 1 (1) deals uno flatu with all causes of action whether they survived under the previous law or not. The category of those which already survived is typified by causes of action in contract. The category of those which did not previously survive but were made to survive by the Act is typified by causes of action in tort involving personal injury. This subsection is silent as to the period of limitation to be applied to actions by or against personal representatives in respect of surviving causes of action, but, apart from any special provision as to limitation, the only period of limitation which could be applicable in 1934, if there was to be any limitation at all, was, so far as causes of action in

simple contract or tort were concerned, the period of six years prescribed by the Limitation Act, 1623. It had been established long before the Act of 1934 that so far as causes of action in contract were concerned the six-year period of limitation applied whether the action was between the original parties to the contract or between one of such parties and the personal representative of the other, or between the personal representatives of both. It is therefore not open to doubt that surviving causes of action in contract remained after the Act of 1934, as they had previously been, subject to the six-year period of limitation prescribed by the Act of 1623, computed from the date of the breach.

But what was the bearing of the Act of 1623 on causes of action which did not previously survive but were for the first time made to do so by the Act of 1934? On the defendant's side it may be said that section 1 (1) of the Act of 1934 created no new causes of action in tort but merely invested causes of action in tort formerly subject to the maxim actio personalis moritur cum persona with the quality of survival for the purposes of suit by and against the personal representatives of the original actors, and, accordingly, that the Act of 1623 applied to such surviving causes of action just as it would have done if both the original actors had remained alive, subject, of course, to any provision to the contrary contained in the remainder of section 1 of the Act of 1934.

On the other hand, it may be said on the plaintiff's side with some plausibility that (so far as at all events as actions involving injury to the person are concerned) the right to bring proceedings against the personal representatives of a deceased tortfeasor, which section 1 (1) of the Act by making the cause of action survive impliedly confers on the injured party or his personal representative, and also the right to bring proceedings against the tortfeasor himself similarly conferred on the personal representative of a deceased injured party, are entirely new rights of action created by the Act of 1934. How, it may be asked with some force, can the Act of 1623 be held applicable to a statutory right of action such as this, which could not possibly have been in contemplation when the Act of 1623 was passed, and was, indeed, a right of action, unknown to the law until the Act of 1934 ordained otherwise some 300 years later?

We think that the former argument should prevail. It appears to us to be reasonably plain that the intention of section 1 (1) of the 1934 Act was (subject to any provision to the contrary elsewhere in the section) to place the personal representative of any person who, at the time of his death, had any cause of action vested in or subsisting against him in the same position as nearly as may be with respect to that cause of action, for all purposes including limitation, as that person would have been in if he had not died. Thus, each surviving cause of action must be taken to have survived with and subject to the same right to plead or liability to be barred by the relevant Limitation Act as was

C. A.
1958
AIREY
v.
AIREY.

applicable to it in the lifetime of the deceased, save in so far as any provision to the contrary is to be found in the remainder of section 1 of the 1934 Act. It is unnecessary to enlarge on the absurdities which would result from the adoption of the opposite view.

But, says the plaintiff, even if it is right to hold that subject to any provision to the contrary in the rest of section 1 of the Act of 1934, subsection (1) has the effect of preserving with respect to surviving causes of action the same periods of limitation as would have been applicable if there had been no death, the section does contain in subsection (3) a provision to the contrary so far as an action such as the present one is concerned, that is to say, an action brought against the estate of a deceased tortfeasor in respect of a tort committed in his lifetime. That special provision in the plaintiff's submission must be considered as exhaustive so far as an action such as this is concerned, and as ousting the application of the six-year period prescribed by the Limitation Act, 1623, if and so far as that period would otherwise have been applicable.

Subsection (3) of section 1 provides that no proceedings shall be maintainable in respect of a cause of action in tort which by virtue of section 1 has survived against the estate of a deceased person unless the conditions in one or other of paragraphs (*a*) and (*b*) of the subsection are fulfilled. Paragraph (*a*) requires that proceedings in respect of that cause of action should have been pending at the date of the death of the deceased. That of course was not the case here, but in cases in which paragraph (*a*) did apply the pending proceedings would as we think, in conformity with the view above expressed, remain subject to any defence of limitation which would have been open to the deceased in his lifetime. The vital provision for the purposes of this case comes in paragraph (*b*) which in cases where the proceedings are not pending at the date of the death of the deceased imposes the two-fold condition that:—"the cause of action arose not earlier "than six months before his death and proceedings are taken in "respect thereof not later than six months after his personal "representative took out representation."

The maximum period of six months before the death within which under paragraph (*b*) surviving torts must have been committed in order to be actionable at all after the death is not, we think, strictly a period of limitation. It is not a period within which action must be taken. It is an ambulatory restriction upon the injured party's right to proceed against the estate of a deceased tortfeasor after his death, whenever he may die. In other words it imposes as a condition precedent to the maintainability of an action against the estate of a deceased tortfeasor the requirement that the tort should have been committed within six months of his death.

The second branch of paragraph (*b*), on the other hand, to our minds clearly imposes a period of limitation. It provides that

the action is not to be maintainable unless proceedings are taken in respect of the cause of action in question not later than six months after the personal representative of the deceased tortfeasor took out representation.

The plaintiff, as we have said, contends that this special provision as to the limitation of actions of this particular kind is exhaustive, and had the effect of ousting the application of the six-year period prescribed by the Act of 1623 if otherwise applicable.

On the other hand the defendant says that this special provision is in addition to and not in substitution for the six-year period so prescribed, and this is the view which commended itself to the judge.

We cannot agree. The defendant's construction involves the reading of the condition in question as requiring not simply that the proceedings should be taken not later than six months after the personal representative took out representation, but that the proceedings should be taken not later than the expiration of six months from the taking out of representation or the expiration of six years from the date on which the cause of action arose, whichever is the earlier. We see no sufficient warrant for attributing this effect to section 1 (3) (*b*). If it had been intended that actions such as this should be subject not only to the special period of limitation expressly prescribed, but also to an overriding limitation period of six years from the accrual of the cause of action, section 1 (3) (*b*) would surely have contained some reference to the latter. Prima facie if it is enacted that a particular kind of action is only to be maintainable if brought within a specified time, that means that it is, so far as time is concerned, to be maintainable if it is brought within that specified time.

In the present instance, there appear to us to have been perfectly good grounds for limiting actions against the estates of deceased tortfeasors in the special way adopted in section 1 (3) (*b*). One may talk loosely of the bringing of an action against the estate of a deceased tortfeasor, but of course such an action is in truth an action against his personal representative as representing his estate, and until a personal representative is duly constituted no such action can be brought. It is therefore perfectly appropriate to make any period of limitation applicable to such an action run from the date when representation to the estate of the deceased tortfeasor is taken out, as the earliest date on which the injured party might have brought his action against the personal representative. That is the principle of limitation adopted here, and it seems to us inconsistent with that principle to import an overriding fixed period of six years from the date when the cause of action arose. If the principle is that time is to run in favour of the personal representative from the earliest date on which the injured party might have brought his action against the personal representative, then the expiration of the fixed period of six years from the date when the cause of action accrued appears to us to be an irrelevant consideration. If the fixed period was applied

C. A.
1958
AIREY
v.
AIREY.

as an overriding period of limitation, it would only have operated in the very rare cases (of which this is one) in which (having regard to the first branch of section 1 (3) (*b*)) representation was not taken out until as long as five-and-a-half to six years from the date of the death, and when it operated would have had the effect of barring the injured party's right to sue the personal representative before there was any personal representative to be sued.

The persons interested in the estate of the deceased tortfeasor could not, so far as we can see, be prejudiced by the exclusion of the fixed six-year period of limitation in favour of a period of six months running from the date on which representation was taken out, for it would be open to them at any time to obtain a grant, thus compelling the injured party to bring his action within the ensuing six months on pain of its becoming statute barred. Moreover, until representation is taken out there cannot be any lawful administration or distribution of the deceased tortfeasor's estate, so it cannot be said that in the interval (however long) between the death of the tortfeasor and the grant of representation the absence of a fixed period of limitation would result in the administration and distribution of the deceased's estate being held up by reason of the injured party's outstanding claim.

In sum, we think the intention of the second branch of section 1 (3) (*b*) of the Act of 1934 was first to give the injured party a reasonable chance of bringing his action against the personal representative of the deceased tortfeasor by making time run against the injured party only from the date on which representation to the estate of the deceased tortfeasor was taken out, so as to constitute a personal representative for the injured party to sue; and secondly to obviate delay in the administration and distribution of the deceased tortfeasor's estate by fixing the short period of only six months from the grant as the period within which the injured party must bring his action on pain of its becoming statute barred. It appears to us that at all events when taken in conjunction with the restriction of the right to bring such an action to torts committed within six months of the death of the tortfeasor contained in the first branch of section 1 (3) (*b*), the second branch so construed provided a perfectly fair and adequate mode of limitation.

If it is asked why section 1 of the Act of 1934 should in this matter of limitation treat surviving causes of action in tort differently from surviving causes of action in contract, the short answer is that for whatever reason section 1 (3) (*b*) did, according to its plain terms, make special provision in this respect for actions in tort brought after the death of the deceased tortfeasor. But it is, we think, possible to go further than that. The position as regards the limitation of actions against the estates of deceased contractors was well settled before the Act of 1934 came into force, and it may well have been thought advisable to leave that position undisturbed. On the other hand, until the Act of 1934 came into force the only provisions operative as regards the limitation of actions brought against the estates of

deceased tortfeasors were those contained in section 26 (5) of the Administration of Estates Act, 1925 (re-enacting the relevant part of section 2 of the Civil Procedure Act, 1833), in relation to the survival of causes of action in tort involving injury to property.

Section 26 (5) of the Act of 1925 was in these terms:—"An "action may be maintained against the personal representative "of a deceased person for any wrong committed by the deceased "within six months before his death to another person in respect "of his property, real or personal, but the action shall be brought "within six months after the personal representative of the "deceased has taken out representation. Any damages recovered "in the proceedings shall be payable as a simple contract debt "incurred by the deceased."

One may compare the relevant part of section 2 of the Act of 1833 which was as follows:—". . . and further, an action of tres-"pass, or trespass on the case, as the case may be, may be main-"tained against the executors or administrators of any person "deceased, for any wrong committed by him in his lifetime to "another, in respect of his property, real or personal, so as such "injury shall have been committed within six calendar months "before such person's death, and so as such action shall be brought "within six calendar months after such executors or administrators "shall have taken upon themselves the administration of the "estate and effects of such person; and the damages to be "recovered in such action shall be payable in like order of "administration as the simple contract debts of such person."

There was no provision extant as regards the limitation of surviving causes of action in respect of torts involving injury to the person for the simple reason that causes of action in tort of that description did not survive.

The language of section 26 (5) of the Act of 1925 and its precursor section 2 of the Act of 1833, quoted above, closely resembles the language of section 1 (3) (*b*) of the Act of 1934. We think it is reasonably plain that the period of limitation provided for in the two earlier of these enactments must be taken to have been exhaustive, and to have excluded any application of the six-year period of limitation to the cases to which it applied.

As we have said, section 1 (7) of the Act of 1934 repealed section 26 (5) of the Act of 1925 which had itself repealed section 2 of the Act of 1833.

Next, one may observe that the Act of 1934 having by section 1 (1) made all causes of action in tort whether to property or person survive against the estate of a deceased tortfeasor treats them all alike for the purposes of the limitation imposed by section 1 (3) (*b*), and frames the limitation provision in terms closely resembling those used in the Acts of 1833 and 1925 in relation to surviving torts against property.

We think that these circumstances, which seem to us to provide a sufficient explanation of the special treatment as regards limitation accorded to actions against the estates of deceased

C. A.
1958
AIREY
v.
AIREY.

tortfeasors, can legitimately be taken into account for the purpose of resolving any doubt as to the exclusion of the six-year period of limitation under the Act of 1623 in cases to which section 1 (3) (*b*) of the Act of 1934 applies, and in our judgment they tend to support the view that it was excluded.

If we are right so far, it appears to us to be really clear beyond argument that the six-year period of limitation imposed by section 2 of the Limitation Act, 1939, with respect to actions in tort cannot be applicable to the present action any more than the like period imposed by the Act of 1623 would have applied if the Act of 1939 had not been passed.

The repeal effected by section 34 of the Act of 1939 of the old six-year period of limitation did not, ex hypothesi, affect actions such as the present one, because that period of limitation had never applied to them. If the Act of 1939 had imposed its own substituted six-year period of limitation on all actions of tort without saving or qualification it might have been found, surprisingly enough, to have applied for the first time sub silentio to actions such as the present one a six-year period of limitation to which they had never before been subject. That curious result is, however, to our minds wholly excluded by the saving provision in section 32, which so far as material for the present purpose provides that: "This Act shall not apply to any action . . . for which "a period of limitation is prescribed by any other enactment . . ."

If our view as to the exclusion of the old six-year period of limitation is accepted, then it follows that before the Act of 1939 came into force actions such as the present one were subject to one period, and one period only, of limitation, viz., the period of six months from the taking out of representation to the estate of the deceased tortfeasor imposed by section 1 (3) (*b*) of the 1934 Act. This was, in our view, a period of limitation prescribed by another enactment, viz., the Act of 1934, with the result that the actions to which it applies were excluded from the operation of the Act of 1939 by section 32 of that Act, and that the status quo with regard to the limitation of such actions was thus preserved.

The judge while holding, contrary to our view, that actions to which section 1 (3) (*b*) of the Act of 1934 applied were, before the Act of 1939 came into force, subject to the six-year period of limitation under the Act of 1623, nevertheless came to the conclusion that since the Act of 1939 came into force neither the old nor the new six-year period has been applicable to such actions. He reached this conclusion (in effect) on the ground (i) that section 3 of the Act of 1623 which imposed the old six-year period was repealed by section 34 of the Act of 1939 and so ceased to apply; and (ii) that the new six-year period introduced by section 2 of the Act of 1939 did not apply either, because an action of this kind was one for which a period of limitation (viz., the period of six months from taking out representation) was prescribed by another enactment (viz., section 1 (3) (*b*) of the Act of

1934), and was consequently excluded from the operation of the Act of 1939 by the saving provision contained in section 32.

We confess that if we agreed with the judge that the old six-year period was applicable to actions of this class before the 1939 Act came into force, we would be reluctant (as he clearly was himself) to hold that the Act of 1939, which does not even mention the Act of 1934, had the apparently accidental effect of abrogating for no discernible reason the six-year period of limitation previously applicable to them. But having regard to the view we take, it is unnecessary to discuss what the position would then have been.

We also find it unnecessary to discuss the effect of the repeal by section 4 of the Law Reform (Limitation of Actions, etc.) Act, 1954, of so much of section 1 (3) of the Act of 1934 as provides that an action is not to be maintainable in respect of a surviving cause of action in tort unless the cause of action arose not earlier than six months before the death of the deceased, which has no bearing on the present case. We mention it only for the purpose of disclaiming any view one way or the other on the question whether the conclusion we have reached in this case involves the corollary that actions which were statute-barred in the lifetime of a tortfeasor become once more maintainable after his death, provided that they are brought within six months of the taking out (at any distance of time) of representation to his estate.

For the reasons we have stated we would dismiss this appeal.

Appeal dismissed.

Solicitors: *L. Bingham & Co.; Theodore Goddard & Co. for Swinburne & Jackson, Gateshead.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* SILKIN *v.* BEAVERBROOK NEWSPAPERS LTD. AND ANOTHER.

1958
June 9, 10.

Diplock J.

[1957 S. No. 1037.]

Libel and Slander—Fair comment—Test of fairness—Question of honesty.

Any person is entitled to say, by way of comment on a matter of public interest, what he honestly thinks, however exaggerated, obstinate or prejudiced that may be; such comment is fair and sustainable as a defence to a libel action, unless it is so strong that no fair-minded person could have made it honestly.

Test of Bray J. in *Rex* v. *Russell* (unreported, December 2, 1905, cited by Lord Hewart C.J. summing up in *Stopes* v. *Sutherland,* House of Lords Printed Cases 1924, at p. 375) applied.

1958

SILKIN
v.
BEAVERBROOK
NEWSPAPERS
LTD.

JURY ACTION.

The plaintiff, Lord Silkin, a solicitor of the Supreme Court, and a Privy Councillor, who had until 1950 been a Labour Member of Parliament and a Cabinet Minister and since that date an active member of the House of Lords, brought an action against Beaverbrook Newspapers Ltd., printers and publishers of the Sunday Express, a weekly newspaper with an extensive circulation in the United Kingdom and throughout the world, and against John Junor, the editor of that newspaper, claiming damages for alleged libel contained in a paragraph in the issue of the Sunday Express dated December 16, 1956. The words complained of were as follows: "Sugar for "Silkin" "From these humble Tories I turn to a lordly "Socialist. Forward the first Baron Silkin. Observe the return "to Britain of the Heinkels—not in the skies but on the rolling "roads. These economical little runabouts are selling briskly "in the petrol famine. They are seen everywhere—even in New "Palace Yard, Westminster, where M.P.s park their cars. What "has this to do with Lord Silkin? Why, he is chairman of Noble "Motors who market the Heinkels in Britain. And his son, "former Socialist candidate, Mr. John Silkin, is a director. Oh "the eloquence that solemn, portly Lord Silkin has churned out "in the House of Lords against arming the Germans. He has "said that part of his case is 'emotional.' 'I feel it is wrong "'that so soon after the events of the war we should join hands "'with them today for the purpose of combining our forces.' "Of course, when Lord Silkin joins hands with the Germans now, "he represses his emotion. It is just good solid business. From "which no doubt he makes a fine profit."

By his statement of claim the plaintiff alleged that those words were defamatory and that they meant that he was an insincere and hypocritical person who was prepared to sacrifice his principles for selfish reasons of personal profit and that he was unfit to participate in the debates in the House of Lords.

The defendants denied that the words were defamatory. Alternatively, they pleaded that the words were fair comment made bona fide and without malice on a matter of public interest, namely, the attitude of a member of the House of Lords to Germany and the Germans. The particulars of the facts on which the words were claimed to be fair comment were as follows: (1) The plaintiff is the first Baron Silkin and is and was at all material times a member of the Labour Party. He is the father of one John Silkin, who was at one time a Labour Party candidate. (2) The German firm of the name of Heinkel was during the war with Germany between 1939 and 1945 the manufacturer of a bomber type of aircraft which took a prominent part in offensive operations against the British Isles. The firm of Heinkel has in recent years manufactured, among other things, a very small motor-vehicle which is extremely economical in its use of petrol. (3) In or about December, 1956, there was a threatened shortage

of petrol in the United Kingdom, and on December 17 a system of petrol rationing was introduced by Her Majesty's Government. In consequence there was a demand for motor-vehicles economical in their consumption of petrol and the aforementioned Heinkel vehicles were frequently to be seen in London and at New Palace Yard, Westminster, where Members of Parliament parked their cars. (4) At all material times the plaintiff was chairman of the board of directors and his son John was a director of Noble Motors Ltd., who were the Heinkel concessionaires in the United Kingdom, the United States of America and Canada for the Heinkel motor-vehicles in question. (5) On March 1, 1951, the plaintiff made a speech in the House of Lords opposing rearmament of Western Germany, and said among other things that "there is also the "moral question. After all, we know that on two occasions "Germany has been guilty of aggressive war. We remember the "brutalities, the horrors, the great massacres of millions of people. "Are these the people with whom we want to conduct even a "defensive war as allies? Does not the whole moral sense of "the world revolt against our taking them into our hearts once "more at the present time?" (6) On March 24, 1954, the plaintiff made a speech in the House of Lords with reference to Western Germany in which he said: "There is also the "emotional side, and in some quarters those of us who take this "view have been described as taking an emotional view. I make "no apology for doing so and for the fact that at any rate part of "my case . . . is an emotional case. I feel it is wrong that so "soon after the events of the war and the undoubted cruelty "and oppression which we suffered and others suffered we should "join hands with them for the purpose of combining our forces."

P. Colin Duncan and *A. T. Hoolahan* for the plaintiff.
Gerald Gardiner Q.C. and *Helenus Milmo* for the defendants.

The following cases were mentioned during the hearing of the action: *Campbell* v. *Spottiswoode* [1]; *Peter Walker & Son Ltd.* v. *Hodgson* [2]; *Hunt* v. *Star Newspaper* [3]; *Kemsley* v. *Foot* [4]; *McQuire* v. *Western Morning News* [5]; *Sutherland* v. *Stopes*.[6]

DIPLOCK J. (in his summing-up): This is a comparatively simple case, but it is important, because we are here concerned with one of the fundamental freedoms—freedom of speech, the right to discuss and criticize the utterances and the actions of public men. Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual, like Lord Silkin, whether he is in public life or

[1] (1863) 3 B. & S. 769.
[2] [1909] 1 K.B. 239.
[3] [1908] 2 K.B. 309; 24 T.L.R. 452.
[4] [1952] A.C. 345; [1952] 1 T.L.R. 532; [1952] 1 All E.R. 501.
[5] [1903] 2 K.B. 100; 19 T.L.R. 471.
[6] [1925] A.C. 47; 41 T.L.R. 106.

1958

SILKIN
v.
BEAVERBROOK
NEWSPAPERS
LTD.

Diplock J.

not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public, which means you and me, and the newspaper editor and the man who, but for the present bus strike, would be on the Clapham omnibus, to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

I will spend a little time on the law in this matter, because it is important, not merely to the parties in this case, but to all of us.

Let us look a little more closely at the way in which the law balances the rights of the public man, on the one hand, and the rights of the public, on the other, in matters of freedom of speech. In the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men.

The first point, therefore, is that you should not misstate the material facts on which you are commenting. That is common sense and it is the common law. In a great many libel actions one of the matters which the jury have to consider is whether the facts are materially misstated. We shall have to look together at the article complained of a little later to see what are the facts on which the comment is said to be based, but you may think, having heard the evidence of Lord Silkin and the very able addresses of counsel, that it is not seriously contended that any of the facts set out in the article are misstated, unless you were to take the view that the last two or three sentences were statements of fact and not comment at all. The last two or three sentences are those, you remember, of which Lord Silkin primarily complains.

[His Lordship said that the second and very important requirement was that the subject of the comment should be a matter of public interest. In the present case the plaintiff's attitude to Germany and the Germans was a matter of public interest, not a mere matter of private interest, and his Lordship so directed the jury. He continued:] What are the limits of the right of comment? Quite rightly they are very wide. First of all, who is entitled to comment? The answer to that is "everyone." A newspaper reporter or a newspaper editor has exactly the same rights, neither more nor less, than every other citizen, and the test is no different whether the comment appears in a Sunday newspaper with an enormous circulation, or in a letter from a private person to a friend or, subject to some technical difficulties with which you need not be concerned, is said to an acquaintance in a train or in a public-house. So in deciding whether this was fair comment or not, you dismiss from your minds the fact that it was published in a newspaper, and you will not, I am sure, be influenced in any way by any prejudice you may have for or

against newspapers any more than you will be influenced in any way by any prejudice which you may have for or against Lord Silkin's politics. Those are matters which you will, I am sure, all of you, dismiss from your minds.

I have been referring, and counsel in their speeches to you have been referring, to fair comment, because that is the technical name which is given to this defence, or, as I should prefer to say, which is given to the right of every citizen to comment on matters of public interest. But the expression "fair comment" is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided—and this is the important thing—that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?

It is because honesty is the cardinal test that very often in cases of this kind you find it alleged that the person who made the comment was actuated by personal spite or by some other ulterior motive so that the comment he made did not express his honest opinion on a matter of public interest; but that is not alleged here. What is said here is that the comment in this article is so strong and of such a kind that it passes out of the domain of criticism and that no one could on these facts honestly hold the views as to Lord Silkin's conduct which are expressed in the article.

On what the true test is I think what I can best do is to repeat to you, adapting it to the facts of this case, a statement made by a judge some years ago when he said this [1]: "When "you come to a question of fair comment you ought to be "extremely liberal, and in a matter of this kind . . ."—a matter relating in this case to views held about Germany and Germans—"you ought to be extremely liberal, because it is a matter on "which men's minds are moved, in which people who do know, "entertain very, very strong opinions, and if they use strong "language every allowance should be made in their favour. They "must believe what they say, but the question whether they "honestly believe it is a question for you," the jury, "to say. If "they do believe it, and they are within anything like reasonable

[1] Bray J. in *Rex* v. *Russell* (unreported, Dec. 2, 1905, cited by Lord Hewart C.J. in *Stopes* v. *Sutherland* summing up, House of Lords Printed Cases, 1924, at p. 375).

1958

SILKIN
v.
BEAVERBROOK
NEWSPAPERS
LTD.

Diplock J.

"bounds, they come within the meaning of fair comment. If "comments were made which would appear to you to have been "exaggerated, it does not follow that they are not perfectly honest "comments."

That is the test, primarily one of honesty, not whether you yourselves agree with it. That is the test which you have to apply. I have dealt at some length with fair comment, because that is the real issue in this case, as counsel told you. You have, of course, first to decide whether the words are defamatory at all, that is to say, whether they tend to lower Lord Silkin's reputation in the estimation of right-thinking people; but you would probably have no difficulty in saying, if for example the facts about Lord Silkin's connexion with Heinkel cars were quite untrue, that the words would be defamatory, and I do not understand Mr. Gardiner to suggest the contrary; so that, in considering your verdict in this case, you will no doubt concentrate your minds primarily on the question of fair comment, with which I have already dealt, I am afraid, at some length.

Before I turn to the article, I think it is right that I should remind you of the facts on which the comment was based, because those are the facts which you have got to consider and then say to yourselves: could any man honestly hold the views and express the comment on those facts?

I remind you of the facts in this case. In the course of Lord Silkin's evidence there was a good deal of cross-examination devoted to exactly how much he made out of his venture in Noble Motors. The exact amount made, whether he made a large amount or a small amount, is not one of the facts commented upon and, even if you think, as perhaps you do, that his first answers in the box as to what he made were not particularly candid, dismiss that from your minds in deciding the question whether the comment was fair, because that is not one of the facts commented upon.

The facts which are commented on are these. [His Lordship read the facts relied on by the defendants and said that it was conceded that they were true. He continued:]

Those are the facts on which the defendants say they were commenting in the article, and those are the facts which you will bear in mind when you are asking yourselves the question in the terms in which I put it to you: not whether you agree with the comment made on those facts, but whether you think it is a comment which any man, be he prejudiced or obstinate, could honestly hold.

I turn now to the article. [His Lordship read the paragraph complained of, said that it was the concluding words "Of course, "when Lord Silkin joins hands with the Germans now, he "represses his emotion. It is just good solid business. From "which, no doubt, he makes a fine profit" on which the jury should concentrate, and continued:]

Lord Silkin has said, as indeed would be natural, that he went

into the business in the way he has described, the concession for the Heinkel cars, with the object ultimately of manufacturing them in this country, but he went into it—no one suggests it is wrong—as most people go into business, with the idea of making some money if he could.

I will just read the words complained of again. They have just quoted from the speech where he said "I feel it is wrong that, so "soon after the events of the war, . . . we should join hands "with them today for the purpose of combining our forces" and they go on: "Of course, when Lord Silkin joins hands with the "Germans now, he represses his emotion. It is just good solid "business. From which, no doubt, he makes a fine profit."

Those are the words of which Lord Silkin complains. You have to consider whether they are fair comment on what has gone before. It is not suggested that what had gone before were not true statements. Although it is a question for you, you will no doubt feel that those last sentences are comment on what has gone before. The matter which you have to decide, and I emphasize this again, because it is so important, is not whether you, any of you, agree with that comment. You may all of you disagree with it, feel that it is comment that is not correct. But that is not the test. I will remind you of the test once more. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view—could a fair-minded man have been capable of writing this? That is a totally different question from the question: Do you agree with what he said?

So in considering this case, members of the jury, do not apply the test of whether you agree with it. If juries did that, freedom of speech, the right of the crank to say what he likes, would go. Would a fair-minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment? If the answer to that is yes, then your verdict in this case should be a verdict for the defendants. Such a verdict does not mean that you agree with the comment. All it means is that you think that a man might honestly hold those views on those facts. But it is for you, the jury, not for me, the judge, to answer that question, and the answers which juries have given in cases of this kind to that question have formed the law which lies at the basis of freedom of speech in this country. That is why I said to you at the beginning that this case, though it is a comparatively short and simple case, is an important case, to which I am sure you will all give most conscientious thought when you retire from the jury box.

If you take the view that that test is fulfilled, that this does come within the limits of fair comment, then the proper verdict for you to bring in is a verdict for the defendants. If you were to take the view that it was so strong a comment that no fair-minded man could honestly have made it, then the defence fails and you would have to consider the question of damages. [His

1958

SILKIN v. BEAVERBROOK NEWSPAPERS LTD.

Lordship added that damages, if any, should be not unreasonably high and not unreasonably small.]

Verdict and judgment for the defendants with costs.

Solicitors: *Blacket Gill & Topham; Allen & Overy.*

M. M. H.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958
May 14.

Lord Goddard C.J., Cassels and Diplock JJ.

* REGINA *v.* MARLEY.

Criminal Law—Evidence—Statutory declaration—Goods stolen from railway station—Proof of dispatch—Statutory declaration made by packers—Form—Exact terms of statute to be complied with—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 41 (3).

The appellant was convicted of stealing a quantity of clothing, which was in the possession of the British Transport Commission. At the trial the prosecution, in accordance with section 41 (3) of the Criminal Justice Act, 1948,[1] tendered declarations made by the packers of various parcels of the stolen goods to prove their dispatch. In all but one of the declarations the declarant, after stating "I packed the goods" and describing the addressing and contents of the parcel, stated "it was handed to British Railways "the same day for conveyance by rail to destination." The deputy-chairman of quarter sessions admitted the declarations, rejecting an objection made on behalf of the appellant that they did not comply with the terms of section 41 (3). On appeal against conviction, on the ground that the declarations had been wrongly admitted:—

Held, that to comply with the terms of section 41 (3), the declarant should state either that he handed the goods to the British Transport Commission, or that he saw them so handed, or declarations should be made by the persons who actually handed the goods to the Commission; in the present case, although the declarations did not conform with the requirements of the subsection, the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and dismiss the appeal.

APPEAL against conviction.

The following are the facts relevant to this report. The appellant, Edward George Marley, was convicted at Surrey quarter sessions of the larceny of a quantity of clothing, the property of the British Transport Commission. A variety of goods had been packed and sent off by different firms from Nottingham addressed to addressees in Surrey which would in the ordinary course of

[1] Criminal Justice Act, 1948, s. 41 (3): "In any proceedings for "an offence consisting of the stealing "of goods in the possession of the "British Transport Commission or "any Executive . . . constituted "under section 5 of the Transport "Act, 1947, or of receiving goods so "stolen knowing them to have been "stolen . . . a statutory declaration "made by any person—(*a*) that he "dispatched or received or failed to "receive any goods . . . shall be "admissible as evidence of the facts "stated in the declaration."

transport come to Bricklayers' Arms station, a goods station in London. At the trial, the case for the prosecution was that the appellant on November 7, 1957, took two chests to that station and asked to have them sent to Morden or Mitcham station to be called for. He filled up a consignment note in another name, giving an address at Morden, and said that the chests contained leather goods. On November 9 he collected the chests from Morden station, had them put in his car and drove away. He was stopped by two police officers who opened the chests and found that they contained stolen property which must have been put in by a confederate at Bricklayers' Arms station. The appellant denied any knowledge of the goods.

The prosecution in order to prove the dispatch of the stolen property tendered a number of statutory declarations in purported accordance with section 41 (3) of the Criminal Justice Act, 1948. The declarations were made by the packers of various parcels of goods and five out of six of them were, so far as is material, in the following terms: "On . . . I packed into a parcel . . . This parcel "was addressed by means of a . . . label to . . . It was handed "to British Railways the same day for conveyance by rail to "destination."

The deputy-chairman admitted the declarations, rejecting a submission made on behalf of the appellant that they did not comply with the requirements of section 41 (3) as the declarants did not state therein that they themselves had dispatched the goods. The appellant appealed against his conviction on the ground that the declarations had been wrongly admitted.

S. Lewis Langdon for the appellant.
M. Corkrey for the Crown.

No cases were cited in argument.

LORD GODDARD C.J. stated the facts and continued: It was clear that the appellant was a party to the stealing of the goods and the jury convicted him of the actual stealing. He stole them because he took them out of the possession of the British Transport Commission at Morden station and no jury could have any doubt that he had guilty knowledge about them.

The only point in the case is one taken by Mr. Langdon which raises for the first time a question concerning a most useful provision contained in section 41 (3) of the Criminal Justice Act, 1948. Its purpose is to avoid the necessity of having to call witnesses from all over the country to trace goods which have been stolen in the course of transit or at the place of destination where the dispatch and course of travel has to be proved.

[His Lordship read section 41 (3) and continued:] In the present case most of the statutory declarations are in the same handwriting and are practically word for word the same in all material parts and have, I think, obviously and quite properly been prepared by the railway police. The persons who make the declarations

C. C. A.
1958
REGINA
v.
MARLEY.

are, for the most part, packers who prove the preparation of the parcel. That is the preliminary point to the dispatch; the parcel has to be packed and that is part of the dispatching. The declarants describe the packing up, addressing and labelling of the parcel, its contents and value. They then say that the parcel "was handed" to British Railways for conveyance. In one case only the declarant says: "I handed," and if he handed it, that is all right; but if he did not hand it, the declarant ought either to say "I saw it handed to the British Transport Com-"mission" or the person who actually handed it to the British Transport Commission ought also to make a declaration. It is an almost unnecessary formality because the parcel is packed for dispatch and it is proved to have got into the possession of the British Transport Commission by evidence given on behalf of the Commission, as in this case, that the goods were collected at their station. But where a statute allows documentary evidence of this sort to be given, that is to say, evidence by statutory declaration instead of by oral evidence in court, it is most important that the exact terms of the statute should be complied with. Therefore, the right course here would be for somebody to say of his own knowledge that the goods were handed either by him or by some person in his presence to the British Transport Commission.

There is, therefore, a hiatus in these statutory declarations, but it is not one which the court will allow to set aside a proper conviction for an extremely clever theft because we shall apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in this case as it is often applied in cases either where some formal evidence is missing, or where evidence has been given which ought not strictly to have been given, provided that the court is of opinion that no miscarriage of justice could have been caused thereby. The proviso allows the court to decide the point in an appeal in favour of the appellant, but nevertheless to dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. Nobody could have any doubt that no substantial miscarriarge of justice has occurred for the reasons I have given, that this man was a party to the stealing of the goods which were in the possession of the British Transport Commission. We shall apply the proviso and dismiss this appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, British Transport Commission.*

E. M. W.

[COURT OF APPEAL.]

* LONG v. LLOYD.

C. A.

1958
May 2, 5, 19.

Jenkins, Parker and Pearce L.JJ.

[1956 L. 2187.]

Sale of Goods—Innocent misrepresentation—Right of rescission—Sale of lorry — Delivery and acceptance — Claim to rescind — Whether claim maintainable.

Contract—Innocent misrepresentation.

On October 19, 1956, the plaintiff, a haulage contractor, saw a newspaper advertisement inserted by the defendant offering for sale at £850 a 1947 Dennis 12/14-ton lorry described as in "exceptional "condition." On the telephone that evening the defendant told the plaintiff that the lorry was in "first-class condition." On the next day the plaintiff saw the vehicle at the defendant's premises. The defendant said that the lorry was capable of a speed of 40 miles an hour. On October 22, 1956, the plaintiff, accompanied by the defendant, took the lorry for a trial run on the road. The defendant made various representations as to the lorry, one of which was that its fuel consumption was 11 miles to the gallon. The plaintiff noticed several minor defects on the run, but on the defendant assuring him that there was nothing wrong with the vehicle of which he had not told him, the plaintiff there and then bought the lorry for the reduced price of £750, paying half the purchase price and leaving the balance to be paid later. On October 23, 1956, a receipt was posted to the plaintiff by the defendant: "Received "from [the plaintiff] the sum of £375 by cheque being half pay-"ment of Dennis vehicle DDW 864 as tried and approved by the "above. Balance remaining £375."

On October 24, 1956, the plaintiff drove the lorry from Sevenoaks, where he carried on business, to Rochester to pick up a small load. On the journey the dynamo ceased to function and the plaintiff was advised to fit a reconstructed dynamo. He noticed also that an oil seal was allowing oil to escape, that there was a crack in one of the wheels, and that the vehicle had consumed 8 gallons of fuel for a journey of about 40 miles. That night he told the defendant of these defects. The defendant said that the dynamo was "all right" when the lorry left him and offered to pay half the cost of the reconstructed dynamo. This the plaintiff accepted. The defendant denied any knowledge of the broken oil seal. The next day the dynamo was fitted and the lorry was driven to Middlesbrough by the plaintiff's brother. On October 26, 1956, the plaintiff learnt from his brother that the lorry had broken down on its journey. In consequence, the plaintiff wrote to the defendant complaining of leakage or consumption of oil from the sump, of a fuel consumption of only 9 miles a gallon, and of the fact that instead of the lorry being a 40-miles-an-hour vehicle it was an effort to keep it at 25 miles an hour with the 4-ton load.

In an action by the plaintiff for rescission of the contract on the ground of innocent misrepresentation:—

Held, that, assuming that the innocent misrepresentation relied on by the plaintiff gave rise to a right to rescission after execution of the contract, such right was barred by acceptance of the goods; in the circumstances, the act of the plaintiff in dispatching the lorry on a business trip to Middlesbrough amounted to a final acceptance of the vehicle by the plaintiff, for better or worse, and

C. A.
1958
LONG
v.
LLOYD.

extinguished any right of rescission remaining in him after completion of the sale.

Leaf v. *International Galleries* [1950] 2 K.B. 86, 93; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693; *Seddon* v. *North Eastern Salt Co. Ltd.* [1905] 1 Ch. 326; 21 T.L.R. 118; *Solle* v. *Butcher* [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107 considered.

Decision of Glyn-Jones J. affirmed.

APPEAL from Glyn-Jones J.

The plaintiff, Stanley Irvin Erry Long, appealed from a judgment of Glyn-Jones J. dated July 15, 1957, dismissing a claim to rescission of an executed contract for the sale of a lorry for £750 on the ground of innocent misrepresentation.

The following facts are taken from the judgment of the court: Both parties carried on business as haulage contractors, the plaintiff at Sevenoaks, the defendant at Hampton Court. On Friday, October 19, 1956, the plaintiff read a newspaper advertisement inserted by the defendant offering for sale at £850 a 1947 Dennis 12/14-ton lorry described as in "exceptional condition." On the telephone that evening the defendant said to the plaintiff that it was "in first-class condition." The next day, Saturday, the plaintiff saw it at the defendant's premises. The defendant said that it was capable of 40 miles per hour. The plaintiff said that he would be willing to pay £750 for it, if he was satisfied on a trial run, and it was agreed that on the plaintiff paying £5, the defendant would hold the vehicle for him until Monday. That night it was arranged on the telephone that the plaintiff might pay one-half of the purchase price in cash and the remainder a few days later. The defendant repeated that it was a good vehicle.

On Monday, October 22, 1956, the plaintiff took trade plates to the defendant's premises in order to take the lorry (which was unlicensed) for a trial run on the road. The defendant made various representations as to the lorry, one of which was that it would do 11 miles to the gallon. The defendant and the plaintiff drove it in turn. The speedometer was not working, there was a wire which had to be pulled in order to decelerate since the spring was missing from the accelerator pedal, and the plaintiff had difficulty with the fifth (or top) gear. The defendant having assured the plaintiff that there was nothing wrong with the vehicle about which he had not told him, the plaintiff there and then bought the lorry for £750, paying a cheque of £370, which, together with the £5 already paid, made up half the purchase price and left a balance of £375 to be paid later. Before leaving the plaintiff said: "If I find anything wrong, your 'phone won't "stop ringing." The defendant answered: "It's quite all right."

On Tuesday, October 23, 1956, a receipt was posted to the plaintiff by the defendant: "Received from Mr. S. E. Long the "sum of £375 by cheque being half payment of Dennis vehicle "DDW 864 as tried and approved by the above. Balance

"remaining £375." On Wednesday, October 24, 1956, the plaintiff drove the lorry to Rochester to pick up a small load. On the journey the dynamo ceased to function and the plaintiff was advised that night to fit a reconstructed dynamo. He noticed also that an oil seal was allowing oil to escape, that there was a crack in one of the wheels, and that he had used 8 gallons of fuel for about 40 miles. That night he told the defendant of these defects. The defendant said the dynamo was "all right" when the lorry left him and offered to pay half the cost of the reconstructed dynamo. This the plaintiff accepted. The defendant denied any knowledge of the broken oil seal. The next day, Thursday, October 25, 1956, the dynamo was fitted and the lorry was driven by the plaintiff's brother on a journey to Middlesbrough.

On the night of Friday, October 26, 1956, the plaintiff heard from his brother that the lorry had broken down on its journey. In consequence, the plaintiff wrote to the defendant complaining of leakage or consumption of oil from the sump, of a fuel consumption of only 9 miles per gallon instead of 11, and of the fact that instead of the lorry being a 40-miles-per-hour vehicle it was an effort to keep it at 25 miles per hour with the 4-ton load. He ended: "The above in addition to the oil cup retainer, the "rear offside spring retaining bolt, and also one cracked wheel "(one to my knowledge), the dodgy accelerator, has convinced me "that you have wilfully and deliberately misrepresented the state "of the vehicle and under these circumstances I ask for the "return of my money, and the vehicle will be returned to you "by about Tuesday (I hope it lasts that long)." The plaintiff did not persist in that charge of fraud. On November 14, 1956, the lorry was examined by an expert, who gave evidence of many serious defects which he found, sufficient, in his opinion, to make it unroadworthy.

Glyn-Jones J. gave judgment for the defendant. The plaintiff appealed.

Eric Crowther for the plaintiff.
Lindsay Cullen for the defendant.

The following article, textbooks and cases, not referred to in the judgment, were cited in argument: article entitled "*Seddon* "v. *North Eastern Salt Co.*," 55 L.Q.R. 90 at p. 104; Benjamin on Sale, 6th ed., p. 502, note (*a*), 8th ed., p. 427; Chalmers' Sale of Goods, 13th ed., pp. 117, 119, 188, note (*s*); Cheshire and Fifoot on Contract, 4th ed., pp. 238, 239; *Duranty's* case [1]; *Cooper* v. *Joel* [2]; *Slim* v. *Croucher* [3]; *Redgrave* v. *Hurd* [4]; *Newbigging* v. *Adam* [5]; *Armstrong* v. *Jackson* [6]; *Schroeder* v. *Mendl* [7];

[1] (1858) 26 Beav. 268.
[2] (1859) 1 De G.F. & J. 240.
[3] (1860) 1 De G.F. & J. 518.
[4] (1881) 20 Ch.D. 1.
[5] (1888) 13 App.Cas. 308.
[6] [1917] 2 K.B. 822, 825; 33 T.L.R. 444.
[7] (1877) 37 L.T. 452.

C. A.
1958
LONG
v.
LLOYD.

Whurr v. *Devenish* [8]; *Edler* v. *Auerbach* [9]; *Peters* v. *Batchelor* [10]; *Rose (Frederick E.) (London) Ltd.* v. *Pim (Wm. H.) Junr. & Co. Ltd.*[11]

Cur. adv. vult.

May 19. PEARCE L.J. read the following judgment of the court, in which he stated the facts and continued: The judge found that the defendant honestly made the misrepresentations complained of, that the vehicle had probably deteriorated while out of use, and that it had the defects alleged. He said: "The "fact remains that the plaintiff was induced to buy this vehicle "by material representations made to him by the defendant "which, though honestly made, were untrue, and I must "therefore deal with Mr. Crowther's argument that in the "circumstances of this case his client is entitled to rescind the "contract."

Mr. Crowther's argument is founded on the view expressed on this somewhat vexed question by Denning L.J. in the comparatively recent cases of *Solle* v. *Butcher* [1] and *Leaf* v. *International Galleries*.[2]

That view, while accepting, so far as it relates to matters of title, the well-established principle that rescission of a contract for the sale of land will not be granted after completion on the ground of innocent misrepresentation (see *Wilde* v. *Gibson* [3] and *Brownlie* v. *Campbell* [4]), rejects as no longer authoritative *Seddon* v. *North Eastern Salt Co. Ltd.*,[5] the well-known case concerning sales of shares, in which Joyce J. clearly stated the law to be that the court would not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of "innocent misrepresentation: see, for instance, *per* Warrington tion *Angel* v. *Jay*,[6] in which the same principle was applied to an executed lease.

Denning L.J.'s view on this question, which has been ably and persuasively championed before us by Mr. Crowther, is thus expressed in *Leaf* v. *International Galleries* [7]: "The observations "of Joyce J. in *Seddon* v. *North Eastern Salt Co. Ltd.*[8] are, in "my opinion, not good law. Many judges have treated it as "plain that an executed contract of sale may be rescinded for "innocent misrepresentation: see, for instance, *per* Warrington "L.J. and Scrutton L.J. in *T. and J. Harrison* v. *Knowles* & "*Foster* [9]; *per* Lord Atkin in *Bell* v. *Lever Bros. Ltd.*[10]; and

[8] (1904) 20 T.L.R. 385.
[9] [1950] 1 K.B. 359; 65 T.L.R. 645; [1949] 2 All E.R. 692.
[10] (1950) Blundell's Rent Restrictions Cases, No. 793.
[11] [1953] 2 Q.B. 450; [1953] 3 W.L.R. 497; [1953] 2 All E.R. 739.
[1] [1950] 1 K.B. 671, 695; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.
[2] [1950] 2 K.B. 86, 90; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.
[3] (1848) 1 H.L.C. 605.
[4] (1880) 5 App.Cas. 925.
[5] [1905] 1 Ch. 326; 21 T.L.R. 118.
[6] [1911] 1 K.B. 666.
[7] [1950] 2 K.B. 86, 90.
[8] [1905] 1 Ch. 326.
[9] [1918] 1 K.B. 608, 609, 610.
[10] [1932] A.C. 161, 224; 48 T.L.R. 133.

"*per* Scrutton L.J. and Maugham L.J. in *L'Estrange* v. *F.* "*Graucob Ltd.*[11] Apart from that, there is now the decision of "the majority of this court in *Solle* v. *Butcher*,[12] which overrules "the first ground of decision in *Angel* v. *Jay*.[13]"

In *Solle* v. *Butcher*[14] Denning L.J. had said: "The fact that "the lease has been executed is no bar to this relief. No distinc- "tion can, in this respect, be taken between rescission for "innocent misrepresentation and rescission for common misappre- "hension, for many of the common misapprehensions are due "to innocent misrepresentation; and *Cooper* v. *Phibbs*[15] shows "that rescission is available even after an agreement of tenancy "has been executed and partly performed. The observations in "*Seddon* v. *North Eastern Salt Co. Ltd.*[16] have lost all authority "since Scrutton L.J. threw doubt on them in *Lever Bros. Ltd.* "v. *Bell*[17] and the Privy Council actually set aside an executed "agreement in *Mackenzie* v. *Royal Bank of Canada.*[18] If and "in so far as *Angel* v. *Jay*[19] decided that an executed lease could "not be rescinded for an innocent misrepresentation, it was, in "my opinion, a wrong decision. It would mean that innocent "people would be deprived of their right of rescission before they "had any opportunity of knowing they had it. I am aware that "in *Wilde* v. *Gibson*[20] Lord Campbell said that an executed "conveyance could be set aside only on the ground of actual "fraud; but this must be taken to be confined to misrepresenta- "tions as to defects of title on the conveyance of land."

Denning L.J.'s condemnation of *Seddon* v. *North Eastern Salt Co. Ltd.*[21] and *Angel* v. *Jay*[22] was by no means fully accepted by the two other members of the court in *Leaf* v. *International Galleries.*[23] Lord Evershed M.R. said: "In the circumstances "it is unnecessary, as my brethren have already observed, to "express any conclusion on the more general matter whether "the so-called doctrine which finds expression in the headnote "to *Seddon* v. *North Eastern Salt Co. Ltd.*[24] ought now to be "treated as of full effect and validity. The doubt on that matter "is the greater since the observations of the majority of this "court in the recent decision in *Solle* v. *Butcher*[25]; but out of "respect to the forceful argument of Mr. Weitzman and because "the matter is one of interest to lawyers . . . I venture to add "some observations which may be relevant when the general "application of this doctrine has to be further considered . . . "Finally, I add this: true it is that since the observations of "Scrutton L.J. in *Lever Bros. Ltd.* v. *Bell*,[26] and of this court "in *Solle* v. *Butcher*,[27] much greater doubt may be entertained

[11] [1934] 2 K.B. 394, 400, 405.
[12] [1950] 1 K.B. 671.
[13] [1911] 1 K.B. 666.
[14] [1950] 1 K.B. 671, 695.
[15] (1867) L.R. 2 H.L. 149.
[16] [1905] 1 Ch. 326.
[17] [1931] 1 K.B. 557, 588.
[18] [1934] A.C. 468.
[19] [1911] 1 K.B. 666.
[20] 1 H.L.C. 605.
[21] [1905] 1 Ch. 326.
[22] [1911] 1 K.B. 666.
[23] [1950] 2 K.B. 86, 93, 95.
[24] [1905] 1 Ch. 326.
[25] [1950] 1 K.B. 671.
[26] [1931] 1 K.B. 557.
[27] [1950] 1 K.B. 671.

C. A.
1958
LONG
v.
LLOYD.

"about the validity of Joyce J.'s decision in 1905. Still, it was "given forty-five years ago. The article [55 L.Q.R. 90] that "Mr. Weitzman read to us was written eleven years ago. There "had been opportunity for Parliament to alter the law if it was "thought inadequate. I am not saying that that is a ground on "which we should conclude that the so-called doctrine of *Seddon* "v. *North Eastern Salt Co. Ltd.*[28] is well stated or is in all "respects correct; but the fact that it has stood for such a length "of time, even though qualified, is another consideration deserv-"ing of some weight, when this matter has further to be debated "and to be adjudicated upon."

Jenkins L.J. said[29]: "So far as dealings in land are con-"cerned, there is a considerable body of authority to the effect "that rescission on the ground of innocent misrepresentation will "not be allowed after conveyance. For instance, there are the "observations of Lord Campbell to that effect in *Wilde* v. "*Gibson*[30]; and the doctrine has also been applied to leases in "*Angel* v. *Jay*.[31] In some of the cases, on the strength of the "authorities concerning sales of land, the proposition has been "stated in general terms to the effect that no executed contract "can after completion be rescinded on the ground of innocent "misrepresentation. As appears from the recent decision of "the majority of this court in *Solle* v. *Butcher*,[32] it seems prob-"able that the proposition thus generally stated is unduly wide. "In particular, it cannot be assumed that it necessarily holds "good with respect to a sale of chattels passing by delivery. For "the purposes of this case, however, I find it unnecessary to "decide how far it is possible to claim, on the ground of innocent "misrepresentation, rescission of a contract for the sale of "chattels passing by delivery after the contract has been com-"pleted by delivery of those chattels; and I propose to confine "myself to considering whether, assuming such a claim to be "open, this is a case in which it should properly be allowed."

The question was thus left open in *Leaf* v. *International Galleries*[33] but the court was unanimous in holding that on the assumption that the innocent misrepresentation did give rise to a right to claim rescission after the contract had been completed, such right had in the circumstances of the case been lost by the time that the buyer purported to exercise it.

Mr. Crowther's able argument has not sufficed to resolve our doubts on the question of principle, but we think it is unnecessary here, as it was in *Leaf's* case,[33] to decide whether the innocent misrepresentation relied on by the plaintiff gave rise to a right to rescission after completion of the contract, because we are satisfied that his right to do so, if it ever existed, had been lost by the time that he purported to reject the lorry.

We should next refer to the facts of *Leaf's* case,[33] and the

[28] [1905] 1 Ch. 326.
[29] [1950] 2 K.B. 86, 91.
[30] 1 H.L.C. 605, 632.
[31] [1911] 1 K.B. 666.
[32] [1950] 1 K.B. 671.
[33] [1950] 2 K.B. 86.

observations made by the members of the court on those facts. The contract was a contract for the sale of a picture which the sellers innocently misrepresented to have been painted by Constable. The buyer took delivery of the picture and kept it for a matter of five years. He was then informed on attempting to sell the picture that it was not a Constable. Thereupon he brought his action for rescission on the ground that the sellers had misrepresented, albeit innocently, the identity of the artist. He could have claimed damages for breach of warranty but refrained from doing so.

On these facts Denning L.J., after referring to sections 11 (1) (*c*) and 35 of the Sale of Goods Act, 1893, said [34]: "In this "case the buyer took the picture into his house and, apparently, "hung it there, and five years passed before he intimated any "rejection at all. That, I need hardly say, is much more than a "reasonable time. It is far too late for him at the end of five "years to reject this picture for breach of any condition. His "remedy after that length of time is for damages only, a claim "which he has not brought before this court."

He also said [35]: "Although rescission may in some cases be a "proper remedy, it is to be remembered that an innocent mis-"representation is much less potent than a breach of condition; "and a claim to rescission for innocent misrepresentation must "at any rate be barred when a right to reject for breach of "condition is barred. A condition is a term of the contract of a "most material character, and if a claim to reject on that "account is barred, it seems to me a fortiori that a claim to "rescission on the ground of innocent misrepresentation is also "barred. So, assuming that a contract for the sale of goods may "be rescinded in a proper case for innocent misrepresentation, "the claim is barred in this case for the self-same reason as a "right to reject is barred. The buyer has accepted the picture. "He had ample opportunity for examination in the first few days "after he had bought it. Then was the time to see if the "condition or representation was fulfilled. Yet he has kept it "all this time. Five years have elapsed without any notice of "rejection. In my judgment he cannot now claim to rescind."

Jenkins L.J. founded himself on the five years' delay as being far in excess of the reasonable time within which the right to claim rescission, if it ever existed, should have been exercised; and while expressing no dissent from, did not advert to, Denning L.J.'s view to the effect that the buyer's acceptance of the picture in itself barred any right there might otherwise have been to claim rescission.

Lord Evershed M.R. said [36]: "I also agree that this appeal "should be dismissed, for the reasons which have already been "given. On the facts of this case it seems to me that the plain-"tiff ought not now to be allowed to rescind this contract." He

[34] [1950] 2 K.B. 86, 90.
[35] Ibid. 91.
[36] Ibid. 93.

C. A.
1958
LONG
v.
LLOYD.

also said[37]: "If a man elects to buy a work of art or any other "chattel on the faith of some representation, innocently made, "and delivery of the article is accepted, there is much to be said "for the view that on acceptance there is an end of that particular "transaction, and that, if it were otherwise, business dealings in "these things would become hazardous, difficult and uncertain."

As to the facts of the present case, Mr. Crowther contrasts the period of only a few days between the delivery of the lorry to the plaintiff and his purported rescission of the contract with the period of five years in *Leaf's* case.[38] He says the plaintiff was entitled to a reasonable time within which to ascertain the true condition of the lorry and to exercise (if so advised) the right of rescission which for the present purpose he must be assumed to have had. It is, of course, obvious that so far as time is concerned, this case bears no resemblance to *Leaf's* case.[38]

Nevertheless, a strict application to the facts of the present case of Denning L.J.'s view to the effect that the right (if any) to rescind after completion on the ground of innocent misrepresentation is barred by acceptance of the goods must necessarily prove fatal to the plaintiff's case. Apart from special circumstances, the place of delivery is the proper place for examination and for acceptance. It was open to the plaintiff to have the lorry examined by an expert before driving it away, but he chose not to do so. It is true, however, that the truth of certain of the representations, for example, that the lorry would do 11 miles to the gallon—could not be ascertained except by user and, therefore—the plaintiff should have a reasonable time to test it. Until he had had such an opportunity it might well be said that he had not accepted the lorry, always assuming, of course, that he did nothing inconsistent with the ownership of the seller. An examination of the facts, however, shows that on any view he must have accepted the lorry before he purported to reject it.

Thus, to recapitulate the facts, after the trial run the plaintiff drove the lorry home from Hampton Court to Sevenoaks, a not inconsiderable distance. After that experience he took it into use in his business by driving it on the following day to Rochester and back to Sevenoaks with a load. By the time he returned from Rochester he knew that the dynamo was not charging, that there was an oil seal leaking, that he had used 8 gallons of fuel for a journey of 40 miles, and that a wheel was cracked. He must also, as we think, have known by this time that the vehicle was not capable of 40 miles per hour. As to oil consumption, we should have thought that, if it was so excessive that the sump was practically dry after 300 miles, the plaintiff could have reasonably been expected to discover that the rate of consumption was unduly high by the time he had made the journey from Hampton Court to Sevenoaks and thence to Rochester and back.

On his return from Rochester the plaintiff telephoned to the defendant and complained about the dynamo, the excessive fuel

[37] [1950] 2 K.B. 86, 94. [38] Ibid. 86.

consumption, the leaking oil seal and the cracked wheel. The defendant then offered to pay half the cost of the reconstructed dynamo which the plaintiff had been advised to fit, and the plaintiff accepted the defendant's offer. We find this difficult to reconcile with the continuance of any right of rescission which the plaintiff might have had down to that time.

But the matter does not rest there. On the following day the plaintiff, knowing all that he did about the condition and performance of the lorry, dispatched it, driven by his brother, on a business trip to Middlesbrough. That step, at all events, appears to us to have amounted, in all the circumstances of the case, to a final acceptance of the lorry by the plaintiff for better or for worse, and to have conclusively extinguished any right of rescission remaining to the plaintiff after completion of the sale.

Accordingly, even if the plaintiff should be held, notwithstanding *Seddon* v. *North Eastern Salt Co. Ltd.*,[39] to have had a right to rescission which survived the completion of the contract, we think that on the facts of this case he lost any such right before his purported exercise of it.

For these reasons we would dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Farmar & Miller, Sevenoaks, Kent; Piesse & Sons for Abbott, Sturgess & Co., Richmond, Surrey.*

J. A. G.

[39] [1905] 1 Ch. 326.

[COURT OF APPEAL.]

* PRACTICE DIRECTION (SERVICE OF NOTICE OF APPEAL OUT OF TIME).

C. A.
1958
June 19.

Court of Appeal—Notice of appeal—Service out of time—Dispensation with application for extension of time—R.S.C., Ord. 64, *r.* 7.

Where for any reason notice of appeal in any case is not served in due time (e.g., because an application for a certificate under the Legal Aid and Advice Act, 1949, is pending), if the respondent's solicitors by letter accept service out of time, the "proper "officer" defined by R.S.C., Ord. 58, r. 5 (5) has authority, on production of the letter accepting such service, to direct the appeal to be set down without requiring a formal application to the court for an extension of time under Ord. 64, r. 7.

By direction of
LORD EVERSHED M.R.

June 19, 1958.

[CHANCERY DIVISION.]

1958
Mar. 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31;
April 1, 2;
May 26.

Harman J.

* BYRNE *v.* KINEMATOGRAPH RENTERS SOCIETY LTD.

[1957 B. No. 611.]

Natural Justice—Tribunal—Trade association—Disqualification recommended—Remedy of injunction and damages—Contractual relationship—Necessity.

Trade Dispute — Act in furtherance of — Conspiracy — Predominant object—Use of unlawful means.

Restraint of Trade—Trade association—Tribunal—Quasi-judicial proceedings—Natural justice.

Trespass — Privacy, invasion of — Access to premises — False reasons given.

The plaintiff at the material time was in control of two cinemas; the first defendant, K.R.S., was a limited company for the protection of film distributors; the third and fourth defendants, H. and B., were respectively the secretary and head of the investigation department of K.R.S.; the second defendant, C.E.A., was a trade union to protect exhibitors of films and their employees.

Following complaints from one of the members of K.R.S., B. decided to have investigations carried out at the plaintiff's cinemas. Visits by K.R.S. inspectors were made for that purpose on 23 occasions between September 16, 1955, and April 30, 1956; on two occasions, namely, December 3, 1955, and February 13, 1956, discrepancies were found between the number of tickets sold and the returns to the distributors, which would have the result of a financial loss to the distributors. On April 30 the inspectors (of whose existence the plaintiff had hitherto been unaware) disclosed their identity to him and asked to check his box-office returns. They deliberately refrained from telling the plaintiff their real objective and said that it was a routine inspection. Failing to see certain return sheets the inspectors came back on May 3, when they questioned the plaintiff and his wife (who was in charge of the box-office) from 10 a.m. until 6.30 p.m. about the discrepancies of December 3 and February 13. No satisfactory explanation was furnished but the plaintiff and his wife alleged that the discrepancies were due to lack of adequate staff.

The inspectors' report was sent to B., who made his own report to J.I.C. (the joint investigation committee of K.R.S. and C.E.A.). The plaintiff was told that he could attend a meeting of J.I.C. on June 26, when he could, if he wished, make representations on the matter. At the meeting the plaintiff was called in and confronted with "this" (the report of B.), but he was not allowed to see it. He read certain letters he had written to B. and was questioned by H. His wife was not permitted to give evidence.

K.R.S., following that meeting of J.I.C., recommended its members not to supply films to the plaintiff, who was told that this course had been adopted pending a full investigation at his expense by accountants nominated by K.R.S. The plaintiff was unwilling to agree to an investigation by accountants nominated by K.R.S., and the recommendation came into operation, with the result that the plaintiff was unable to continue his business of exhibiting films.

By this action the plaintiff asked for a declaration that the recommendation of J.I.C. was null and void on the grounds that it was the result of proceedings conducted contrary to the tenets of natural justice, and for an injunction to restrain K.R.S. from

carrying out the recommendation. He also claimed damages for conspiracy and trespass against K.R.S., H. and B. and for breach of contract against K.R.S. for failing to treat him according to natural justice.

The plaintiff contended that the defendants could not plead against the claim in conspiracy that what they did was in the interests of the trade, because the means used were unlawful, namely, trespass or unlawful invasion of privacy by visits to the cinema, not for the purpose of seeing films but of checking the plaintiff's returns, and access to his office obtained by a direct falsehood. The plaintiff also contended that K.R.S. owed him a duty whether or not his claim was based on contract:—

Held, (1) that the claim for damages for conspiracy failed, as the predominant object of the defendants had been to protect their own interests and not to injure the plaintiff, and they had not committed trespass or employed other unlawful means to attain that object.

(2) That the remedies of a declaration and an injunction based on the claim that the defendants did not act according to natural justice must have a contractual basis no less than the remedy of damages.

Abbott v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226 and *Russell* v. *Duke of Norfolk* (1948) 64 T.L.R. 263; [1948] 1 All E.R. 488; [1948] W.N. 111 applied.

Dicta in *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524 not applied.

(3) That the contract here, if there were one, came into existence when the plaintiff was invited to attend the inquiry by J.I.C. and he agreed to do so, and it would be implied in such a contract that it would be fairly conducted.

Weinberger v. *Inglis* [1919] A.C. 606; 35 T.L.R. 399 applied.

(4) That a domestic tribunal like J.I.C. was not required by the principles of natural justice to conduct itself like a court of law, and although there were no rules of universal application to every kind of inquiry and to every kind of domestic tribunal, natural justice required: (a) that the person accused should know the nature of the accusation made against him; (b) he should be given an opportunity to state his case; and (c) the tribunal must act in good faith.

Russell v. *Duke of Norfolk* (supra) applied.

(5) That although the methods of the defendants might be deplored, they had not in the circumstances failed to comply sufficiently with the rules of natural justice and the plaintiff's claim failed.

ACTION.

The following statement of facts is taken from the judgment: In 1955 the plaintiff, Miles Austen Byrne, was interested in the entertainment industry in Hereford where he controlled two halls known as the Kemble Theatre and the County Cinema. The former was the property of the plaintiff company, Miles Byrne (Hereford) Ltd., in which the plaintiff was a shareholder and of which he was the managing director. He was, in addition, the lessee of the County Cinema. At the Kemble "live" theatrical shows were the main part of the entertainment, supplemented by film performances; the County Cinema was wholly given up to the latter. Contracts for films in both halls were negotiated

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

and concluded by the plaintiff in the name of the plaintiff company in spite of the fact that it had no interest in the County.

The first defendant (hereafter called K.R.S.) was a company limited by guarantee whose object was to protect the interests of film renters (distributors of films to exhibitors) in this country. It had about 20 such members who between them apparently controlled more than nine-tenths of the films in commercial distribution. The third and fourth defendants, Hill and Belton, were or had been two K.R.S. employees.

The second defendant (hereafter referred to as C.E.A.) was a trade union registered as such and concerned to protect the interests of exhibitors of films and their employees. C.E.A. claimed to represent over nine-tenths of the cinema proprietors in this country, but neither of the plaintiffs was a member, and it was a part of their case that C.E.A. was indirectly controlled by the three largest distributing concerns, which owned chains of cinemas known as circuits. The circuits it was further alleged were through associated companies intimately connected with the large renters, with the effect that the circuits were favoured at the expense of the small or independent exhibitor outside the ring, and C.E.A. was the ally of the renters.

As a result of a recommendation given by K.R.S. to its members the plaintiff had in effect been put out of business and had been very seriously injured in his trade. In this action, as originally framed, he sought to have this recommendation pronounced null and void on the grounds that it was the result of proceedings conducted in defiance of the tenets of natural justice or, alternatively, as being in restraint of trade and contrary to public policy. He also sought to have the defendants enjoined from implementing the recommendation and from interfering with his liberty to trade with members of K.R.S. He also claimed damages against Hill and Belton—and by amendment against K.R.S.—for conspiracy to injure him in his trade. By further amendments the plaintiff claimed damages for trespass against K.R.S., Hill and Belton, and damages against K.R.S. for breach of contract to treat him in accordance with natural justice.

Before the advent of sound films most film bookings were at a flat rate; but with the coming of the talking film in about 1930, percentage bookings were adopted, that is, talking films were hired out on a sharing system. This complicated accounts between exhibitors and renters, and the latter set up a "Sound "Inspection System." This organization in about 1930 was handed over to K.R.S., which set up an investigation department. Since the beginning of 1931 the renters had not made inspections themselves, though rights of inspection appeared to be included in their ordinary contracts with exhibitors, but had left the whole matter to K.R.S., who did not in this matter appear to act as agents for the renters but as a principal carrying out its object of protecting its members' interests.

The K.R.S. investigation department was originally run by the defendant Hill, then secretary of the society, but he subsequently handed over control to the defendant Belton. The investigation department employed inspectors up and down the country to make routine visits to cinemas and to check the results of these visits with the returns made by exhibitors to renters. The method employed was to buy tickets at the cinema early in the day's performance and again towards the end of the day, and by a comparison of the two numbers with those shown on the returns to test the accuracy of the latter. Some check was also made by what were called hand tallies where the inspector sitting in the cinema or just outside it made a count of patrons. No notice of these activities was given to exhibitors, nor was there anything in the renters' contracts to show that such an organization existed, or that the renters claimed to exercise their rights of inspection through K.R.S., and the plaintiff said [which Harman J. accepted] that until the end of the investigation here he had no knowledge that there were such people as K.R.S. inspectors. Apart from the visits known as routine visits, extra visits known as special visits might be made when irregularities were suspected. It appeared to be the procedure, if and when evidence of irregularity came into the inspectors' hands, sooner or later to confront the exhibitor with the evidence and to try and extract from him a confession of guilt. The results were then reported to the defendant Belton, who made a summary of the case, which he put before the Joint Investigation Committee (hereafter called J.I.C.). This body, which came into existence in 1930, was a committee of K.R.S. and was presided over by one of the council of that body, but by invitation there sat on it three members nominated by C.E.A. The object of the J.I.C. was, and always had been, to deal with cases of dishonest returns, and C.E.A. considered it right to nominate representatives on the ground that it was in the exhibitors' interest as well as in that of the renters that returns should be honestly made. The C.E.A. members might take part in the discussion of a case, but it appeared that the J.I.C. had never voted, and if it did they would be in a minority because the chairman was always a member of K.R.S. The J.I.C. did not hear evidence or in any way investigate the case before it. It assumed the correctness of the defendant Belton's summary. If Belton's summary showed a prima facie case the J.I.C. apparently as a routine matter proceeded to ban or blacklist the exhibitor pending an investigation of his books. (That was what happened here.) The exhibitor was called upon to agree to an examination of his books and returns for an unlimited period by accountants nominated by K.R.S. and at his expense. If he agreed to this course, limited bookings were allowed to him to keep his trade alive in the interim.

The accountants' report when received was considered by the J.I.C. at a further meeting at which the exhibitor was not

1958

Byrne v. Kinematograph Renters Society Ltd.

present, and final sentence was then passed either confirming the ban or requiring the payment of the deficiency if one be found. There was apparently some appellate authority, but recourse to it was not considered to be the right of the exhibitor. Its activities were never invoked here, nor were the plaintiffs informed of its existence. It was, however, alleged on the part of K.R.S. that it owed no duty to people in the position of the plaintiffs, and had therefore no obligation to treat them with justice. The contention of K.R.S. was that the members of the society were at liberty to do their business or to withhold it as they chose, and the fact that they all accepted as of course the recommendations of the society in a case of banning and deprived the person banned of his livelihood was not a matter of which in the absence of bad faith complaint could be made.

The plaintiff's businesses were of necessity run as separate businesses, though the plaintiff apparently hired films for both houses in the name of the plaintiff company. The booking of films was the plaintiff's main function. He also personally supervised the front of the house and paid the renters' bills as and when they came in. According to him he had nothing to do with the box-office at either hall and exercised no supervision over them, having delegated all this to his wife, who was a small shareholder in the plaintiff company and had a small salary for her work for the County. According to her, and she was the only witness on this subject, a competent cashier was employed at the Kemble and no irregularity or discrepancy was discovered there by the K.R.S. inspectors. Mrs. Byrne, however, said that it had been impossible to find a suitable cashier for the County and that the box-office was run partly by "usherettes" and partly by other persons employed on a part-time basis. It was necessary, when showing films on sharing terms, that records of some sort should be sent to the renters. In fact at the County no return book was kept at all. The only book-keeping consisted in the retention of copies of the returns sent to the renters week by week. For the two weeks, however, which showed the main discrepancies, help was apparently short, and Mrs. Byrne herself made the copies which went to the renters. She, however, told the investigators and the court that she never made any check of cash takings against ticket numbers but simply accepted the daily returns made up by the cashier. Harman J. found that this was a shockingly lax way of carrying on business and one which would make it impossible to explain figures five or six months old at any rate in the absence, as was the case here, of the person or persons employed at the relevant dates.

It appeared that some time in 1955 a firm of renters known as Twentieth Century Fox Film Co. Ltd., who did a considerable business with the plaintiff, complained to K.R.S. that his returns were unsatisfactory. Belton thereupon decided upon a special investigation and instructed one Lewis to put a check on the County Cinema and report as soon as possible. Lewis was a

young investigator in the service of K.R.S., and his superior was a man called Pinder. These two, with some assistance, carried out the special investigation, which began with a visit on September 16, 1955, by Lewis and one O'Keefe, who bought early and late tickets in two price ranges and took a hand tally. The results were reported to Belton, who applied to the renters for the return covering that day. This return was not forthcoming until late in November and no discrepancies were found, but Belton on his own initiative and without consulting the renters decided to try again. The next visit was made on November 28, when a like process was gone through, and the process was repeated on Saturday December 3. The result of this investigation was to show a serious discrepancy. Tickets taken at the beginning of the week tallied with the returns, but those taken on Saturday did not, and it appeared that in fact the whole of Saturday's takings appeared on the return for the following Sunday, with the result that the renter (by coincidence the same firm), whose sharing ended on Saturday, lost his share of that day. On the other hand the exhibitor who engaged films on the Sunday at a flat rate made a profit at the renter's expense. This convinced Belton that a fraud was being perpetrated, as it did not occur to him that there could be any other explanation or that it was fair to the exhibitor to ask for one. He decided instead to continue the investigation, and for the period from that time until February 13, 1956, 10 further visits were made. The films on show came from various renters. The figures showed no discrepancies of a substantial nature at all.

Belton, however, was determined to find a discrepancy, and in a letter of February 8, 1956, he wrote to Lewis: "A final "secret check can . . . be made over the six days' run of the "Fox booking commencing Monday February 20, and if the "results of all these visits do not show up any further evidence "of irregularities, I am of the opinion that the serious discrepan-"cies of December 3 last should be taken up with the exhibitor "with a view to getting an explanation. However, we will await "the outcome of your latest checks before reaching a decision in "this respect."

Two further checks were therefore made on Monday and Saturday February 13 and 18, when discrepancies similar to those of November reappeared in a slightly aggravated form, the whole of Saturday's and some of Friday's tickets being withheld from the return until Sunday. The investigators considered these to be a triumph for them, and wrote on February 28 to Lewis in these terms: "You will no doubt be pleased to learn that our "patience has at last been rewarded. Although the result of "the visit of February 11 disclosed no discrepancies, the check "over the six day run of Fox's 'Love is a Many Splendoured "'Thing' has revealed cuts similar to those disclosed on this "company's previous booking 'The Seven Year Itch' which "played over six days commencing November 28 last." Lewis

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

then wrote: "I am delighted that events have turned once again "in our favour. . . ." Pinder in his letter said: "I was delighted "to learn that at last we had been fortunate in securing further "evidence at the above."

Belton was not yet satisfied with the evidence which he had got, but did not think fit to demand any explanation. Instead he caused 10 further visits to be made to the County and two to the Kemble. These showed no further substantial discrepancies; they extended up to April 30.

On this latter date Lewis and Pinder were instructed to confront the plaintiff with the existence of the discrepancies and to demand an explanation of them. Accordingly, towards the end of the performance on that day they disclosed their identity as K.R.S. inspectors and asked to check the tickets in the box-office. In order to lull any suspicion that the plaintiff might have they told him a direct lie, namely, that the inspection was a mere routine matter in accordance with their ordinary duties. Pinder produced some kind of authority from K.R.S. and the two men spent the evening in the box-office counting rolls of unused tickets. They then asked to see the return book, and on being informed by the plaintiff that none was kept they asked for copies of the renters' returns. The plaintiff answered that these were with his accountants and were not immediately available. They arranged that the plaintiff should communicate with his accountants, obtain the returns and notify Pinder when the investigation could be resumed.

On the next day the plaintiff communicated with his accountants and ascertained that he could get the return sheets back at once. Thereupon he telephoned K.R.S., asking for Pinder, but was answered by Belton, who explained that he was in charge of the investigation and, when the plaintiff asked what it was all about, said that it was no routine investigation, as his inspectors had said, but a special investigation directed by himself having regard to discrepancies already in his possession. An appointment was made for the following Thursday, May 3, for the investigation to be continued.

On this occasion the inspectors arrived at 10 a.m. and continued to question the plaintiff and his wife all day, leaving at 6.30 p.m. The plaintiff and his wife were confronted with the formal reports made by the inspectors on their 23 visits (21 for the County and two for the Kemble), and the attention of Mrs. Byrne in particular was directed to the large discrepancies over the two weeks ending December 3, 1955, and February 18, 1956. She and her husband were pressed again and again to explain how it came about that tickets bought on the Saturday appeared as bought on the Sunday following in each week. They offered no explanation at all; the plaintiff said that he knew nothing about it, and Mrs. Byrne explained how the box-office was run and that after so long an interval she could offer no explanation.

as the cashiers employed in December and February had both left, one of them having been discharged for dishonesty.

Lewis failed to obtain any kind of confession of dishonesty; he remained convinced, however, that the returns had been manipulated in favour of the exhibitor and that either Mrs. Byrne or someone under her direction was responsible. His superior, Pinder, on the other hand, by the end of the day was convinced of the honesty of the plaintiff and his wife, and thought that some explanation must be forthcoming involving a muddle on the part of some employee. This view of Pinder, however, did not appear in Lewis's long report, though Pinder signed it. Lewis said he supposed Pinder would send a covering letter expressing his disagreement, while Pinder said he considered the report to be Lewis's responsibility and that he was not bound to state his view.

The plaintiff and his wife said that the attitude of the inspectors was outwardly friendly and that Pinder pointed out to them that according to the inspectors' returns hand tallies on two occasions seemed to show that more people had witnessed the performance than appeared on the renters' returns. This, of course, would have been a loss to renter and exhibitor alike. The plaintiff wished these latter occasions to be entered in the report which he knew the inspectors were about to make, and he said that he was assured that this would be done. They did not appear in Lewis's report, but they were already known to Belton, who did not consider any importance should be attached to them.

On May 5, 1956, the plaintiff wrote to the defendant Hill, then secretary of the K.R.S., in the following terms: "... "Referring to your inspectors' call on us last Monday and Thurs- "day it does appear that all this trouble could have been avoided "if either your members had reported to me any queries they "discovered right away instead of a lapse of six months in "between, or we had been on circuit inspection. You will appre- "ciate that, like many places these days, we suffer very badly "from staff difficulties and so do not always know from one day "to another exactly who will be on duty or not. Also having "two theatres to manage in this city, does not make things any "easier from my point of view. . . ." Belton on May 7 wrote: ". . . not having yet received a full report from the society's "inspectors arising out of their investigations during last week, "I would prefer not to offer any comment except in so far that "the matters which are the subject of the investigation were "disclosed as a result of the inspectors visiting the cinema in "the normal course of their duties, and experience has shown "that it is not always expedient or in some cases even possible "to bring such matters to the notice of exhibitors immediately "upon discovery. However, I will write to you again. . . ."

After receiving Lewis's report Belton wrote a long letter to the plaintiff in which he set out the details of the two discrepant weeks and reckoned that the net difference was something under

1958

Byrne v. Kinematograph Renters Society Ltd.

£70, of which the renters' share might be rather less than half. The letter continued: "It appears that several persons may have "had a hand in putting entries on the return sheets, and although "Mrs. Byrne is understood to be responsible for all matters "appertaining to the box-office and returns and identified some "of the returns as being in her own handwriting, the only "explanation given for the discrepancies is the general one that "reliance has been placed on figures supplied by various former "cashiers who are no longer in the company's employment. So "far as one can gather little or no check has been made upon "the figures, but irrespective of the question of responsibility "the facts contained in the inspectors' reports clearly indicate "that the renter whose percentage bookings played on the dates "in question suffered serious loss in consequence of the dis-"crepancies. Moreover, the following Sunday programmes in "each case are understood to have been booked on flat rentals. "The position is certainly a very unsatisfactory one indeed, and "in accordance with normal procedure a full record upon the "facts will be made to the Joint Investigation Committee com-"prising representatives of the society and of the Cinematograph "Exhibitors' Association. Notwithstanding the representations ". . . as to your staff difficulties, the committee may well take "a very serious view of the position and will almost certainly "expect some further and more detailed investigation to be "made which usually takes the form of an audit by a firm of "independent accountants, at the exhibitors' expense. You will "be notified of the committee's decision in due course, and in "the meantime should you deem it necessary to put forward "any additional explanations for the discrepancies, particularly "those of which examples have been quoted in this letter, I "shall be glad to hear from you. Will you please also let me "know whether or not you are prepared to facilitate an indepen-"dent audit on the lines to which I have referred so that the "committee may be advised accordingly."

The plaintiff replied: "While you mention TWO cases where "the mistakes appear to be against the interest of your members, "you have not mentioned the ones where the mistakes are "against us to the benefit of your members. Regarding your "ideas of having an independent firm of accountants—this is "all right—but quite honestly, with cinema business what it is "these days, I cannot afford to pay for this service, as I already "have a big enough bill, each year, from my own chartered "accountants. I sincerely feel that these two cases would have "been cleared up, without all this trouble, had your members "concerned reported the matter to me at once on receipt of the "returns. Instead, I am expected to remember back for six "months after it happened. With two theatres to run and a "constant change of staff these days, makes it impossible, as I "am only human and cannot work miracles! Also, I am not "happy about your Joint Investigation Committee in so far as

"I note they are made up of C.E.A. representatives, and for "this reason alone will be against me from the start because I "have never become a member of the C.E.A., but only belong "to the A.I.C. [Association of Independent Cinemas]. Therefore "it may be possible that the C.E.A. representatives will be "prejudiced against me. So how will I get a fair hearing? . . ."

Belton replied on May 14, and said this amongst other things: "My letter of the 11th instant cites two such cases where the "renter's share appears to have been seriously affected and in "such circumstances some further investigation would seem to "be required in order to determine where responsibility lies and "the extent to which the renter or renters may have suffered. ". . . the fact that you are not a member of the Cinematograph "Exhibitors' Association does not prejudice your case in the "slightest degree since all exhibitors whether members of a trade "association or not receive a fair hearing and may, if they so "desire, appear in person. I will notify you in due course of "the date when the committee meeting is to take place." The plaintiff answered that a thorough investigation had been made by the inspectors, who appeared only to have two cases in their mind.

The plaintiff was advised that there was to be a meeting of the J.I.C. on Tuesday, June 26 next, "and if you wish to make "personal representations to the committee please attend at the "head office" at the time stated.

At the meeting held on June 26 the J.I.C. consisted of six members, three from K.R.S. and three from C.E.A., the chairman being the chairman of K.R.S. The members of the committee had placed before them a document produced by Belton and based on the inspectors' returns and Lewis's report. It was headed "Examples of irregularities." It stated that the inspectors' checks indicated "a substantial cut" in favour of Sunday bookings. It mentioned that there were other minor irregularities. It did not state that there were 23 visits, from 21 of which no discrepancy emerged. It put forward shortly Mrs. Byrne's plea that the cause of the cuts was staff trouble. It made no statement of Belton's belief or of Lewis's belief that a dishonest practice was involved, nor of Pinder's contrary belief, but it implied that dishonesty was involved, and this was the impression made on the majority of the J.I.C.

The plaintiff was called in and asked to explain "this," "this" being Belton's summary report, which the plaintiff at once asked to see. This was refused him. The chairman was willing that he should see it, but Belton reminded him that this was not the practice, saying that the plaintiff knew the charges against him from Belton's letter of May 11. The plaintiff replied that he had given his explanation in letters written to Belton. These the J.I.C. had not seen, and the plaintiff was authorized to read them if he cared to. He read a number of them, but seeing that no impression was being made on the committee he

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

desisted. He was then questioned by Hill as to the box-office procedure in his business. The plaintiff disclaimed knowledge of this and wished to put his wife forward to give evidence. There was some conflict on this subject but Harman J. found she was not allowed to do so, though she interjected some words trying to prompt her husband, who in effect said that it was a muddle of which he could at this date offer no explanation. At this point the plaintiff and his wife left, but the plaintiff shortly afterwards returned and handed in for the inspection of the committee a document he had prepared showing his Sunday takings since September, 1955.

After the plaintiff left there was a short discussion in the J.I.C., and their decision appeared in a minute in these terms: "Minutes of the Joint Investigation Committee meeting held "... June 26, 1956, at 2.45 p.m. ... County, Hereford. Miles "Byrne (Hereford) Ltd. The committee noted the details of "irregularities as described in the summary which indicated "cutting in favour of Sunday flat bookings, and also represen-"tations from Mr. and Mrs. Byrne who appeared before it. "Mr. Byrne read the correspondence which had taken place "between the society and himself following the official check and "reiterated the explanations previously given to the society's "inspectors and in the correspondence, principally, that staff "difficulties necessitating frequent changes in the box office had "given rise to inefficiency and mistakes in the returns. When "questioned Mr. Byrne admitted that he had not given sufficient "attention to checking the box office figures and the cash, but "could offer no explanation for the specific irregularities disclosed "by the inspectors' visits on December 3, 1955, and February "18, 1956, from which only his company could have benefited. "Having considered the whole position in the light of the exhibi-"tor's replies to questions, the committee decided that the "matter should take its normal course and recommended that "no further contracts should be entered into with Mr. Byrne or "his companies for the supply of films pending the result of an "investigation by independent auditors."

This recommendation was put before the council of the K.R.S. on August 9, 1956, and was then approved. That was a mere formality because it was acted on before the council in fact approved it. The minute read: "Recommendations of Joint Investiga-"tion ... Committees June 26 ... 1956. The following recom-"mendations were approved: To bar Miles Byrne Circuit Miles "Byrne (Hereford) Limited County and Kemble Hereford etc."

The ban was in fact imposed before the investigation and without any decision being reached by the J.I.C. as to whether the matter involved a mere £30 or some more serious figure, or any consideration whether the plaintiff had been guilty of fraud or mere failure to supervise his box office. It was, however, as appeared from the minute, the normal procedure of this committee. The J.I.C. members said that the bar would not be

operative pending the proposed investigation; it was apparently the practice to allow an operator during this period not only to fulfil the contracts he already had but to complete contracts still inchoate, and to allow a limited number of bookings to keep the cinema alive. This was, however, merely a matter for Belton's discretion, and was not ever clearly communicated to the plaintiff as a firm offer or promise. Moreover, the latter part of it was conditional upon the acceptance by the exhibitor of the terms imposed by the J.I.C., which were that he should submit to an investigation by accountants nominated by K.R.S. and pay all the costs involved. These were variously estimated at between £50 and £500.

On June 27, 1956, before the committee's recommendation had been sanctioned by the council, Belton wrote to the plaintiff in terms which repeated the minute and concluded: "In accordance, therefore, with normal procedure the committee has recommended that it is not in the best trading interests of members of the Kinematograph Renters' Society to enter into further contracts with you or your companies for the supply of films to the cinemas pending the result of a full investigation by a firm of independent accountants nominated by the society. The committee will review the position again in the light of the auditor's report. I shall be glad to know, therefore, that you are prepared to facilitate and meet the expense of the investigation as required so that the necessary arrangements may be put in hand without delay." The decision involved the Kemble Theatre as well as the County Cinema, although no irregularities had been suggested at the former.

On the same date, June 27, the letters crossing, the plaintiff wrote to Hill as follows: "I was a little dismayed at the Joint Investigation Committee yesterday, that the chairman should spring questions at me, before even reading the charge to me. In fact, at no stage of the proceedings was I given any chance to know the exact findings of the investigation which you must admit, is not quite fair to the defendant. Further, it seems a little ruthless to put me on the 'barred list' before the case has been cleared. Do you or the committee realize that this will force me to close within a few weeks because I shall be unable to fill the odd dates at both of my cinemas. I am willing to submit to an outside firm of accountants, to be agreed with with me, to investigate further but in the meantime do kindly allow me to keep open. Please be just and fair—that is all I am asking. Perhaps, therefore, you will reconsider the matter of bookings until the case has been cleared." Hill replied that he was passing the letter on to Belton.

The plaintiff at this point consulted solicitors.

There ensued a long correspondence between the solicitors of K.R.S. and the plaintiff respectively, in which the K.R.S. solicitors were adamant that their conditions must be accepted, while the plaintiff would agreed to pay the costs but was not willing to

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

accept the K.R.S. nominee although he offered to accept an independent accountant. In the result, no relaxation of the ban beyond the fulfilment of the inchoate contracts was ever allowed. The plaintiff played his last K.R.S. film at the Kemble at Christmas, 1956, and the last at the County in March, 1957, and was then driven out of business.

Alan Campbell for the plaintiffs.

Charles Russell Q.C. and *Charles Fletcher-Cooke* for the defendants, K.R.S., Hill and Belton.

J. G. Strangman Q.C. and *T. A. C. Burgess* for the defendant C.E.A.

The following cases not referred to in the judgment were cited in argument: *Quinn* v. *Leathem* [1]; *Pratt* v. *British Medical Association* [2]; *Sorrell* v. *Smith* [3]; *D. C. Thomson & Co. Ltd.* v. *Deakin* [4]; *Huntley* v. *Thornton* [5]; *Six Carpenters Case* [6]; *Hickman* v. *Maisey* [7]; *The Carlgarth* [8]; *Weinberger* v. *Inglis (No. 2)* [9]; *General Medical Council* v. *Spackman* [10]; *Maclean* v. *The Workers' Union* [11]; *Ware and De Freville Ltd.* v. *Motor Trade Association.* [12]

Cur. adv. vult.

May 15. HARMAN J. having stated the facts read the following judgment: The proximate cause of a result so calamitous to the plaintiff was his insistence that the investigating accountants should be independent in the sense of being unconnected with either party, while K.R.S. insisted that a firm who habitually conducted this type of investigation on its behalf should be employed.

The plaintiff is, however, in the position in which he finds himself by reason of the recommendation of the J.I.C. imposing the ban. The use of the word "imposing" is, in my judgment, justified because, as I was told, K.R.S. accepts these recommendations as a matter of course and the renter members of K.R.S. do the like.

This case does not in my judgment ultimately depend on the credibility of the witnesses, but I ought to say a word about it.

An attack was made on Mrs. Byrne, and counsel for K.R.S. devoted some time to suggestions, both in cross-examination and in argument, that the discrepancies could not have been accidental but must have been deliberately produced by dishonesty on her

[1] [1901] A.C. 495; 17 T.L.R. 749.
[2] [1919] 1 K.B. 244; 35 T.L.R. 14.
[3] [1925] A.C. 700.
[4] [1952] Ch. 646; [1952] 2 All E.R. 361.
[5] [1957] 1 W.L.R. 321; [1957] 1 All E.R. 234.
[6] (1610) 8 Co.Rep. 146a.
[7] [1900] 1 Q.B. 752; 16 T.L.R. 274.
[8] [1927] P. 93.
[9] [1918] 1 Ch. 517; 34 T.L.R. 337.
[10] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.
[11] [1929] 1 Ch. 603.
[12] [1921] 3 K.B. 40; 37 T.L.R. 213.

part, for which the plaintiffs were responsible even if not privy to them. I reject these suggestions. K.R.S., through its then secretary the defendant Hill, disclaimed them on a motion in the action. Apart from that no charge of fraud appears on the pleadings, nor was any made at the so-called hearing by the J.I.C. whose decision was taken without any discussion of this point.

It was at one time rather faintly suggested by the plaintiffs that the inspectors' returns on their weekly visits might have been false, for instance that tickets entered as having been bought on Saturday might really have been bought on the following Sunday, but there was not foundation for this and the plaintiffs' counsel in his reply made no reference to it. I accept the inspectors' reports at their face value.

Unlawful conspiracy is alleged against all the defendants, though no claim for damages is or can be made against C.E.A. having regard to section 4 of the Trade Disputes Act, 1906. The conspiracy is first alleged to be that of K.R.S. and its employees Hill and Belton by setting in motion the process of investigation which I have described and by reporting to the J.I.C., and thus bringing about as a result the recommendation which resulted in the ban. C.E.A. only comes into this part of the case at one point, namely, by reason of the presence of its members at the sitting of the J.I.C. on June 26, and their concurrence in the recommendation then made. It is said that these things were done without just cause or maliciously or with the intention of injuring the plaintiffs first because no renters had questioned the plaintiff on his returns or complained of his conduct of his business and, secondly, because the plaintiffs were not members of C.E.A. but of another and rival institution called the Association of Independent Cinemas Ltd. (A.I.C.). Other minor matters said to show a want of good faith are set out by way of particulars in the statement of claim. In effect the plaintiff in order to succeed on this branch of the case must show, as he sets out to do, that the predominant purpose of the defendants was spite or an intention to injure the plaintiff. It is a defence to this claim that the object, or the predominant object, of the defendants was to protect their several trade interests. The plaintiff however asserts that this defence will not avail here because the defendants in the execution of their objects, even conceding that these were the promotion of their own trade interests, made use of unlawful means which resulted in the injury done. The unlawful means are said to be trespass upon the plaintiff's property or an unlawful invasion of his privacy.

For myself I have been unable to find any evidence to support the plaintiff's claim that the defendants were not acting in good faith. In my judgment the plaintiff wholly fails to prove that C.E.A. was in fact controlled by the big circuits. Its rules appear to have been drawn to prevent that very thing. No doubt A.I.C. was to some extent, like any splinter organization, a thorn in the side of C.E.A. and in competition with it, but no evidence was

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

led which even suggested that K.R.S. was concerned in this matter except the mere fact that Pinder was interested enough to ask the plaintiff whether he was not connected with A.I.C. and, finding that he was and was chairman of the Birmingham branch, felt that it was of sufficient interest to communicate the information to Belton. But of a determination to drive the plaintiff out of business because he was a member of one organization rather than the other I find no trace at all.

The plaintiff, when he came before the J.I.C., claimed to have a representative of his union to sit on the committee upon the grounds that he would not get a fair hearing otherwise. This seems to me to be nonsense. It was a request to have an advocate in his favour present on the committee rather than a request for an impartial hearing. I am satisfied that no member of the J.I.C. was influenced by the fact that the plaintiff was not a member of C.E.A. It may be true that if he had been a member of C.E.A. that body would have supported him at a later stage of the dispute, and that as he was not a member, C.E.A. was not concerned to do so, but this had nothing to do with the matters of which the plaintiff complained. After the recommendation was made by the J.I.C. the matter was wholly in the hands of K.R.S., and C.E.A. had no more to do with it.

The essential elements to constitute an actionable conspiracy are so clearly established by *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1] that I need not repeat them here. In my judgment the predominant object of K.R.S. and its employees was to further the objects of that society while the predominant object of C.E.A., so far as it participated, was to forward its objects upon the footing that insistence on correct returns was as much in the interests of the exhibitors as of the renters. It remains therefore to consider whether, in pursuance of these objects, unlawful means were used, and this brings me to the question of trespass.

It is alleged by the plaintiff that the investigation conducted by K.R.S. through Belton and his emissaries was illegal because it involved acts of trespass on the plaintiff's property. It was argued that the twenty-three visits of Pinder or Lewis and their assistants to the County Cinema which I have described were all acts of trespass because they went into the cinema not for the purpose for which alone the public was invited to enter but for a different purpose, namely, to obtain evidence against the plaintiff. I cannot think there is anything in this point. The cinema was open to the public who were invited to go in and take tickets, and this is what Pender and Lewis and their assistants did. Their motives in taking the tickets are, I think, immaterial from this point of view. They did nothing they were not invited to do, and in my judgment it cannot be said that because they may not have wished to see the performance but were merely interested in the numbers on the tickets or in counting the number of patrons they committed acts of trespass.

[1] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142.

The events of April 30 and May 4 are rather different. On April 30 Pinder and Lewis entered the hall in the usual way and bought tickets. They apparently sat through the performance or nearly, and then emerged into the foyer and asked to see the proprietor. When he arrived one of them told him they were cinema inspectors, and asked to see the ticket stocks in the box office. Pinder told a lie at this point, saying the inspection was only a routine matter. The inspectors thus obtained the plaintiff's consent to enter the box office and check the rolls of tickets. It is said that if the plaintiff had been told that the inspectors were obtaining entry in order to level accusations of fraud at him and if they had not told him a lie he would never have let them in, and that therefore his consent was obtained by deceit and was no consent.

A great deal was said during the course of the hearing about whether the plaintiff was ever accused of fraud during the investigation, and it was said to be a matter of complaint that though that accusation was being made against him it was never made clear to him. In my judgment this is a false point. It is quite true that Belton and Lewis thought that the plaintiff was guilty of or responsible for dishonesty in the conduct of his business, but this was not an essential part of the accusation against the plaintiff. On a motion in the action the defendant Hill swore that no allegation was made against the plaintiff's integrity, and it appeared as the trial went on that, if every member of the J.I.C. had been told that the discrepancies in question were consistent with honesty and must be considered as such, the matter would have taken the same course. At a later stage no doubt the question of dishonesty might have become of great importance, but that stage was never reached.

Further, in my opinion the lie told by the inspector about the nature of the visit made no difference to the plaintiff who in fact discovered the truth from Belton on the telephone on the very next day, as also did he then find out that discrepancies in his returns were the subject-matter of investigation. Nonetheless he was willing to go on with the investigation and in fact invited the inspectors to return, as they did on May 4. On this latter occasion the inspectors were in the plaintiff's office by his invitation and so remained, and it seems to me that no trespass can have been committed on this occasion.

It was said, in addition, that the plaintiff's privacy was invaded by the inspectors, and that this was some act of unlawfulness apart from trespass. I can only say that I do not appreciate this argument.

Thirdly, it was said that the conspiracy was fostered by the irregularity in the procedure employed at the inquiry by the J.I.C. This seems to me to be only another way of alleging an absence of natural justice, and I do not propose to discuss that at this juncture.

Lastly, it was said that the recommendation was unlawful as

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

being in restraint of trade and against public policy, and reference was made to certain sections of the Restrictive Trade Practices Act, 1956, which did not in fact come into force till August, 1956, after the recommendation was made. It is true that both K.R.S. and C.E.A. are "trade associations" within the definition of section 6 (8) of this Act, and that section 6 (7) therefore applies.

It seems to follow that the objects clauses of both associations are registrable under the Act, and may in due course come up for investigation by the Restrictive Practices Court under section 20. It is not for me to predict what view that court may take, and I cannot hold the recommendation void on either of the grounds alleged.

I therefore conclude that there was no wrongful conspiracy here either because the paramount object was to injure the plaintiff or because unlawful means were employed, and the claims to damages for conspiracy and trespass in my judgment fail.

As I have said, the plaintiff put in the forefront of his case the complaint that he had not been treated in accordance with natural justice, and he sought on this ground to have the decision of the J.I.C. set aside though he made no claim for damages under this head till the amendment made at the trial. This omission the plaintiff considered he was constrained to make because he was not alleging any contractual relationship between himself and any of the defendants. He claimed, nevertheless, to be entitled to a declaration and an injunction in the absence of any contract. For myself I cannot accept this view. I think the existence of some contract is essential. The plaintiff's argument rested on certain dicta of Pilcher J. in *Davis* v. *Carew-Pole*.[2] In that case Pilcher J. came to the conclusion that he would have been justified by the decision of the Court of Appeal in *Abbott* v. *Sullivan*[3] in holding that relief by way of declaration and injunction was available to the plaintiff, though not damages, in the absence of any contractual nexus between him and the defendants.

The headnote in *Davis* v. *Carew-Pole*[4] reads as follows: "The "plaintiff, a livery stable keeper, was required to attend a meeting "of the stewards of the National Hunt Committee, who were "inquiring into an allegation that the plaintiff, an unlicensed "trainer, had trained a horse for a steeplechase contrary to the "National Hunt Rules. The plaintiff attended the inquiry when, "without any prior notification, his alleged activities in connexion "with the training of two other horses were considered. The "plaintiff was declared a disqualified person under the rules. In "an action against the committee claiming a declaration that the "stewards' decision was ultra vires and void and an injunction "restraining the defendants from treating the plaintiff as a dis-"qualified person, Pilcher J. held that, on the evidence and on the "true construction of the rules, the stewards were not entitled

[2] [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524.

[3] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[4] [1956] 1 W.L.R. 833.

"to declare the plaintiff a disqualified person. A claim by the "plaintiff for damages was abandoned:—*Held* (1) . . . [that goes "to natural justice] (2) That even though there might not have "been any contractual link between the plaintiff and the com-"mittee, when there could be no claim in damages, the court had "jurisdiction to grant an injunction and declaration; that since "under the rules the stewards were not, in the circumstances, "entitled to declare the plaintiff a disqualified person, the plaintiff "was entitled to the relief sought. *Per curiam.* Once the plain-"tiff submitted to the jurisdiction of the committee, he was in "contractual relation with the stewards and might have been "entitled to claim damages." In that case the National Hunt Committee had a code of rules which the judge found not to have been observed. That aspect of the case is irrelevant here.

In the judgment one finds this [5]: "Originally in this type of "action it was necessary for the plaintiff to show, if he wished to "succeed, either that some proprietary right had been infringed or "that the defendants had committed a tort such as a libel or "had been guilty of a conspiracy to injure the plaintiff or had "acted in breach of contract if the parties were linked by any "contract express or implied." The judge then goes on to say that counsel for the defendant had argued that a contractual basis was necessary, and in its absence the defendant could act as wrongfully as he liked. The judge continues [6]: "This argument "did not appeal to me. It is no doubt true to say that, where "no tort is alleged and no contract express or implied is made "out, no claim for damages can succeed in cases of this type. "In this connexion I refer to the decision of the Court of Appeal "in *Abbott* v. *Sullivan*.[7]" He then states the headnote in that case, and goes on in these words [8]: "The principal matter dealt "with in the judgments of the court related to the question "whether it could properly be said on the facts of that case that "any contract could be implied between the plaintiff and any of "the defendants which would enable the plaintiff to recover "damages against such defendants or any of them. Evershed "M.R. and Morris L.J. took the view that no contract could be "implied and therefore no damages were recoverable. Denning "L.J. took a contrary view." Then he states the declaration made in the court below, and observes this [9]: "Morris L.J. said "that he could see no objection to this declaration, although the "necessity for the declaration had by that time become academic "because the plaintiff had in fact been reinstated. Evershed "M.R. took a similar view,"—now this is the point—"and it "therefore appears that the majority of the court would, if "necessary, have been prepared to hold in that case that, although "there was no contractual link between the plaintiff and the "Cornporters' Association, nonetheless, the committee having

[5] [1956] 1 W.L.R. 833, 841.
[6] Ibid.
[7] [1952] 1 K.B. 189.
[8] [1956] 1 W.L.R. 842.
[9] [1956] 1 W.L.R. 843.

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

"purported to expel him from the Cornporters' Association, the "court had jurisdiction to declare that he should be reinstated on "the list or register. The case, therefore, is one which, although "that particular decision may not have been necessary and had "become academic, nonetheless shows that the majority of the "Court of Appeal, in a case where there was no contractual link "between the plaintiff and the committee, assented to the view "that the court had jurisdiction to make the type of declaration "there asked for, namely, that the Cornporters' Committee, in "purporting to do what they had, had exceeded their jurisdiction."

Pilcher J. then deals with a certain portion of the judgment of Denning L.J., and goes on like this [10]: "A glance at the state-"ment of claim in the present case will show how the learned "pleader had done his best to link the plaintiff and the defendants "by contract. Whilst admiring his ingenuity, I am not prepared "to hold that any implied contract could properly be inferred, at "any rate until the plaintiff received the summons to attend the "inquiry and submitted himself to the jurisdiction of the stewards. "In *Abbott* v. *Sullivan* [11] it will be remembered that the plaintiff "had refused to attend the tribunal, saying that they had no "jurisdiction. In the present case the plaintiff has submitted to "the jurisdiction of the National Hunt Stewards, and at least "from the moment when he did so impliedly agreed to abide "by their finding, subject, of course, to any legal right which "he might have to impugn it. From that moment it seems to "me that he was in contractual relation with the stewards of "the committee. In those circumstances, unless Mr. Gardiner "had decided, I think quite wisely, to waive his claim for "damages, he might have been entitled to recover damages. If "at a time antecedent to the hearing of the inquiry the plaintiff "has submitted to the jurisdiction of the tribunal, if it be neces-"sary that the parties should be in contractual relationship (and "I think that it follows from *Abbott* v. *Sullivan* [11] that it is not, "where no damages are claimed), then it seems to me that there "is a very great deal to be said for the proposition that, once the "plaintiff had submitted to the jurisdiction of the committee, "they were impliedly linked by contract and linked in such a "fashion that it would certainly be inequitable and I think wrong "that the defendants should be entitled to say that the plaintiff "in any event in this particular case had no cause of action "against them." The judge then granted the injunction and the declaration.

It will be observed that in the end the judge held that there was a contractual nexus in that case, so that his views were obiter dicta and are not binding on this court.

With the greatest respect to the judge I think his views are not justified by *Abbott* v. *Sullivan* [12] on which he relied. The

[10] [1956] 1 W.L.R. 844.
[11] [1952] 1 K.B. 189.
[12] Ibid.

main question before the Court of Appeal was whether the plaintiff could recover damages against certain members of the committee which had purported to decide against him. It was held—I am reading from the headnote [13]—" by the Court of Appeal . . . " that the committee's resolution . . . was ultra vires and no " action lay against the trade union on any ground. But held by " Evershed M.R. and Morris L.J., Denning L.J. dissenting, " that in acting outside their jurisdiction the Cornporters' Com- " mittee had not acted in breach of contract, and that an order " for damages could not be made against the first two defendants " for the committee's ultra vires resolution or against the fourth " defendant for inducing the committee to make the resolution." Denning L.J. held this [14]: " ' The jurisdiction of a domestic " ' tribunal such as the Cornporters' Committee must in the last " ' resort be based on contract, express or implied,' and the " resolution . . . was made in breach of contract for which . . . the " remedy of damages would lie."

As I said, a declaration and an injunction were pronounced by the judge of first instance. Both those matters had become academic by the time the case reached the Court of Appeal, which was not really concerned with any matter except the issue of damages; and they held by a majority that no sufficient contract existed to support a claim for damages, largely because no such claim was made in the pleadings at all.

Talking about the committee, the Master of the Rolls says this [15]: " . . . it is, in my judgment, plain that its jurisdiction " must be founded upon a contract express or implied mutually " entered into and binding on all those who enjoy the privileges " of being accepted into the ranks of the cornporters." He goes on below,[15] " The matter was, however, clearly fought and tried " out in the court below, and in the circumstances the judge " arrived at the conclusion, as I think, rightly, that the necessary " contractual foundation for what had been done had not been " established." Morris L.J. came to a similar conclusion.

The dissenting judgment of Denning L.J. did not arise out of that but out of the fact that he thought you could spell out a contractual relationship, and the whole essence of the case was that a contract was necessary. Denning L.J. expressly said [16] that the court there approved of the declaration made by Croom-Johnson J. on the footing that there was at least a sufficient contractual nexus to justify such a form of relief. In my judgment the remedies by way of declaration or injunction must have a legal and a contractual basis no less than the remedy of damages.

Russell v. *Duke of Norfolk* [17] seems to me relevant in this connexion; there Lord Goddard C.J. came to the conclusion that

[13] [1952] 1 K.B. 189.
[14] Ibid.
[15] Ibid. 194.
[16] Ibid. 206.
[17] (1948) 64 T.L.R. 263; [1948] 1 All E.R. 488. [1948] W.N. 111.

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

no contract could be implied—see his observations[18]: "I can "find no contract here under which the stewards were under any "duty to the plaintiff to hold an inquiry. It is said that they "did hold an inquiry, and, therefore, that they must hold it "honestly, fairly, and in accordance with natural justice. That "seems to me to be a fallacy. If there was no contractual duty "to hold an inquiry, how can there be a breach of contract in "withdrawing the licence, however the inquiry was conducted? "It is admitted that the licence might have been withdrawn "without any inquiry."

Both Lord Goddard C.J. and the Court of Appeal[19] in that case assumed that it was essential to find a contractual basis for the obligation to treat a man with natural justice. In the absence of such a contract there was no obligation, and if no obligation the fact that natural justice was not done was not a matter of which the plaintiff could complain.

In the course of the hearing Mr. Campbell, while not accepting this view, did seek to amend his claim by alleging a breach of contract, and this amendment I allowed though made after the close of the plaintiff's case, because it seemed to me desirable that if the plaintiff had any rights he should not be deprived of them by the absence of some plea. The plaintiff by his final amendment alleges that, by setting up their investigation system, K.R.S., or that body jointly with C.E.A., warranted or contracted first that reports by their inspectors and the summary of those reports by Belton should be fair and accurate and, secondly, that the inquiry by the J.I.C. should be conducted in accordance with natural justice. It is, however, in my judgment clear that there could have been no contract in this case so long as the plaintiff was ignorant of the existence of the investigation system, and that any contract, therefore, must have been subsequent to April 30, after the happening of all the events of which complaint is made.

This question of contract is a very difficult one, and it was discussed by Denning L.J. in *Abbott* v. *Sullivan*[20] already cited[21]: "There remains, however, the question whether this way "of putting the claim"—that is the contractual one—"is suffi-"ciently pleaded. No contract is alleged between the committee "and the plaintiff. I confess that I feel much difficulty on this "score, which is increased by the fact that the Master of the "Rolls and Morris L.J. think the point is not sufficiently pleaded. "If this had been an ordinary case of contract I should be "prepared to regard the omission as fatal. But this is not an "ordinary contract case. It is a claim in an uncharted area "on the borderland of contract and of tort. I can quite under-"stand a pleader being perplexed as to the right way of putting "the claim; and in the special circumstances I think it is one of

[18] [1948] 1 All E.R. 491.

[19] (1948) 65 T.L.R. 225; [1949] 1 All E.R. 109; [1949] W.N. 6.

[20] [1952] 1 K.B. 189.

[21] Ibid. 205.

"the rare cases where he would be fully justified in stating the "material facts without venturing to commit himself to the "precise legal category in which they fall. . . . We all agree that "the facts are sufficiently stated to enable us to make a declara-"tion which is founded on contract; and I think we should "entertain the claim for damages on that footing also, despite "the lack of formulation in the statement of claim." He explains that the contract there was that the tribunal would not act outside the jurisdiction which their rules gave them, and as they acted outside their jurisdiction then damages lie against them.

The case here is different because there are no rules and no procedure is laid down, and therefore one cannot, as in most cases, satisfy the inquiry by examining rules to see whether they have been broken or procedure to see whether it has been transgressed.

I have already read the statement of Pilcher J. at the end of *Davis* v. *Carew-Pole*,[22] and I need not repeat it.

The contract here, if there be one, must it seems to me come into existence when the plaintiff is invited to attend the inquiry by the J.I.C., and agrees to do so. The contract would then be that the inquiry should be fairly conducted, and, in my judgment, it would be right in a case of this sort to imply such a contract. Compare, for instance, the speech of Lord Parmoor in *Weinberger* v. *Inglis*[23]: "As at present advised and without hearing further "argument I am not prepared to hold that a body in the position "of the Committee of the Stock Exchange have an absolutely "autocratic power to act as they please, and without regard to "fundamental principles of just inquiry, in exercising a duty "which is judicial in this sense, that it necessarily implies con-"sideration and a decision which affects not only the immediate "pecuniary interests, but also the whole business status of the "member whose re-election is refused. The Committee are not, "of course, bound to treat such a question as though it were a "trial. They can obtain information in any way they think best. "I am, however, not satisfied that they are not subject to the "limitation expressed in this House by Lord Loreburn (*Board of "Education* v. *Rice*[24]) always giving a fair opportunity to those "who are parties in the controversy for correcting or contradicting "any relevant statement prejudicial to their view. 'In such "'cases the Board of Education will have to ascertain the law "'and also to ascertain the facts. I need not add that in doing "'either they must act in good faith and fairly listen to both "'sides, for that is the duty lying upon everyone who decides "'anything.'"

It seems to me that bodies like K.R.S., who exercise monopolistic powers and may ruin a man by their recommendations,

[22] [1956] 1 W.L.R. 842.

[23] [1919] A.C. 606, 636; 35 T.L.R. 399.

[24] [1911] A.C. 179; 27 T.L.R. 378.

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

ought not to act in an arbitrary manner or at the least that if they do, as this body did, set up an investigation committee which is a quasi-judicial body, they must be taken to hold out to those over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair. Indeed, in the present case, the plaintiff was expressly told that he would get a fair hearing.

It has, however, often been pointed out that it is a great mistake to suppose that the principles of natural justice require a body of this sort to conduct themselves as though they were a court of law—see Tucker L.J. in *Russell* v. *Duke of Norfolk*[25]; he is there considering the inquiry and says[26]: "Throughout "this inquiry he was, at every stage, it seems to me, given an "opportunity of presenting his case and of asking any questions "which he desired to ask. It is true that he was not in terms "asked: 'Have you got any witnesses? Do you want an "'adjournment?' A layman at an inquiry of this kind is, of "course, at a grave disadvantage compared with a trained "advocate, but that is a necessary result of these domestic "tribunals which proceed in a somewhat informal manner. "Counsel for the plaintiff, in the course of his forceful argument "on this point, again and again said: 'What would be said of "'local justices who acted in this way?' With all due respect, "the position is totally different. This matter is not to be "judged by the standards applicable to local justices. Domestic "tribunals of this kind are entitled to act in a way which would "not be permissible on the part of local justices sitting as a "court of law. The conclusion I have reached on this aspect "of the case is that there was no material on which a jury could "have arrived at a conclusion that this inquiry was conducted "in a way contrary to the principles of natural justice. If, as I "think is the better view, it really was a matter of law for the "decision of the judge, I should unhesitatingly hold that there "was nothing here which was contrary to the principles of natural "justice as laid down in the various authorities which have been "brought to our notice. There are, in my view, no words which "are of universal application to every kind of inquiry and every "kind of domestic tribunal. The requirements of natural justice "must depend on the circumstances of the case, the nature of "the inquiry, the rules under which the tribunal is acting, the "subject-matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of "natural justice which have been from time to time used, . . ."

What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more. It is said, however, that none of these necessities was complied with here. As regards

[25] [1949] 1 All E.R. 109. [26] Ibid. 118.

good faith I have already said that I see no evidence of bad faith. It was said, however, that the plaintiff was not told of the true charge against him, which was one of fraud. This I have already said is, in my judgment, a false point. The J.I.C. was not concerned with fraud at the stage then reached. Secondly, it was said that he was not shown the charge, that is to say, Belton's summary, which was the only document before the J.I.C. This is much more serious, but on the whole I conclude that the plaintiff was not injured in this respect. There is nothing in Belton's summary which is not in Belton's letter to the plaintiff of May 11, and the plaintiff admitted that he knew what was the complaint made against him, namely, the discrepancies in the two weeks already discussed. Next it was said, to vitiate the proceedings, that Belton, his accuser, was in attendance throughout, and reference was made to *Cooper* v. *Wilson*.[27] That was a very different case. The plaintiff had been dismissed from his office by the chief constable, and when he appealed from that decision he found the chief constable, a respondent to the appeal, sitting and acting as one of the tribunal. Here I see no reason why Belton should not be present. He was not a member of the J.I.C., and there was no evidence that he took any part in the decision. Next it is said that the charge did not contain all the relevant material. It is quite true that it omitted to state the total number of visits made and their result or the deficiency in the hand tallies, but, in my judgment, the addition of these two matters would not have been relevant to the J.I.C.'s decision. Further, it said that the plaintiff was prevented from calling his wife to testify on his behalf. This I think is true, but not fatal, because it is clear to me, having heard Mrs. Byrne's evidence in the witness-box, that she would have been able to add nothing on the only point which was relevant, that is to say, an explanation of the discrepancies. The whole burden of her song was that there was, and could be, no explanation after the lapse of so long a time, having regard to the way in which the business was conducted. She did not pretend that the discrepancies did not exist, nor that they did not show that money which should have gone to the renter went into the pocket of the exhibitor. If, therefore, she had been allowed a right of audience she could not have altered the result.

Finally, it was said that the penalty was so disproportionate to the offence that the decision could not have been come to bona fide. I agree that in the result the decision has brought about a punishment altogether disproportionate, for I propose to treat the plaintiff as having been an honest man. He was never accused of fraud by the defendants, still less convicted of it, and he is entitled therefore to the benefit of any doubt there may be. Nevertheless, I do not regard the proceedings of the J.I.C. as necessarily taken in bad faith because they did not foresee the result. This came about owing to the plaintiff's unwillingness to

[27] [1937] 2 K.B. 309; 53 T.L.R. 623.

1958

BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.

Harman J.

submit to the K.R.S. terms, and not directly from the recommendation of the J.I.C. on this occasion. The stipulation that the accountants should be nominees of K.R.S., and that the plaintiff should pay their costs in any event was no doubt harsh, but it can be justified when it is considered that he was under obligation to make true returns to the renters and had failed to do so, and that it was this default of his that made investigation necessary.

In the result, therefore, much as I deplore the methods of the defendants, greatly as I doubt whether it is in the interests of the trade which they purport to represent to behave in this kind of way, I cannot hold that the plaintiff has any legal ground for the accusations he makes against them. His action must therefore fail, and must be dismissed with the usual consequences.

Action dismissed.

Solicitors: *Bieber & Bieber; Hugh V. Harraway & Son; Pothecary & Barratt.*

I. G. R. M.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958
June 16, 23.

Lord Goddard C.J., Barry and Ashworth JJ.

* REGINA *v.* ADAIR.

Criminal Law—Summing up—Direction to jury after retirement—Question from jury—Whether relevant evidence should be reviewed.

Criminal Law—Court of Criminal Appeal—Substitution of verdict—Alternative counts—Conviction on larceny count—No verdict on receiving count—Court's power to substitute verdict of receiving—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

Criminal Law—Larceny—Alternative counts for larceny or receiving—Conviction on one and no verdict on other—Appeal—Substitution of verdict—Criminal Appeal Act, 1907, *s.* 5 (2).

The appellant was charged together with F. on an indictment the first count of which charged them with breaking and entering a dwelling-house, which was a public-house, and stealing cigarettes and liquor, and the second charged them with receiving the cigarettes knowing them to have been stolen. Some of the stolen cigarettes had subsequently been found in the appellant's flat. The prosecution invited the jury to convict on the basis that the appellant and F. themselves broke into the public-house. It was not suggested that the appellant was only an accessory before the fact and not actually present. After retirement the jury requested a further direction asking: "If [the appellant] in "fact remained at . . . [his flat] but organized the breaking-in "of the . . . public-house, put pressure on someone to carry out the "breaking and supplied a key or other equipment, could [the appel-"lant] be found guilty of burglariously breaking and entering the "premises?" The deputy chairman replied: "The answer is, "he is an accessory before the fact and the short answer is: Yes." The jury then found the appellant guilty on the first count and

were discharged from returning a verdict on the second count. F. was acquitted on both counts. The appellant appealed on the ground that the further direction was inadequate since there was no evidence to support the elements of organization and pressure:—

Held, that (1) it was not in every case where by the form of their question a jury indicated a different approach to the problem from that which was put forward on behalf of the Crown, that it was necessary by way of further direction to review all the evidence relevant to the points involved in the jury's question; but if the form of the question showed that the jury appeared to be assuming facts or drawing inferences for which there was no supporting evidence, further direction was called for; accordingly, as there was no evidence that the appellant put pressure on someone to carry out the breaking-in, and it was not possible to say that if the jury had been reminded of the absence of any such evidence they would have convicted, the subsequent direction was inadequate and the verdict on the first count could not stand; but that (2) it was plain that the jury must have been satisfied of facts sufficient to convict the appellant of receiving and, therefore, pursuant to section 5 (2) of the Criminal Appeal Act, 1907, the court would substitute for the verdict of guilty on the first count a verdict of guilty on the second count.

Reg. v. *Melvin* [1953] 1 Q.B. 481; [1953] 2 W.L.R. 274; [1953] 1 All E.R. 294 distinguished.

APPEAL against conviction.

The appellant, George Johnston Adair, was charged together with a woman named Farin at the County of London Quarter Sessions on an indictment containing three counts. The first count charged them jointly with breaking and entering a dwelling-house and stealing over 80,000 cigarettes, nine bottles of whisky and five bottles of brandy; the second count charged them jointly with receiving 68,000 cigarettes knowing them to have been stolen; the third count charged them jointly with receiving a wireless set knowing it to have been stolen. The appellant was found guilty on the first and third counts of the indictment. Farin was found not guilty on those counts but guilty of receiving 500 cigarettes. The jury were discharged from giving a verdict in respect of the appellant on the second count.

The appellant appealed against his conviction on the first count.

The facts are fully set out in the judgment.

F. H. Lawton Q.C. and *C. G. L. Du Cann* for the appellant.
H. F. Cassel for the Crown.

The following cases were cited in argument: *Reg.* v. *Bullock* [1]; *Reg* v. *Melvin* [2]; *Reg.* v. *Seymour.* [3]

On June 16 the Court of Criminal Appeal indicated that they

[1] [1955] 1 W.L.R. 1; 38 Cr.App.R. 151; [1955] 1 All E.R. 15.
[2] [1953] 1 Q.B. 481; [1953] 2 W.L.R. 274; [1953] 1 All E.R. 294.
[3] [1954] 1 W.L.R. 678; 38 Cr.App.R. 68; [1954] 1 All E.R. 1006.

C. C. A.
1958
REGINA
v.
ADAIR.

would not allow the appeal and would give their reasons at a later date.

Cur. adv. vult.

June 23. ASHWORTH J. read the judgment of the court. This appellant was charged together with a woman named Farin at the adjourned quarter sessions for the County of London in an indictment containing three counts. In the first count they were jointly charged with breaking and entering a dwelling-house and stealing over 80,000 cigarettes, nine bottles of whisky and five bottles of brandy; in the second count they were jointly charged with receiving 68,000 cigarettes knowing them to have been stolen; in the third count they were jointly charged with receiving a wireless set knowing it to have been stolen. The appellant was found guilty on the first and third counts, while the woman Farin was found not guilty on those counts but guilty of receiving 500 cigarettes which were found among her personal belongings. The appellant did not challenge the verdict or sentence on the third count, but contended that as a matter of law he was wrongly convicted on the first count.

The incident out of which the charge on the first count arose occurred in the night of December 8/9, 1957, when premises known as the Royal Oak public-house were entered by means of a key which fitted one of the doors of the bar, and the cigarettes and liquor were stolen. On the following day police officers visited a flat occupied by the appellant and the woman Farin, and there they found stacked round a gas stove, cartons containing 68,000 cigarettes, some of which could be identified as having come from the Royal Oak. They also found equipment suitable for making keys, including some plasticine bearing the impression of a key.

The appellant's explanation to the police, which he repeated in his evidence at the trial, was that the cigarettes must have been deposited in the flat by a lodger named Bill, and that he, the appellant, had nothing whatever to do with the entry into the Royal Oak or the stealing therein. The key-making equipment was said by him to have been in his possession for amusement purposes only.

Counsel for the Crown invited the jury to convict the appellant and Farin on the first count on the basis that they had themselves broken and entered the Royal Oak. No suggestion was made that the appellant should be convicted on the basis that while not taking part in the actual burglary he had organized or assisted in the crime and was, accordingly, liable to be convicted as an accessory before the fact.

In his summing-up the deputy chairman dealt fully and accurately with the law and the facts on the footing that the appellant was alleged to have broken and entered the premises himself. In the absence of any suggestion that the appellant

might be convicted as an accessory it is not surprising that the summing-up contained no reference to that point.

The jury retired to consider their verdict and two hours later they returned, desiring further direction on a point of law which they expressed in the following terms: "If Adair in fact remained "at 15, St. Luke's Road [his flat] but organized the breaking-"in of the Royal Oak public-house, put pressure on someone to "carry out the breaking-in and supplied a key or other equip-"ment, could Adair be found guilty of burglariously breaking and "entering the premises?" The deputy chairman's reply was as follows: "The answer is, he is an accessory before the fact and "the short answer is: Yes." After a very short further retirement the jury returned a verdict of guilty against the appellant on the first count.

Mr. Lawton contended for the appellant that in the circumstances, and having regard to the way in which the case for the Crown had been presented, the short further direction given by the deputy chairman was inadequate. He did not contend that if the three elements mentioned in the jury's question had been proved by evidence, namely, organization, pressure and the supply of a key, the deputy chairman's answer would have been wrong in law. His contention was that there was no evidence whatever to support two of the elements, namely, organization and pressure, and that the deputy chairman should have directed the jury that their approach to the problem involved assumptions which the Crown had not suggested, and which were not supported by the evidence.

In our view, it would not be right to say that in every case where, by the form of their question, a jury indicate a different approach to the problem from that which was put forward on behalf of the Crown, it is necessary by way of further direction to review all the evidence relevant to the points involved in the jury's question. But if the form of the question shows that the jury appear to be assuming facts or drawing inferences for which there was no supporting evidence, further direction is called for, and they should be reminded how far the relevant evidence went. In the present case there was certainly no evidence that the appellant put pressure on someone to carry out the breaking-in, and it is not possible to say that if the jury had been reminded of the absence of any such evidence, they would have convicted the appellant on the first count.

While we have no wish to criticise the deputy chairman, who was confronted by a difficult question, we are of opinion that a fuller direction was called for than that contained in his short answer, and on this ground the conviction on the first count cannot be upheld.

Having regard to their verdict on the first count, the deputy chairman rightly discharged them from returning a verdict in respect of the appellant on the second count. The question now arises whether this court should substitute for the verdict of

C. C. A.
1958
REGINA
v.
ADAIR.

guilty on the first count a verdict of guilty on the second count, in pursuance of section 5 (2) of the Criminal Appeal Act, 1907. That subsection is in the following terms: "Where an appellant "has been convicted of an offence and the jury could on the "indictment have found him guilty of some other offence, and "on the finding of the jury it appears to the Court of Criminal "Appeal that the jury must have been satisfied of facts which "proved him guilty of that other offence, the court may, instead "of allowing or dismissing the appeal, substitute for the verdict "found by the jury a verdict of guilty of that other offence, and "pass such sentence in substitution for the sentence passed at "the trial as may be warranted in law for that other offence, "not being a sentence of greater severity."

In the first place it is clear that as the jury were discharged from returning a verdict in respect of the appellant on the second count, there is no such obstacle to the application of section 5 (2) as existed in *Reg.* v. *Melvin.*[1] In that case the jury had acquitted the prisoners on a count for larceny, and this court held that it had no power in the circumstances to substitute a verdict of guilty of larceny, although the facts would certainly have warranted such a course. When subsection (2) of section 5 is invoked, the question arises whether it is clear to this court that the jury must have been satisfied of facts which proved the prisoner guilty of the other offence: see *Rex* v. *Smith.*[2]

In our view, it is plain from the terms of the jury's question, and their subsequent verdict on the first count, that they must have rejected the explanation offered by the appellant for his possession of the cigarettes and the key-making equipment. It is equally plain that they must have been satisfied that the appellant was directly implicated in the theft, and that when the cigarettes came into his possession he must have known that they were stolen. Confirmation of this view is to be found in the fact that the jury convicted the woman Farin of receiving 500 cigarettes, which had been given to her by the appellant.

In these circumstances, we think that the present case falls well within the ambit of section 5 (2) and, accordingly, we substitute for the verdict of guilty on the first count a verdict of guilty on the second count. The sentence of 18 months' imprisonment which was passed in respect of the first count will stand as the sentence on the substituted verdict.

Order accordingly.

Solicitors: *Sampson & Co.; Solicitor, Metropolitan Police.*

C. J. E.

[1] [1953] 1 Q.B. 481; [1953] 2 W.L.R. 274; [1953] 1 All E.R. 294.

[2] (1923) 17 Cr.App.R. 133.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (REPRESENTATION: MENTAL INCAPACITY).

1958
June 23.

Probate—Practice—Representation—Mental or physical incapacity—Evidence of—Non-Contentious Probate Rules, 1954 (*S.I.* 1954, *No.* 796), *r.* 33.

Where application is made for a grant of representation for the use and benefit of a person incapable of managing his own affairs, and the applicant is not a person authorized by the Court of Protection to apply, evidence of incapacity will be required.

When the incapable person is a patient (whether certified or not) who is resident in an institution, the Probate registrar will normally accept a certificate from the medical superintendent or deputy medical superintendent in the following terms:

[*Name of institution.*]

[*Name of patient.*]

I certify that:

1. The above-named patient, who is now resident in this institution, is in my opinion through mental infirmity arising from disease or age incapable of managing his affairs.

2. In my opinion the above-named patient is unlikely to be fit to manage his own affairs within a period of three months.

(Sgd.).....

Date..... [*Deputy*] *Medical Superintendent.*

If the medical superintendent is unable to give such a certificate, the matter should be referred to the registrar for directions.

Evidence of the incapacity of a person not a resident patient should be in the form of an affidavit by the patient's doctor.

B. LONG,

June 23, 1958. Senior Registrar.

[PROBATE, ETC., DIVISION.]

1958
June 13.

Willmer J.

* FERRANTI (OWNERS) *v.* AMERICAN JURIST (OWNERS) AND CLAYCARRIER (OWNERS).

AMERICAN JURIST (OWNERS) *v.* FERRANTI (OWNERS) AND CLAYCARRIER (OWNERS).

THE AMERICAN JURIST AND THE CLAYCARRIER.

PRACTICE NOTE.

[1955 F. 1938.]

Admiralty—Practice—Appeal—Time for appealing—Period calculated from date when decree is perfected—Decree perfected when settled in Admiralty Registry—R.S.C., Ord. 58, *r.* 4 (1).

The date on which a decree in an Admiralty action is "perfected," within the meaning of R.S.C., Ord. 58, r. 4 (1),[1] is the date when the decree is settled in the Admiralty Registry, and not when it is sealed; accordingly, the period in which notice of appeal may be served is calculated from the former date.

Statement in the Annual Practice, 1958 ed., at p. 1667, not followed.

CHAMBERS SUMMONS.

The *American Jurist*, while taking action to avoid a collision with the *Claycarrier*, collided with the *Ferranti*. The *Ferranti* started an action claiming against the *American Jurist*, who counterclaimed against the *Ferranti* and joined the *Claycarrier* as second defendants to the counterclaim. The *Ferranti* joined the *Claycarrier* as second defendants in the original action.

On April 28, 1958, Willmer J. gave judgment in the action, holding that the collision was caused by the negligence of those on board the *American Jurist* and the *Claycarrier*, and apportioned the blame equally.

The normal practice of the Admiralty Registry is that, after judgment has been delivered, the notes of the trial are initialled and dated and the decree is settled by the Admiralty Marshal. The decree is collected by the solicitor concerned, stamped, and then returned to the Admiralty Registry to be sealed.

[1] R.S.C., Ord. 58, r. 4: "(1) Subject to the provisions of this rule, every notice of appeal shall be served under paragraph (5) of rule 3 of this Order within the following period (calculated from the date on which the judgment or order of the court below was signed, entered, or otherwise perfected), that is to say:—(*a*) in the case of an appeal from an interlocutory order . . . (*b*) in the case of an appeal from an order or decision made or given in the matter of the winding up of a company, or in the matter of any bankruptcy . . . (*c*) in any other case, 6 weeks. . . ."

The notes to Ord. 58, r. 4 (1), in the Annual Practice (1958) at p. 1667 state: "*Date on which the judgment or order . . . was signed, entered or otherwise perfected* . . . An Admiralty decree is perfected by being settled and sealed in the Registry (*The Orient* (1869) 3 Mar.L.C. 321)."

In accordance with the normal practice the notes of the trial were initialled and dated, and the Admiralty Marshal settled the decree on May 5, 1958.

By a summons, dated June 9, 1958, and heard in chambers on June 13, the *American Jurist* applied for leave to extend the time for service of notice of appeal under R.S.C., Ord. 58, r. 3 (5).

The parties were represented at the hearing of the summons by their solicitors.

WILLMER J. held that a decree in an Admiralty action is perfected when it is settled in the registry. In the present case, therefore, time for appealing was from May 5, and the period of six weeks would not expire till June 16. Accordingly, the defendants were still within the time allowed for serving notice of appeal, and the summons to extend the time must be dismissed with costs.

His Lordship further intimated that for the future arrangements should be made for the date of settling the decree to appear on the copy which is taken up.

Summons dismissed.

Solicitors: *Hill, Dickinson & Co.; Thomas Cooper & Co.; Ince & Co.*

A. S-R.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958
June 9, 23.

Lord Goddard C.J., Barry and Ashworth JJ.

* REGINA *v.* NOSEDA.

REGINA *v.* FIELD.

REGINA *v.* KNIGHT.

REGINA *v.* FITZPATRICK.

Criminal Law—Sentence—Borstal training—Further offence—Appropriate sentence.

In deciding whether to send a person who has already served a sentence of Borstal training and who has committed a further offence back to Borstal for a further period, although there is no general principle applicable to all cases, courts should take the following factors into consideration: whether the offender is (1) a person who has been released from Borstal on licence, (2) an absconder from Borstal, or (3) a person who has remained absent without leave from Borstal.

(1) In the case of a person who commits an offence while on licence, and who is therefore liable to recall and subject to section 45 (3) of the Prison Act, 1952, the appropriate order to be made in respect of the fresh offence is a short term of imprisonment pending

C. C. A.

1958

REGINA v. NOSEDA. REGINA v. FIELD. REGINA v. KNIGHT. REGINA v. FITZPATRICK.

his recall to Borstal, except in cases where the Prison Commissioners indicate that the offender will not be so recalled, or where the nature of the fresh offence was so serious as to make recall inappropriate and call for a substantial sentence, or where there are circumstances in the view of the court or the Prison Commissioners which make a further sentence of Borstal training appropriate.

(2) In the case of an absconder who commits an offence while at large, a short term of imprisonment with a view to recall is desirable if the absconding and fresh offence take place within 12 months of the original sentence, but if it takes place after the offender has undergone more than 12 months' training the view may be taken that further Borstal training is unlikely to be of benefit and that imprisonment is the only alternative.

(3) A person who commits a fresh offence while absent without leave from Borstal should ordinarily be treated as an absconder.

APPEALS against sentence.

REGINA v. NOSEDA.

REGINA v. FIELD.

The appellants, George Edward Noseda, aged 20, and Michael Frederick Field, aged 19, pleaded guilty at Middlesex Quarter Sessions to burglary and taking and driving away a car and were sentenced to Borstal training. It was the third sentence of Borstal training to be imposed on Noseda and the second on Field. Noseda was first given a sentence of Borstal training in May, 1955, when he was convicted of office-breaking and larceny. He was released on licence in November, 1956. In April, 1957, he was again sentenced to Borstal for house-breaking and larceny. In January, 1958, he absconded with Field and in his company committed the offences for which he was again sentenced to Borstal training. Against that sentence he now appealed.

Field was first sent to Borstal in January, 1957, for taking and driving away a motor-car. He absconded in June, 1957, but was recaptured. He again absconded this time with Noseda in January, 1958, and committed the offences for which he had now been sentenced to a further period of Borstal training. He now appealed against that sentence.

REGINA v. KNIGHT.

The appellant, John Knight, aged 18, pleaded guilty with one Nodder at County of London Quarter Sessions on March 27, 1958, to larceny and shop-breaking and to taking and driving away a motor-car. He was sentenced to Borstal training. He had previously been sent to Borstal in January, 1957, for garage-breaking and larceny. He absconded in May, 1957, but was recaptured. In January, 1958, after completing 12 months of his sentence he failed to return from home leave and committed over 20 further offences. In March, 1958, he received a fresh sentence of Borstal training at Surrey Quarter Sessions for offences committed in that county, and on March 27, 1958, he also

received the sentence of Borstal training at County of London Quarter Sessions for offences committed in the County of London. Against that sentence he now appealed.

REGINA *v.* FITZPATRICK.

The appellant, George Peter Fitzpatrick, aged 19, pleaded guilty at Salford Quarter Sessions to house-breaking and was sentenced to Borstal training. He had previously been committed to Borstal in January, 1956, for shop-breaking and larceny, was released on licence in September, 1957, but in February, 1958, while on licence, he committed further offences for which he was again sentenced to Borstal training. Against that sentence he now appealed.

On June 9 all four appellants appeared before the Court of Criminal Appeal. In the case of Noseda and Field the court, reserving its reasons, set aside the sentences of Borstal training and substituted sentences of 18 months' imprisonment in each case.

In the case of Knight the court dismissed the appeal.

In the case of Fitzpatrick the court imposed a sentence of three months' imprisonment pending his recall to Borstal.

The appellants appeared in person.

Cur. adv. vult.

June 23. LORD GODDARD C.J. read the following judgment of the court: In each of these cases leave had been granted to the appellant to appeal from an order made by a court of quarter sessions that he should be sent to Borstal for training, and in each case a similar order had been made by a court on a previous occasion. The question which arises in each case is whether it is desirable that a person should be sent to Borstal for training on a second, or possibly a third, occasion, and as this is a problem which quite frequently arises, the court decided to determine the appeals but to put into writing the reasons for its decision, in the hope that they may be of some guidance to courts which are required to deal with similar problems in the future.

In the first place, although it is hardly necessary to say so, each case must be considered on its own particular facts, and there is no general principle applicable to all cases under which a second or indeed a third sentence of Borstal training is to be regarded either as appropriate or inappropriate. The most that can be said is that the occasions on which a third sentence is appropriate are likely to be rare.

In our view, the first factor to consider is whether the offender is (1) a person who had been released from Borstal on licence, or (2) an absconder from Borstal, or (3) a person who had remained absent without leave from Borstal, for example, after a visit to his home.

(1) We deal first with the case of a person released from

C. C. A.
1958
REGINA v. NOSEDA. REGINA v. FIELD. REGINA v. KNIGHT. REGINA v. FITZPATRICK.

Borstal on licence. He may fairly be said to have shown some response to his training and is prima facie in a different class from a person who either absconds from Borstal or is absent without leave. When a person is released from Borstal on licence, he is liable to recall to Borstal to complete his training, and under section 45 (3) of the Prison Act, 1952, remains so liable for a period of four years from the date of his sentence. Then he may be detained till the expiration of three years from the date of his sentence or for a period of six months from the date when he is taken into custody under the order of recall whichever is the later. If such a person commits an offence or offences while on licence and is brought before a court which has jurisdiction to send him to Borstal, it is in our view important that the court should know what period of his original training is outstanding in the event of his being recalled to Borstal, and whether he will in fact be recalled to Borstal. As we understand it, the practice of the Prison Commissioners is to recall to Borstal a person who has committed an offence while released on licence, unless the court imposes a fresh sentence of Borstal or imposes a substantial sentence of imprisonment.

For a person in this class we think that, as a general rule, the appropriate order in respect of the offence committed by him while released on licence is a short term of imprisonment with a view to his recall to Borstal. The short sentence of imprisonment is required so that he may be detained in custody pending his recall to Borstal and, in passing sentence, the court should make it clear that recall to Borstal is intended. This course would not, however, be appropriate if the Prison Commissioners indicate that the accused person would not be recalled to Borstal. Nor would recall be appropriate if the nature of the further offence was so serious as to call for a substantial sentence. On the other hand, if the commissioners report that the offender did make a good response to training but appears to need a longer period of training than the remaining part of his sentence would provide, a further sentence of Borstal may be appropriate.

(2) A person who absconds from Borstal thereby indicates his unwillingness to respond to the discipline and training provided in Borstal but that is not of itself a valid reason why he should not be required to submit to them. If an absconder is brought before a court for a further offence committed while at large, we think that if the absconding and further offence take place early in his training, say within 12 months or so of the original sentence, a short term of imprisonment with a view to recall is desirable. We assume that in such cases absconders will be sent to the correction centre before resuming training. On the other hand, if the person absconds after undergoing more than 12 months of training and commits an offence, the court which has to deal with him, or the Prison Commissioners, may take the view that further Borstal training is unlikely to be of benefit and, accordingly, that imprisonment is the only alternative.

(3) A person who is absent without leave from Borstal and commits a further offence should ordinarily be treated as an absconder.

Before preparing this judgment the court has had the advantage of ascertaining the practice of the commissioners in regard to these varying types.

[His Lordship then stated the facts in relation to each appeal: In the case of Noseda and Field his Lordship said that, having regard to the ages and histories of the two appellants, and having considered the Prison Commissioners' reports on them, the court had decided that a further period of Borstal training was not likely to be of value and, accordingly had substituted in respect of each of them a sentence of 18 months' imprisonment.

In the case of Knight, in the court's view, the course taken by Surrey Quarter Sessions was entirely justified and, although in the circumstances the third sentence of Borstal training passed at the County of London Quarter Sessions was in a sense unnecessary, they saw no reason to alter it and dismissed the appeal.

In the case of Fitzpatrick, it was a case in which completion of the original Borstal training should be enforced and, accordingly, the court had substituted a sentence of three months' imprisonment with a view to the appellant's recall to Borstal.]

Orders accordingly.

Solicitor: *Registrar, Court of Criminal Appeal.*

E. M. W.

[COURT OF APPEAL.]

* PIOTROWSKA *v.* PIOTROWSKI.

C. A.
1958
June 23.
Hodson and Morris L.JJ., Vaisey J.

Husband and Wife—Practice—New trial—Divorce—Adultery—Denial of adultery—Dismissal of wife's petition—Later confession to perjured evidence on behalf of husband—Application for new trial—R.S.C., Ord. 58, *r.* 10.
Fraud—Fraud to court.

On the hearing of a wife's petition for divorce on the ground of her husband's adultery with one J. S., the trial judge accepted the evidence of the husband, of J. S., and of her mother, acquitted the husband of the adultery alleged, and dismissed the wife's petition. Later, the husband, J. S., and her mother confessed that they had given false evidence in the suit relevant to the issue of adultery, pleaded guilty to charges of perjury, and were convicted and sentenced on those charges.

The wife obtained leave to appeal out of time, and on the hearing of the appeal applied for a new trial:—

Held, that on the evidence before it the court ought to grant a

C. A.

1958

PIOTROWSKA
v.
PIOTROWSKI.

new trial under the powers conferred on it by R.S.C., Ord. 58, r. 10.[1]

Worsley v. *Worsley and Worsley* (1904) 20 T.L.R. 171 applied.

APPLICATION for a new trial.

The parties were married in 1945, both being Poles in a labour camp in Germany. On March 7, 1955, the wife left her husband, and on December 2, 1955, presented a petition for divorce on the ground of his adultery, the allegation being that on divers dates and since March 7, 1955, the husband had frequently committed adultery with one Jessie Smith at an address in Hardcourt Road, Sheffield. Further particulars were sought as to the date and place of each act of adultery alleged; and the response was that on March 7, 1955, Jessie Smith was pregnant as a result of the husband's adultery with her on a date or dates unknown some six or seven months earlier; and it was alleged that they had lived together.

At the hearing of the suit before Lord Merriman P. in November, 1956, the husband, Jessie Smith, and her mother—the last two having been lodgers in the house where the parties had lived at the relevant time—all gave evidence and all strongly denied the allegation that Jessie Smith had been pregnant at the alleged time. There were a number of errors and omissions in the case as presented on behalf of the wife. Certain particulars of the alleged adultery which had been asked for had not been given, and material evidence on the reports of an inquiry agent supporting the allegation that the husband and Jessie Smith had occupied the same bedroom was not available for the court, though it was found after the hearing. The President accepted the evidence given on behalf of the husband, acquitted him of adultery, and on November 30, 1956, dismissed the wife's petition.

On June 25, 1957, the husband, Jessie Smith, and her mother confessed that they had falsely sworn in the suit that Jessie Smith was not at the relevant time, March, 1955, pregnant. They pleaded guilty to charges of perjury, on which charges they were convicted and sentenced.

On January 20, 1958, the wife applied to the Court of Appeal for leave to appeal out of time, supporting the application with affidavit evidence as to the confessions of the three witnesses at the suit. Leave having been granted, she asked on the hearing of the appeal for a new hearing of the suit based on adultery in view of the material now before the court.

R. V. Cusack (who did not represent the wife at the hearing before Lord Merriman P.) for the wife.

The husband was not represented and did not appear.

[1] R.S.C., Ord. 58, r. 10: "(1) On "the hearing of any appeal the Court "of Appeal may, if it thinks fit, make "any such order as could be made in "pursuance of an application for a "new trial or to set aside a verdict, "finding or judgment of the court "below."

No case other than that referred to in the judgment was cited in argument.

HODSON L.J. stated the facts and continued: The President accepted the evidence of the woman and the mother and incidentally that of the husband, although he had not previously been disposed to accept the evidence of the husband as against that of the wife, whom he found to be an apparently credible witness; but in the puzzling situation in which he found himself because of the way in which the case was presented to him, he acquitted the parties charged with adultery. Since then the husband himself, the woman, Jessie Smith, and her mother have all admitted their perjury in these divorce proceedings in that matter and have suffered the penalty of the law for it. That is really all I need say.

There should be a new hearing under the powers conferred on this court by Ord. 58, r. 10.[1] Reference has been made by counsel to *Worsley* v. *Worsley and Worsley*,[2] where a somewhat similar situation occurred in a case where the trial had been before a judge and jury. After a witness who had given evidence had confessed that it was false, the Court of Appeal ordered a new trial; and I have in my own recollection a case in which a similar course was taken where the hearing was before a judge alone.

Every comment which the President made in his judgment is, in my respectful opinion, well justified so far as the material before this court is concerned. Indeed, it is apparent that in one particular respect the case was presented to the court in a most unsatisfactory form. [His Lordship referred to the defects in the pleadings and the evidence, and continued:] It is undesirable for me to make any further comment on the case. I repeat that the situation in which the President found himself was such that the conclusion which he reached was almost inevitable; but on the information which we now have I think there must be a new hearing.

MORRIS L.J. I entirely agree.

VAISEY J. I also agree.

Appeal allowed.
Order of court below set aside.
Petition to be reheard.

Solicitors: *Peake & Co. for Lapage, Norris, Sons & Saleby, Stroud.*

M. M. H.

[1] For footnote 1 see p. 798.

[2] (1904) 20 T.L.R. 171.

[COURT OF APPEAL.]

C. A.

1958
June 4, 5, 6;
July 1.

Hodson,
Morris and
Sellers L.JJ.

* WALSH *v.* HOLST & CO. LTD. AND OTHERS.

[1955 W. No. 349.]

Negligence — Onus of proof — Res ipsa loquitur — Brick falling from occupier's building onto user of highway—Contractors and subcontractors engaged on work involving dislodgment of bricks—Whether brick speaks against more than one defendant—No explanation as to why brick fell — Evidence of safe system — Whether onus discharged.

A man walking along the pavement of a narrow street was hit on the head by a half-brick which, it was found, came from a building on the opposite side of the street where work was in progress. He brought an action for personal injuries, alleging negligence against the main building contractors, the subcontractors, and the owners and occupiers of the building, an electricity board.

The board was at the time converting the premises into offices. The contractors were engaged in breaking out brickwork on the wall abutting the highway with a pneumatic drill, and the subcontractors bricking in the resulting jagged holes. The building was covered by a scaffolding of high quality, steel sheeting at pavement level, wire netting at higher levels, and a canopy to catch materials which it was known might and did fall. Additional precautions during breaking out operations included tarpaulins, and a man posted in the road to warn passers-by against bricks which might and did fall or ricochet off the scaffolding. After that operation, workmen cleared up materials which had fallen into the road or had lodged insecurely in the holes or on the scaffolding; and a foreman followed up with an inspection. The particular foreman had died before the trial, and there was no evidence that such inspection had been carried out after the last breaking-out operation before the accident. At the time the brick fell the only man at work on the wall was a bricklayer employed by the subcontractor, whose evidence that no brick came off his scaffolding while he was at work was accepted by the judge; and on that evidence the claim against the subcontractor was not pursued. No witness was able to explain why the brick fell:—

Held, (1) that the doctrine of res ipsa loquitur applied to shift the burden of proof from the plaintiff, for a brick falling on the head of a person lawfully on the highway spoke effectively against all the defendants, once it was shown that the board was in occupation of the premises from which it fell while the contractors and subcontractors employed by it were carrying out work involving the dislodgment of bricks, and no act of collateral negligence was relied on.

Byrne v. *Boadle* (1863) 2 H. & C. 722; *Penny* v. *Wimbledon Urban District Council* [1899] 2 Q.B. 72; 15 T.L.R. 348; and *Maxwell* v. *British Thomson-Houston Co.* (1902) 18 T.L.R. 278 applied.

But (2), Morris L.J. dissenting, negligence could not be inferred in the present case, for the defendants had discharged the onus on them by showing that they had taken all reasonable steps in the performance of the work to prevent injury to users of the highway, and were accordingly not liable.

Moore v. *R. Fox & Sons* [1956] 1 Q.B. 596; [1956] 2 W.L.R. 342; [1956] 1 All E.R. 182 distinguished.

Per Morris L.J. Though standards of reasonableness must be adhered to, it is no answer, if an accident occurs which could have been avoided by using care, to say that certain safety precautions were taken which nearly succeeded. Either there was here no proper system to avert the occurrence of something which was not only foreseeable but was realized, or, if there was, it was not carried out. The defendants must either show that they were not negligent or must give an explanation of the cause of the accident which does not connote negligence. The evidence here does not negative the existence of negligence.

Decision of Gorman J. affirmed in the result.

APPEAL from Gorman J.

At 2.30 p.m. on September 16, 1955, the plaintiff, John Walsh, was walking along the pavement of Back Darwen Street, Blackburn—a street some 15 feet wide with a narrow pavement on each side. As he was passing a high four-storeyed building on the opposite side of the street, something happened. He was found lying on the footpath with a half-brick lying near him, having sustained injuries to his forehead and nose. It was found by the judge and eventually conceded by the defendants in the subsequent proceedings that he had been struck on the head by a half-brick which had come from the building opposite.

He brought an action for damages for personal injuries based on alleged negligence against the first defendants, Holst & Co. Ltd., a firm of contractors, who were at the time engaged in work on the premises from which the brick came. He later joined as second defendant the subcontractor, L. Crossman, who was employed by the main contractor to do certain brickwork on the building; and he also joined as third defendants the North Western Electricity Board as owners and occupiers of the building.

The facts as elicited from the evidence and found by the judge were as follows: The building from which the brick came had formerly been a generating station and the board was converting it into offices. To this end existing window apertures were being enlarged and new windows being put in on the wall abutting the street. The contractors used a pneumatic drill from the outside to break holes in the side of the building—a process called "breaking out"—so that most of the dislodged bricks fell inside the building; but some did fall outside, most of them falling straight to the ground between the wall and the scaffolding. Within the jagged perimeters of the holes thus created new brickwork was built in by the subcontractor—a process called "bricking in."

Elaborate tubular scaffolding, which was found to be the best of its kind, had been erected by the contractors and it covered the entire side of the building. At ground level on the street enclosing the pavement, there was steel shuttering some seven feet in height; above it wire netting extending some four feet higher; and above that an apron or canopy, which projected at an angle outwards and upwards from the scaffolding for about five feet and was designed to catch falling débris. At the height of the two

C. A.
1958
WALSH
v.
HOLST
& CO. LTD.

top storeys there were wooden plank platforms from which the work of breaking out or bricking in could be done. Wire netting extended upwards on the outside of the top platform; and there was a space between the platforms and the side of the building down which material could fall. When the work of breaking out was in process tarpaulin sheeting was hung round the place where the pneumatic drill was to be used so that no possible "stuff" could go down the scaffold; but the steps taken were not effective to prevent some falling pieces from being projected onto the road when breaking out was in process, for such pieces might hit a part of the tubular scaffolding, and, where there was no wire netting, bounce or ricochet out onto the street. For that reason at such times a man was posted out on the street to warn passers-by of the danger. After the operation the contractor's men would clear up the bits of mortar and brick in the street.

The contractors also recognized that if a brick were left delicately poised in an aperture or on any portion of the scaffolding or of the building itself, it might ricochet off over the apron, even if no one were working or otherwise causing vibration in the building itself. Though no brick had ever to the knowledge of the witnesses cleared the apron and fallen into the road except when the breaking-out operation was being performed, precautions were taken to meet such an eventuality by requiring the workmen, after they had finished with the wall, to go round clearing up and making sure that no loose bricks had been left in the perimeters of the openings. An inspection was carried out by a foreman over the man on the pneumatic drill, a man named Boon, who had died before the hearing of the action and whose evidence was thus not available. No witness was called who said that he had inspected after the last breaking out had taken place before the accident.

There was generally an interval of a week or so between the breaking out and the final bricksetting by the subcontractors. When that work was being done the bricklayer might have some brick or part of a brick to reject and might deliberately throw it down between the platform and the side of the building in the hope that it would just fall to ground level between the steel shuttering and the building. Again a brick which had previously fallen might have become poised in the scaffolding and not been cleared away.

On the day of the accident no breaking out was in process, and only one man was working on the building, a bricksetter named Lord, an employee of the subcontractor who gave evidence on behalf of the plaintiff. His evidence, which the judge accepted, was that no brick came off his scaffold while he was working; and in the light of that evidence the claim against the subcontractor was not pressed.

The only two witnesses called from the contractors were the scaffold foreman, Woodcock, who was called on behalf of the

plaintiff, and the general foreman, Lancaster, who was called on behalf of the defendants. They stated frankly that they did not know and could not explain why the brick fell.

The plaintiff contended that the fall of the brick was prima facie evidence of failure on the part of the contractors and the board to carry out the work without negligence and that as there was no explanation of the accident at all, still less one which did not connote negligence, it followed that res ipsa loquitur and that there should be judgment for him.

The judge held that the doctrine of res ipsa loquitur did not apply where there were, as here, two defendants and it was impossible to say how the accident happened or what were the circumstances which caused the brick to come down in the way it did; and as his Lordship found no evidence that the brick came down through any negligence on the part of either the contractor or the subcontractor, he held that the plaintiff must fail. If, however, the doctrine of res ipsa loquitur did apply his Lordship was satisfied on the authorities that the first and second defendants had complied with the duty of contractors; and as neither of the contractors was to blame there was no negligence, liability for which could be passed over to the board. He gave judgment for all the defendants, declining to assess the damages sustained by the plaintiff.

The plaintiff appealed.

Fenton Atkinson Q.C., *W. G. Morris* and *Harry Hague* for the plaintiff.

Norman Richards Q.C. and *Godfrey Heilpern* for Holst & Co. Ltd. and the electricity board.

The second defendant, L. Crossman, was not represented and did not appear.

The following cases were cited in the course of the argument: *Penny* v. *Wimbledon Urban District Council* [1]; *Moore* v. *R. Fox & Sons* [2]; *Pickard* v. *Smith* [3]; *The Merchant Prince* [4]; *Roe* v. *Ministry of Health* [5]; *The Kite* [6]; *Tarry* v. *Ashton* [7]; *Cassidy* v. *Ministry of Health (Fahrni Third Party)* [8]; *Maxwell* v. *British Thomson-Houston Co. Ltd.* [9]; *Byrne* v. *Boadle* [10]; *Woods* v. *Duncan: The Thetis* [11]; *Bolton* v. *Stone* [12]; *Padbury* v. *Holliday & Greenwood Ltd.* [13]; *Allen* v. *Hayward* [14]; *Reedie* v. *London and North Western Ry. Co.* [15]

Cur. adv. vult.

[1] [1899] 2 Q.B. 72; 15 T.L.R. 348.
[2] [1956] 1 Q.B. 596; [1956] 2 W.L.R. 342; [1956] 1 All E.R. 182.
[3] (1861) 10 C.B.N.S. 470.
[4] (1892) P. 179; 8 T.L.R. 430.
[5] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.
[6] [1933] P. 154; 49 T.L.R. 525.
[7] (1876) 1 Q.B.D. 314.
[8] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.
[9] (1902) 18 T.L.R. 278.
[10] (1863) 2 H. & C. 722.
[11] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420n.
[12] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[13] (1912) 28 T.L.R. 494.
[14] (1845) 7 Q.B. 960.
[15] (1849) 4 Ex. 244.

C. A.
1958
WALSH v. HOLST & CO. LTD.

July 1. HODSON L.J. read the following judgment, in which he stated the nature of the action, and continued: No one knows how or why the brick fell, and the plaintiff contends that res ipsa loquitur, for the brick speaks just as did the barrel of flour in *Byrne* v. *Boadle*.[1] In his judgment Pollock C.B. said[2]: "So in the building or repairing a house, or putting pots "on the chimneys, if a person passing along the road is injured "by something falling upon him, I think the accident alone "would be prima facie evidence of negligence. . . . The present "case upon the evidence comes to this, a man is passing in front "of the premises of a dealer in flour, and there falls down upon "him a barrel of flour. I think it apparent that the barrel was in "the custody of the defendant who occupied the premises, and "who is responsible for the acts of his servants who had the "control of it; and in my opinion the facts of its falling is prima "facie evidence of negligence, and the plaintiff who was injured "by it is not bound to show that it could not fall without negli-"gence, but if there are any facts inconsistent with negligence it "is for the defendant to prove them."

It has been contended here—and this contention appears to have found favour with the judge—that the maxim "res ipsa "loquitur" has no application where there is more than one defendant, for the thing cannot speak effectively against either unless the facts are precisely known. I do not accept this contention. Once it is found that the third defendants were in occupation while the first defendants employed by them as contractors were carrying on work involving the dislodgment of bricks, I think there is a prima facie case against both.

So far as the board is concerned, the law as stated by Romer L.J. in *Penny* v. *Wimbledon Urban District Council*[3] is applicable[4]: "When a person, through a contractor, does work which "from its nature is likely to cause danger to others, there is a "duty on his part to take all reasonable precautions against such "danger, and he does not escape from liability for the discharge "of that duty by employing the contractor if the latter does not "take these precautions. I desire to point out that accidents "arising from what is called casual or collateral negligence cannot "be guarded against beforehand and do not come within this "rule."

No question of collateral negligence arises here. No one knows how the accident came about, and the defendants do not seek to say that if there was negligence it was of a collateral nature.

So far as the contractors are concerned, there is a prima facie case against them also, since they were performing work at the material time which involved the loosening or dislodging bricks from the building.

The existence of the subcontractor does not carry with it

[1] (1863) 2 H. & C. 722.
[2] Ibid. 728.
[3] [1899] 2 Q.B. 72; 15 T.L.R. 348.
[4] [1899] 2 Q.B. 72, 78.

any uncertainty as to the identity of the person against whom the plaintiff is entitled to claim, although the subcontractor and not the main contractor may have been responsible for dislodging the brick. This, I think, follows from the decision of this court in *Maxwell* v. *British Thomson-Houston Co.*[5] There work was being done on a highway, and it was the contractor's duty to take reasonable precautions to protect the public; and he could not escape that duty by delegating the work to a subcontractor. It was a case where the contractors were employed by the Corporation of Leeds, and it was, as in *Penny's* case,[6] clearly stated that by employing a contractor the corporation could not get rid of its own duty.

I am of opinion, therefore—and in this I differ from the judge—that the plaintiff established a prima facie case against both the first and third defendants, and in the absence of any evidence to show that there was no negligence in the conduct of the operations, the plaintiff would, I think, have been entitled to succeed.

The judge did not, however, confine himself to saying that the plaintiff had made out no prima facie case by proving that he was hit by a brick which came from the premises in question when he was lawfully upon the highway and the first defendants were working on the building of which the third defendants were the owners and occupiers.

He went on to deal with the case on the footing that the defendants who are now respondents to this appeal had, by the evidence called before the court, satisfied him that there was no negligence, that is to say, that they had taken all reasonable steps in the performance of the work to prevent injury to persons using the highway.

It is this question which has been the main subject of consideration before this court. The plaintiff submits that since the fall of the brick is prima facie evidence of failure on the part of the first and third defendants to carry out the work without negligence and there is no explanation of the accident at all, still less one which does not connote negligence, there should be judgment for him.

Although there is no such explanation, as for instance, that the fall of the brick had been caused by the subsidence of the building due to some cause over which the defendants had no control and could not reasonably have anticipated, nevertheless the defendants are entitled to succeed if they can prove that there was no negligence on their part, that is to say, that they took all reasonable precautions to prevent injury to users of the highway: compare *Moore* v. *R. Fox & Sons.*[7]

It is necessary to consider what work was being done and what precautions were taken. [His Lordship stated the facts and continued:] The scaffolding was described as the best of its

[5] (1902) 18 T.L.R. 278.
[6] [1899] 2 Q.B. 72.
[7] [1956] 1 Q.B. 596; [1956] 2 W.L.R. 342; [1956] 1 All E.R. 182.

C. A.
1958
WALSH v. HOLST & CO. LTD.
Hodson L.J.

kind, and there was no suggestion in evidence that a type of scaffolding affording more adequate protection could practically have been devised.

The possibility of bricks ricochetting over the apron off the scaffolding through the unwired space still remained, and such an event might happen if a brick were left delicately poised in an aperture or on any portion of the building itself or of the scaffolding, as the contractors recognized. This might possibly occur even if no one was working or otherwise causing vibration in the building itself.

Although no doubt, as the event shows, the possibility was there, the evidence showed that no brick had ever to the knowledge of the witnesses cleared the apron and fallen into the road except when the breaking out operation was being performed. The chance of such an event when, as in this case, no breaking out was being done was therefore remote.

Precautions were, however, taken to meet such an eventuality in that after the men had finished with the wall they went round clearing up and making sure that there were no loose bricks left in the perimeter of the openings. The foreman who was called as a witness did not inspect each hole himself personally. That inspection was carried out by a foreman over the men on the drill, a man named Boon, who, having died, was not available as a witness; but the system of inspection was proved to the satisfaction of the judge; and I cannot hold that the absence of Boon produces such a gap in the evidence of the defendants that they cannot be said to have proved that they not only had a good system of inspection but also worked that system efficiently.

On the whole of the evidence the judge—and I agree with him—held that the defendants had discharged the burden which, on the footing that the plaintiff had made out a prima facie case, lay upon them to prove that they had taken all reasonable precautions to prevent injury to users of the highway. I would dismiss the appeal.

MORRIS L.J. I would be in favour of allowing this appeal. [His Lordship stated the facts and continued:] As Denning L.J. pointed out in his judgment in *Mint* v. *Good*,[8] the law of England has always taken particular care to protect those who use a highway and puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. Thus if a shopkeeper chooses to have a lamp overhanging his shop door, he is himself under a duty to his customers to use reasonable care to see that it is safe, and he does not escape that duty by employing an independent contractor to do it: see *Tarry* v. *Ashton*[9] and *Cassidy* v. *Ministry of Health*.[10] In the latter case Denning L.J. said[11]: "I take it to be clear law, as

[8] [1951] 1 K.B. 517, 526; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159.

[9] (1876) 1 Q.B.D. 314.

[10] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[11] [1951] 2 K.B. 343, 363.

"well as good sense, that, where a person is himself under a "duty to use care, he cannot get rid of his responsibility by "delegating the performance of it to someone else, no matter "whether the delegation be to a servant under a contract of "service or to an independent contractor under a contract for "services."

When the board decided to have work done which involved cutting away parts of a wall abutting the highway, which might mean that some of the bricks in the wall would be insecure in positions above the highway, they became in my judgment under a clear duty to take care to avoid the risks of injuring passers-by. The law does not impose unreasonable burdens, but it exacts a standard of care which is directed by the circumstances. If someone chooses to take away bricks from a wall which is at a height above a street, it is not unreasonable to require that he will not thereafter leave them so placed or poised that they will fall in the street. Nor, if he loosens bricks and leaves them perilously supported so that if they became dislodged they would fall in the street, is it unreasonable to require that he must arrange a place to receive them if they do come away. The seriousness of the consequences must be a factor in assessing the quality of the care which is requisite. A falling brick might easily cause a death. It would be very likely if it hit someone to cause grave injuries. Any reasonable man would foresee these potential perils to users of the highway. While standards of reasonableness must be adhered to, it is no answer if an accident occurs which by using care could have been avoided to say that certain safety measures or precautions were taken which nearly succeeded. [His Lordship referred to the precautions taken by the contractors to avoid material falling into the road:]

After breaking out had ceased there ought not to have been falling pieces. In circumstances to which I will refer there might be some. But if there were any falling pieces there was just the same possibility of their reaching the street as there was during the process of breaking out. The route to the street was the same at any other time. This was known to Holst's men, for they knew that, with the scaffolding and its attachments as they were constructed, falling pieces might reach the street and hit passers-by. They knew that a falling piece could strike the tubular scaffolding and bounce off: the tubular scaffolding would "shoot it out." [His Lordship read excerpts from the evidence of Woodcock, the scaffold foreman, and continued:]

When the work of bricking in was taking place it might be that the bricklayer would have some brick or part of a brick to reject and might deliberately throw it down between the platform and the side of the building in the hope that it would just fall to ground level between the steel shuttering and the building.

One other reason why pieces might fall at times when the drill was not actually being used was that the hacking out of a hole in a brick wall would leave some bricks or parts of bricks

C. A.
1958
Walsh v. Holst & Co. Ltd.
Morris L.J.

unsupported. It is obvious that there was grave risk of leaving some pieces or bricks so insecurely supported that vibration might dislodge them and yield them to the pull of gravity. As the plan of operations involved that after breaking out there was likely to be an interval of a week before bricking in, the necessity for careful inspection was manifest. There was clearly a very high duty to be specially vigilant.

[His Lordship read further extracts from the evidence of the scaffold foreman, and of Lancaster, the general foreman to Holst, and continued:] There was one other way in which a brick or part of a brick might fall even when breaking-out was not taking place. A brick might previously have fallen and become lodged or poised in the scaffolding and not cleared away. Woodcock said that there might be a small piece hanging between two planks which passed unnoticed. [After reading further evidence of the scaffold foreman on the possibility of bricks lodging in the scaffolding being overlooked by the person who was clearing up, and the inexplicable nature of what had happened, his Lordship continued:] On the day when the plaintiff was struck there was no breaking out in process. A holiday period was about to begin and the men working on the building appear mostly to have been engaged in clearing up. There was but one man working on the face of the building. He was Lord, a bricklayer employed by Crossman.

The plaintiff brought his action against Holst, Crossman and the board. Lord was called as a witness for the plaintiff. As he was the only person on any platform outside the building at the time when the brick fell, there might have been reason to conjecture that some action of his was the cause of the falling of the brick. This possibility was explored when he gave evidence. He stated that no brick had fallen from the platform where he was working, and that he had not while working allowed a brick to fall. This evidence appears to have been accepted by the judge, and on this basis it seems to me that Crossman is exonerated. It was not the responsibility of Crossman and his men to make the premises safe either during or after the times of breaking out. But Lord was able to give evidence as to the state of the walls after breaking out. The position was, that while the plaintiff was lawfully and ordinarily using the highway a brick fell on his head which came from this building. In these circumstances it seems to me that there is application of the principle expressed in *Scott* v. *London and St. Katherine Docks Co.*,[12] where Erle C.J. said[13]: "There must be reasonable evidence of negligence. But "where the thing is shown to be under the management of the "defendant or his servants, and the accident is such as in the "ordinary course of things does not happen if those who have "the management use proper care, it affords reasonable evidence "in the absence of explanation by the defendants that the "accident arose from want of care."

[12] (1863) 3 H. & C. 596. [13] Ibid. 601.

The luckless plaintiff, Walsh, did not any more know why the half-brick fell on his head than did the plaintiff in *Byrne* v. *Boadle* [14] know why the barrel had fallen. In his judgment in that case Pollock C.B. said [14]: "A barrel could not roll out of a "warehouse without some negligence, and to say that a plaintiff "who is injured by it must call witnesses from the warehouse to "prove negligence seems to me preposterous. So in the building "or repairing a house, or putting pots on the chimneys, if a "person passing along the road is injured by something falling "upon him, I think the accident alone would be prima facie "evidence of negligence."

How then do Holst explain the matter? The only two witnesses from Holst were Woodcock, the scaffold foreman, who was called on behalf of the plaintiff, and Lancaster, the general foreman, whom the defendants called. The witnesses frankly stated that they could not explain why the brick fell. They did not know. It seems to me that no evidence was given which displaced the evidence of negligence. To adopt the language used by Lord Radcliffe in *Barkway* v. *South Wales Transport Ltd.*,[15] the event of a brick falling onto the highway during building operations is one which "in the ordinary course of things is more likely than "not to have been caused by negligence." Such an event is by itself evidence of negligence. Bricks that are left secure do not fall. Unless someone within the building threw down the half-brick which hit the plaintiff—which was not suggested—then it fell because someone had left it insecure.

In some cases where it is sought to employ the maxim "res "ipsa loquitur" difficulties may arise if there is more than one defendant. When it is suggested that an event is by itself evidence of negligence, the evidence is not of full value unless it shows who was negligent. But in the present case the evidence seems to exclude Crossman from liability. Hence, if the evidence establishes negligence in some person or persons, such person or persons were the servants of Holst. Though the board employed Holst as contractors, the board cannot exclude themselves from liability. The duty of the board to take care that bricks are not dropped from their building on to passers-by in the street is not in abeyance because they employ Holst to do work on their building. They cannot in the present case claim absolution on the basis that there was some "casual act of wrong or negligence" on the part of their contractors. Neither the board nor Holst can explain the matter. How then can the board say that it resulted from some casual act on the part of Holst? The removal of bricks from the wall abutting the street and the reconstruction of such wall were essential parts of what Holst were employed to do: see *Pickard* v. *Smith* [16] and *Penny* v. *Wimbledon Urban District Council.*[17]

[14] 2 H. & C. 722, 728.
[15] [1950] A.C. 185 (not reported on this point); (1950) 66 T.L.R. (Pt. 1) 597, 608; [1950] 1 All E.R. 392.
[16] (1861) 10 C.B.N.S. 470, 480.
[17] [1899] 2 Q.B. 72.

C. A.
1958
Walsh v. Holst & Co. Ltd.
Morris L.J.

It is manifest that Holst and the board owed a duty to take great care to ensure that bricks should not fall on passers-by. The evidence establishes that after the breaking-out process bricks might be left insecure around the perimeters of the holes made in the walls. The holes had to be examined. They had to be examined with the knowledge that visual examination alone might not suffice. Furthermore, the evidence shows that bricks might lodge on a platform or lodge in the scaffolding and that any such bricks ought to be removed. It was known that if any bricks fell they might bounce out into the street.

But no evidence was given as to whether any inspection took place after the last breaking-out operation. The evidence did not established when it was that breaking out last took place. There was a reference (in the passages which I have read) that the men, when they had finished with the pneumatic drill, would go round clearing up. But the evidence was not clear as to whether such men would in the first place inspect, or whether the only inspection was by Boon, who was the foreman over the man on the drill. Boon unhappily had died. But no operator of a drill was called. No one was called who said that he had inspected. Lancaster had a general supervision over the whole work but it was not his task personally to inspect the openings in the wall. The evidence does not show how many men Holst had on the site. None of them were called. It is not known whose duty it was to examine the scaffolding after breaking out to see whether any bricks were lodging. I do not know whether the man who was posted in the street during breaking out had this duty or, indeed, whether it was assigned to anyone.

In my judgment, the barrenness of the defendants' evidence leaves the matter thus: The possibility that a brick might fall and might be projected onto the street was not only foreseeable but it was realized: either there was no proper system designed to avert the occurrence of the possible (and highly dangerous) event, or if there was it was not carried out. I see no reason to suppose that a properly conducted inspection would not have revealed any brick that was insecurely supported either in some position in the wall or in some position on the scaffolding.

The defendants rely on certain testimonials given in evidence as to the excellence of the scaffolding. It was one of the best that Lancaster had ever seen. So it may have been, but the plaintiff was nevertheless struck on the head. When Woodcock was being cross-examined it was entirely legitimate to put to him the following leading question: "If I may sum up: would it be "right to say that, in your opinion, the scaffold was perfectly "safe as regards the erection and the preventing of materials "falling on to the road?" The expected answer was given: "It was." But it is manifest that the scaffold did not prevent falling materials from shooting onto the road, and the defendants knew that. Reliance was placed on another answer given by Woodcock in cross-examination. He said that nothing more could

have been done by anybody to prevent a half-brick falling. If that meant that after breaking out had been undertaken a barely supported hanging brick was not detected, it seems impossible to accept that it could not with care have been detected. Doubtless great care would be needed, but the gravity of the risks and their consequences imposed a duty to take great care. If such a brick fell, I cannot think that steps could not have been taken to prevent its reaching the street. But quite apart from this, the duty was to make safe the bricks in the wall which abutted the street, and not to leave them so that some of them might fall out.

In his judgment in *Moore* v. *R. Fox & Sons*,[18] Lord Evershed M.R. adopted the reasoning of Asquith L.J. in *Barkway* v. *South Wales Transport Co. Ltd.*[19] In *Moore* v. *R. Fox & Sons*[20] there was an accident in circumstances which made the maxim "res "ipsa loquitur" apply. The accident was left unexplained. It was held that it was not sufficient to show that there were several hypothetical causes consistent with an absence of negligence, but that the defendants had to go further and show, either that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them.

In my judgment, a consideration of the evidence given in this case results in the conclusion that the offending brick was allowed or caused to fall owing to negligence, and the evidence does not suggest how the accident could have happened without negligence. If the evidence had negatived the existence of negligence in Holst, then they would be absolved even if they could not explain why the brick fell: see *Woods* v. *Duncan* (*The Thetis*).[21] But, in my judgment, the evidence before the court falls far short of rebutting the strong inference of negligence. It is not like a case where the conduct of one man only is being considered. The conduct of all Holst's men was in issue. It is not clear how many there were or who they were, or in which of them was reposed the duty of seeing that bricks were not so left that they would or might fall. In my judgment, liability was established against Holst and the board. I consider that the plaintiff is entitled to recover damages to be assessed and I would allow the appeal.

SELLERS L.J. The plaintiff was, in the early afternoon of September 16, 1955, walking along the footpath of Back Darwen Street, Blackburn, in a direction which put the large building of the North Western Electricity Board on his right hand on the opposite side of the road, which had a carriageway of about 15 feet. When the plaintiff was level with the building he was seen lying on the footpath and was found to have received a wound on the right forehead and on his nose.

No one saw what had happened, and the plaintiff did not say that anything had struck his head; but because half a brick was

[18] [1956] 1 Q.B. 596, 611–612

[19] [1949] 1 K.B. 54; 64 T.L.R. 462 (not reported on this point); [1948] 2 All E.R. 460, 471.

[20] [1956] 1 Q.B. 596.

[21] [1946] A.C. 401, 419, 425, 434, 439; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

C. A.
1958
Walsh
v.
Holst
& Co. Ltd.
Sellers L.J.

found in the middle of the roadway, as one witness says, or two or three feet away from the plaintiff according to another, it has been found that the plaintiff had been hit on the head by the portion of brick. His injuries were, I think, equally consistent with his having fallen on his head on the pavement. There was no evidence that the brick had any skin or blood on it, or any mark of a contact with the plaintiff's head. The more I have heard of this case the more difficult have I found it to accept the probability that the plaintiff was hit on the head by a brick from the building in question, including the scaffolding erected in front of it.

But before this court the finding of the judge that that is how the accident happened was not seriously attacked and was finally accepted on behalf of the defendants who appeared. The question of liability of the defendants has therefore to be considered in that light. The continuing effect, in my view, is that the liability of the defendants depends in part on the reasonable foreseeability by the defendants of such an accident occurring to anyone on the footpath. Having regard to the precautions which were taken and to the circumstances that no demolition of the wall by pneumatic drill was taking place at the time or had taken place at all that day, I find it difficult to say that the defendants or any of them should have foreseen such an accident as a likely thing to occur, such as would require them to have taken even greater precautions to guard against such a happening. [His Lordship stated his view of the facts, and continued:]

The accident is, as I see it, left quite unexplained. The defendants who appeared have established that they took reasonable precautions, as the judge has found. The servant of the defendant Crossman, who did not appear, has been exonerated of any negligence. In these circumstances, I agree with the judge that it is not possible to find negligence established against any of the three defendants. The matter remains a mystery, which tends to support in my mind the view that it did not happen.

As the Electricity Board had authorized work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the board would be liable for the negligence of the contractors or subcontractors in failing to take due precautions. Likewise, the contractors would be liable for any negligence in the performance of their duties delegated to subcontractors.

Therefore I think the plaintiff was entitled to say that the defendants were required to exonerate themselves from blame in order to escape liability. Once it is postulated or accepted that the plaintiff was hit by a brick and that the brick came from the building in question, it set up a prima facie case of liability, at least against the first and third defendants.

But in the light of the evidence given, no negligence can be

inferred. Counsel for the defendants relied on several passages in the speeches in the House of Lords in *Woods* v. *Duncan* (*The Thetis*).[22]

Lord Russell of Killowen said[23]: "My Lords, assuming that "the principle of res ipsa loquitur applies, and establishes that "prima facie Lieutenant Woods must have been negligent, it is "open to him to prove affirmatively (as in my opinion, he has) "that he did throughout exercise reasonable care. The principle "does not involve this—that, notwithstanding that affirmative "proof, he must be held to have been negligent, unless he can "solve the mystery and prove how the bow-cap came to be open "at the critical moment."

The other passage is in Lord Simonds' speech[24]: I will "assume . . . that this is a case in which the principle of res "ipsa loquitur may be applied. But to apply this principle is "to do no more than shift the burden of proof. A prima facie "case is assumed to be made out which throws upon him the "task of proving that he was not negligent. This does not "mean that he must prove how and why the accident happened: "it is sufficient if he satisfies the court that he personally was "not negligent. It may well be that the court will be more "easily satisfied of this fact if a plausible explanation which "attributes the accident to some other cause is put forward on "his behalf; but this is only a factor in the consideration of the "probabilities. The accident may remain inexplicable, or at "least no satisfactory explanation other than his negligence may "be offered: yet, if the court is satisfied by his evidence that he "was not negligent, the plaintiff's case must fail."

Against this, reliance was placed for the plaintiff on the observations of Lord Evershed M.R. in *Moore* v. *R. Fox & Sons*[25] which, as applied to this case, submitted counsel for the plaintiff, required that proof of proper inspection of the perimeters and scaffolding should have been given. The responsible person in charge of this work was Boon, a foreman, who unfortunately had died and could not give evidence. But Lancaster, a supervising foreman, and another foreman, Woodcock, were called, and it does not seem to me that it can properly be inferred that the duty to inspect the work for loose bricks was not performed or was performed negligently. The organization of the work and the adequate supervision of experienced foremen were not challenged. It would, I think, be pure speculation to hold that a brick (or half-brick) which had remained safely in some unknown position for at least the greater part of a night and day must have been observed to have been in a dangerous position if someone had inspected.

The decision of Lord Evershed M.R. in *Moore* v. *R. Fox & Sons*[25] was based largely on the statement of the law extracted

[22] [1946] A.C. 401.
[23] Ibid. 425.
[24] Ibid. 439.
[25] [1956] 1 Q.B. 596, 611–612, 616.

C. A.
1958
WALSH v. HOLST & CO. LTD.
Sellers L.J.

from Asquith L.J.'s judgment in *Barkway* v. *South Wales Transport Co. Ltd.*[26] but it is to be observed that Asquith L.J. found in favour of the defendants in that case on the ground that although there was no explanation of how or when the tyre had become so defective that it was liable to burst, nevertheless the defendants had shown they were not negligent. The majority decision of the Court of Appeal did not prevail in the House of Lords, because it was there held that there were further precautions which the defendants might have taken to ascertain damage to tyres, in addition to their routine methods to that end. These were precautions which the defendants had not considered and had not taken.

If the facts were known, it might be that there had been some casual or collateral act of negligence on the part of the contractor's or subcontractor's servants for which the third defendants would not be liable, or on the part of Crossman's men, for whom Holst would not be liable. But to attempt to suggest possibilities would be the height of conjecture, and therefore any attempt to reconcile the cases or to define the line demarking liability for an independent contractor's defaults does not arise. On the face of it, a building owner who authorizes work is not liable for the negligence of a contractor's workman in dropping one of his tools, e.g., a trowel or a hammer. I think authority shows clearly he is not. Ought it to be held that it would be otherwise if a bricklayer or his mate negligently dropped a hod with or without bricks in it or a brick without dropping the hod, because bricklaying was the work the contractor was employed and authorized to do? As Lord has not been found to have been negligent, the question does not arise.

Although the plaintiff was innocently walking along on the footpath and was in no way to blame, I feel bound to reach the same conclusion as the trial judge, namely that a full investigation of the facts has failed to bring home liability against the defendants or any of them. To hold otherwise would be, in effect, to make the defendants insurers of the plaintiff's safety and to make them as liable as they would have been if they had omitted to take the elaborate precautions which they had taken. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lord granted.

Solicitors: *Robinson & Bradley for Holden, Blanthorne & Davies, Blackburn; Carpenters for G. Keogh & Co., Bolton.*

M. M. H.

[26] (1948) 64 T.L.R. 462; [1948] 2 All E.R 460, 471.

[CHANCERY DIVISION.]

* *In re* JARVIS, DECD. EDGE *v.* JARVIS.

[1951 J. 2198.]

1958
March 18, 19, 20, 21; *April* 2.

Upjohn J.

Trust and Trustee—Constructive trust—Business—Business and lease bequeathed to executors beneficially—New lease granted to one executor—Business carried on by executor for own benefit—Form of account to be taken—Laches.

Laches—Constructive trust—Business—Promptness necessary in pursuing claim against a constructive trustee of a business.

A testator by his will dated September 9, 1940, appointed his daughters E. and J., the plaintiff and the defendant, to be his executors and trustees, and gave them his business as a tobacconist, confectioner and newsagent at No. 7, W. Road, and declared that "for the purposes of this my will the expression "'my business' shall mean and include the existing lease of the "premises No. 7 [W.] Road and the right of renewal or extension "thereof or grant of a new lease . . . and the goodwill of my said "business and the stock-in-trade fixtures fittings and effects used "for the purposes thereof or belonging thereto and the book debts "due to me in connexion therewith and the benefit of all contracts "relating thereto but not the cash in hand at my death or the "amount standing to the credit of any" business banking account. The testator provided that the gift of the business was subject to the payment by E. and J. of annuities to the testator's wife, and, on her death to another of his daughters. The will gave the executors no power to carry on the business.

At the date of his death, on September 17, 1941, the testator was in occupation for a term of three years expiring on March 25, 1944, at a rent of £70 per annum. The premises had been badly damaged by enemy bombing in 1940 and virtually no business was carried on until they were completely restored in 1944. The plaintiff took little part in the administration of the estate, but the defendant paid the business debts out of her own pocket as far as necessary, the business being insolvent at the date of the testator's death and the debts exceeding the assets by about £350. The defendant had her own business of a similar nature at No. 230, T. Road, which was nearby. The landlords of No. 7, W. Road sued the plaintiff and the defendant for arrears of rent and possession and obtained judgment by default in 1943. The defendant paid off the judgment debt by instalments. In May, 1944, the landlords granted her a new tenancy on substantially the same terms as the testator's tenancy, and she ran the business jointly with that at No. 230, T. Road. In April, 1951, the plaintiff issued a writ claiming an account in respect of the defendant's occupation of No. 7, W. Road, and of the profits of the business carried on there. The defendant conceded that she was a constructive trustee of the leasehold interest for herself and the plaintiff in equal shares but argued that the plaintiff's claim was barred by her laches, acquiescence and delay:—

Held, (1) that the plaintiff was entitled, in spite of her delay, to an inquiry as to what rent, if any, the defendant ought to be charged year by year in respect of her beneficial occupation of No. 7, W. Road.

(2) That, subject to laches, the defendant was accountable as a

[Reported by MARGARET THOMAS, Barrister-at-Law.]

1958

JARVIS, DECD., *In re.*

constructive trustee for the business and its profits subject to all just allowances for her own time, energy and skill, for the assets she had contributed, the testator's debts she had paid and for her mother's annuity.

(3) But that the plaintiff was barred by laches from relief on the claim to the business, since, although she was fully aware of her rights, she took no step to assert them until the issue of the writ in 1951, and the principles applicable were quite different from those applicable in the case of a specific asset, such as a lease.

Dictum of Knight Bruce L.J. in *Clegg* v. *Edmondson* (1857) 8 De G.M. & G. 787, 814 applied.

ACTION.

By his will dated September 9, 1940, William James Jarvis, the testator, after appointing his daughters, the plaintiff, Rosetta Marie Davida Edge, and the defendant, Sheila Irene Mary Jarvis, to be his executrices and trustees, in clause 4 directed as follows: "I give and bequeath to my said daughters [the plaintiff and the "defendant] my business of a tobacconist confectioner and news-"agent now carried on by me at No. 7 Woolwich Road Greenwich "aforesaid and I declare that for the purposes of this my will the "expression 'my business' shall mean and include the existing "lease of the premises No. 7 Woolwich Road and the right of "renewal or extension thereof or grant of a new lease and the "right to compensation on the refusal to grant a renewal or exten-"sion thereof or the grant of a new lease and the goodwill of my "said business and the stock in trade fixtures fittings and effects "used for the purposes thereof or belonging thereto and the book "debts due to me in connexion therewith and the benefit of all "contracts relating thereto but not the cash in hand at my death "or the amount standing to the credit of any banking account "kept by me at my death for the purposes of such business or in "connexion therewith and this gift and bequest is subject to and "shall stand charged with the payment by my said daughters to "my wife the said Irene Ada Jarvis of the sum of £3 per week "during the joint lives of herself and [another daughter of the "testator, Ida Sybil Jarvis] and of the payment by my said "daughters from the date of the death of my said wife of the "sum of £1 10s. per week to my said daughter Ida Sybil Jarvis "during her life." The will gave the executrices no power to carry on the business. The testator died on September 17, 1941, and his will was proved by both executrices.

For many years before his retirement the testator had carried on the business of a tobacconist, confectioner and newsagent at No. 7, Woolwich Road, Greenwich, of which premises he was lessee. At the date of his death he was in occupation for a term of three years expiring on March 25, 1944, at a rent of £70 per annum. He had retired from active management of the business in 1934 or 1935 and had gone to live out of London. From 1939 onwards the day-to-day business was in the hands of his son Ernest, but before that it had for a time been managed by the defendant in conjunction with a business of her own. The

premises were badly damaged by bombing in December, 1940, and were only partly repaired afterwards. The son Ernest handed over the keys to the defendant shortly after the testator's death. After the bombing, and until the premises were restored completely in 1944, no real business of selling goods retail was carried on, or, if it were, it was negligible.

The defendant, who was about ten years older than the plaintiff and who was born in 1918, had opened a tobacco, confectionery and ice-cream business at No. 230, Trafalgar Road, Woolwich, which was nearby, in the early 1930s where the plaintiff had acted as a shop assistant from 1938 to 1941, living there with the defendant. In 1941 the plaintiff took an office job and in 1943 she joined the W.A.A.F. and was posted to Gloucestershire. The joint executors' account was then closed and an account in the sole name of the defendant was substituted. After that the plaintiff left the whole of the administration of the estate to the defendant, although even before that she had played only a formal part in it and the real conduct thereof was by the defendant.

The business debts of No. 7, Woolwich Road at the date of the testator's death amounted to about £457, the goodwill was estimated at nil, the fixtures and fittings were valued at about £22 and the cash in the business was £96. The business was insolvent and the defendant paid all the business debts as far as necessary out of her own pocket, since she wanted to keep the goodwill of the suppliers. In order to keep the quotas and allocations alive against the re-opening of No. 7, Woolwich Road, the defendant tried, with little success, to get them transferred to No. 230, Trafalgar Road. All the time rent for No. 7, Woolwich Road, was accruing due under the tenancy agreement and the landlords were pressing for payment. After some correspondence the landlords, on March 15, 1943, issued a writ against the plaintiff and the defendant for arrears of rent and possession, and they signed judgment in default of appearance. The defendant arranged to pay off the judgment debt at the rate of £5 a month, which she did. She asked for a new tenancy of the premises but this was refused. Some months later, however, the landlords offered to grant her a new tenancy and in May, 1944, a new tenancy agreement was entered into whereby the defendant became a yearly tenant at a rent of £70 per annum and otherwise substantially on the same terms as the old agreement with the testator. Most of the firms with whom the testator had done business did not re-open accounts with the defendant, but she started with tobacco, newspapers and some novels, but no confectionery as she had no points allocation. Her quota of cigarettes and an allocation of newspapers were obtained from suppliers of the old business. For a few months at first the defendant had a partner at No. 7, Woolwich Road, but later she ran the business herself jointly with No. 230, Trafalgar Road.

In January, 1945, the plaintiff was invalided out of the W.A.A.F. and went to live at No. 230, Trafalgar Road with her

1958

JARVIS, DECD., *In re.*

sister, where she acted as a shop assistant. She was paid £2 to £3 a week and provided with free board and lodging. In 1946 she was living with one Edge and the defendant moved out to No. 7, Woolwich Road, leaving them in possession. In 1947 the plaintiff was seriously ill in hospital and after coming out of hospital returned to her job where her sister paid her £4 a week and allowed her and Edge to live at No. 230, Trafalgar Road, rent-free. In 1947 the plaintiff, with the consent of the defendant, started a lending library at No. 230, which apparently was very successful. For this purpose the defendant lent the plaintiff £100, which was paid off by working without wages. In 1948 the confectionery business was transferred from No. 230 to No. 7 and the tobacco business was probably transferred at the same time, leaving only the defendant's ice-cream business and the plaintiff's lending library at No. 230. The defendant continued to pay the plaintiff £4 a week for selling ice-cream on the average of only one day a week owing to the very limited supplies and continued to allow her and Edge to occupy No. 230 rent-free.

By a writ issued in 1951 the plaintiff sought to call the defendant to account in respect of occupation rent for No. 7, Woolwich Road and for the profits of the business carried on there by the defendant. Upjohn J. accepted the defendant's evidence that the plaintiff, after the war, never asked about the business and appeared quite indifferent to it, and would never enter into a discussion about it. He found that after the war the plaintiff had never made any claim to the business; and there was no suggestion that she had ever made any contribution to her mother's annuity. It was equally clear that, although the defendant had originally intended to re-open the business at No. 7, Woolwich Road for the family, by the time the writ was issued she regarded the business as her own. The writ was issued on April 23, 1951, without any previous warning or letter before action. In 1953 the ice-cream business was transferred to No. 7 from No. 230. The mother of the parties died in April, 1956.

Lionel Edwards Q.C. and *C. R. D. Richmount* for the plaintiff.
Michael Albery Q.C. and *A. J. Belsham* for the defendant.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

UPJOHN J. stated the facts and continued: Two questions arise. The first question is as to the new lease of No. 7, Woolwich Road granted to the defendant in 1944. On the principle of *Keech* v. *Sandford*,[1] counsel for the defendant, concedes that she is a constructive trustee of this leasehold interest for herself and the plaintiff in equal shares, but he submits that the plaintiff is barred from making a claim by her laches, acquiescence and delay.

[1] (1726) Sel.Cas.Ch. 61.

There had been a great deal of delay in making a claim from January, 1945, until the issue of the writ in 1951, that is, a period of over six years. But the delay has not been accompanied by any other relevant circumstance except the plaintiff's silence until the issue of the writ and the very generous treatment of the plaintiff by the defendant. It is not, in my view, open to me to take into account the great delay since the issue of the writ. Where the court is asked to exercise a discretionary remedy, such as granting an injunction or specific performance, delay since the writ may be as important as the delay before the writ. I am not being asked, however, to exercise any discretionary remedy but to enforce the plaintiff's right as a beneficiary under a constructive trust. If the plaintiff establishes her rights as at the date of the writ, she is entitled to enforce them. I may add that I am not dealing with the case where the action has gone to sleep for so many years that the delay may itself be evidence of abandonment. I called for evidence on this point as I was so shocked at the delay; but I am satisfied that the action did more or less continuously progress, though at the pace of a snail. I cannot regard the delay in this case as sufficient to defeat the plaintiff's claim. There must be an inquiry as to what rent, if any, year by year, the defendant ought to be charged in respect of her beneficial occupation of No. 7.

The second question is as to the position with regard to the business carried on by the defendant thereat. A trustee must not place himself in a position where his duty and interest conflict, and if he does so he must account for any profit thereby made or for the property thereby acquired. The earlier authorities were all reviewed and the principle again stated in the House of Lords in *Regal (Hastings)* v. *Gulliver*.[2] The old business had been closed down after the bombing, but in a sense its ghost lay there waiting for a new lease of life. When the defendant resurrected the business on the premises at No. 7, Woolwich Road, she was undoubtedly to some extent putting herself in a position where her duty and interests conflicted. In another sense, the business that she opened was a new business, but it was of the same character as the old. It necessarily benefited from the goodwill attaching to the premises, because the newspaper and tobacconist business had been carried on there for 40 or 50 years down to the end of 1940. It may well be that the virtual closure for over three years, coupled with the great excess in those days of demand over supply, made the value of the goodwill small: but it was there because of the former activities of the testator, of whose estate the defendant was a trustee. Furthermore, the defendant was able to get some supplies of cigarettes and newspapers by reason of the testator's earlier connexion with the suppliers. It seems to me clear on principle that the defendant must be accountable as a constructive trustee for those benefits

[2] [1942] 1 All E.R. 378.

1958

JARVIS, DECD., *In re.*

Upjohn J.

which came to her because of her position as a trustee of the testator's estate.

What, then, is the proper method of assessing the accountability? Counsel for the defendant submits that one must look to see what is pleaded and what has been proved at the trial. One must then take those assets of the estate, or the benefits which have been so pleaded and proved at the hearing to have flowed to the defendant by reason of her position as a trustee of the estate, and value those benefits. Counsel for the plaintiff says, on the other hand, that that would be an impossible inquiry and that one must make the defendant accountable for the whole business and its profits, making allowances for the time, energy and skill that the defendant has expended, the assets she has brought in, the testator's debts that she has paid, and, of course, her mother's annuity.

No authority is precisely in point. *Regal (Hastings)* v. *Gulliver*,[3] so strongly relied on by the plaintiff, although containing some helpful observations on the general principle, certainly does not cover this case. I do not think that it is possible to lay down any general rule in relation to businesses beyond the general principle already stated, that a trustee may not make a profit out of his trust. To take an example: suppose that, by virtue of her position as trustee, the defendant had been able to influence (as possibly she did) increased supplies to the shop at No. 230, Trafalgar Road without reopening No. 7, Woolwich Road, she would clearly be accountable—but surely on the basis submitted by counsel for the defendant rather than the basis submitted by counsel for the plaintiff. Each case must depend on its own facts, and the form of inquiry which ought to be directed must vary according to the circumstances. In this case, where the defendant reincarnated the testator's own business on the same premises as formerly and obtained supplies, so far as she was able, from the suppliers of the former business, I think that the proposition propounded by counsel for the plaintiff is correct and that, subject to laches, acquiescence and delay, the defendant is accountable as constructive trustee of the business opened by her at No. 7, Woolwich Road in 1944, subject to all just allowances for her own time, energy and skill, for the assets she has contributed, and the debts of the testator which she has paid, and for her mother's annuity.

Then as to laches, acquiescence and delay for six years before the issue of the writ, the plaintiff has stood by and observed her sister running the business, incurring debts and liabilities, paying her mother £10 a month, and in 1948 transferring assets and business from No. 230, Trafalgar Road to No. 7, Woolwich Road. In that connexion, it is, of course, a remarkable circumstance, strongly relied on by the plaintiff, that the last transfer of assets took place after the issue and service of the writ. The defendant's venture at No. 7, Woolwich Road has in fact proved remarkably

[3] [1942] 1 All E.R. 378.

successful. Until the issue of the writ in 1951, the plaintiff, I am satisfied, made no claim whatever but was paid a weekly wage as a counter assistant at No. 230, Trafalgar Road. It is possible that she took some small part in the administration of No. 7, Woolwich Road by helping with the accounts, but that was a very small matter. Furthermore, although permitting her sister and Edge to reside at No. 230, Trafalgar Road may be attributed to sisterly love on the part of the defendant, it is in my judgment a circumstance which I ought to bring into the scales that the defendant permitted the plaintiff to open her own business at No. 230. All this time the plaintiff was fully aware of her rights but took, I am fully satisfied on the evidence, no step to assert them or to claim at all until the issue of the writ.

In dealing with the business, the principles applying are quite different from those in the case of a specific asset, such as a renewed lease. The principle was stated in *Clegg* v. *Edmondson*[4] by Knight Bruce L.J.[5]: "A mine which a man works is in the "nature of a trade carried on by him. It requires his time, care, "attention and skill to be bestowed on it, besides the possible "expenditure and risk of capital, nor can any degree of science, "foresight and examination afford a sure guarantee against "sudden losses, disappointments and reverses. In such cases "a man having an adverse claim in equity on the ground of "constructive trust should pursue it promptly, and not by empty "words merely. He should show himself in good time willing to "participate in possible loss as well as profit, not play a game "in which he alone risks nothing." No doubt that was the case of a mine, which may be regarded as an exceptionally hazardous undertaking, and the delay which was held to be fatal in that case was ten years, four more than here; but, nevertheless, the principle as stated is of general application.

The plaintiff is seeking to say that the defendant has been a trustee for her of one moiety of this highly successful business, although she has never been at risk for one penny. I have been referred to a number of textbooks and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist. I do not overlook the circumstance that the plaintiff has said she could not afford a solicitor; but I have to try to do justice to both sides. In my judgment, on the whole of the circumstances of this case, in relation to the business the plaintiff by waiting until 1951, has not been sufficiently prompt in seeking her remedy, and this part of the action fails.

Declaration accordingly.

Solicitors: *James & Charles Dodd; Budd Hart & Son.*

[4] (1857) 8 De G.M. & G. 787. [5] Ibid. 814.

[CHANCERY DIVISION.]

1958
June 24.

Wynn-Parry J.

* *In re* TRANSPLANTERS (HOLDING COMPANY) LTD.

[No. 00702 of 1955.]

Limitation of Action—Acknowledgment—Debt—Documents signed by party interested in debt—Company balance-sheets—Auditors' certificate—Whether agents of company—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 23, 24.

Company—Auditor—Whether agent of company—Statute-barred debt—Reference to debt in balance-sheet—Whether acknowledgment—Auditors' certificate of balance-sheets—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 23, 24—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 162 (1).

The proof of a debt owing to the applicant, one of two directors of a company in compulsory liquidation, was rejected by the liquidator on the ground that it was statute barred at the commencement of the winding up. The applicant alleged that there was a sufficient acknowledgment of the debt within the meaning of sections 23 and 24 of the Limitation Act, 1939,[1] as the debt appeared among the loans to the company in two balance-sheets within the time provided by the Act; the balance-sheets were signed by the applicant and his co-director and certified by the company's auditors:—

Held, (1) that, as the balance-sheets were signed by the applicant (whose signature was necessary for their validity), and as he himself was interested in the debt, they could not constitute an acknowledgment for the purpose of sections 23 and 24.

In re Coliseum (*Barrow*) *Ltd.* [1930] 2 Ch. 44 applied.

(2) That the auditors of the company were not (in the absence of special contract) agents of the company, and their normal certificate as to the correctness of the balance-sheet under section 162 (1) of the Companies Act, 1948, could not therefore constitute an acknowledgment by agents within the meaning of section 24 of the Act of 1939.

Jones v. *Bellgrove Properties Ltd.* [1949] 2 K.B. 700; 65 T.L.R. 451; [1949] 2 All E.R. 198 distinguished.

ADJOURNED SUMMONS.

The compulsory winding up of Transplanters (Holding Company) Ltd. began on September 2, 1955, and the company was wound up by an order of December 19, 1955.

The applicant, one of the two directors of the company, sought to prove in the winding up for the sum of £36,392 11s. 10d. for money lent to the company and interest thereon. The liquidator

[1] Limitation Act, 1939, s. 23: "(4) Where any right of action has "accrued to recover any debt . . . "and the person liable or account-"able therefor acknowledges the "claim . . . the right shall be deemed "to have accrued on and not before "the date of the acknowledg-"ment . . ."

S. 24: "(1) Every such acknow-"ledgment as aforesaid shall be in "writing and signed by the person "making the acknowledgment. (2) "Any such acknowledgment . . . as "aforesaid may be made by the "agent of the person by whom it is "required to be made under the last "foregoing section, and shall be "made to the person, or to an agent "of the person, whose title or claim "is being acknowledged. . . ."

rejected the proof on the ground that the debt was statute barred at the commencement of the winding up. The applicant by this summons asked that the liquidator's rejection be reversed; he alleged that there was a sufficient acknowledgment of the debt within the meaning of sections 23 and 24 of the Limitation Act, 1939, as the debt appeared among the loans to the company in two balance-sheets of the company dated respectively December 31, 1951, and December 31, 1953. The balance-sheets were signed by the applicant and his co-director and were certified by the company's auditors.

I. J. Lindner Q.C. and *Philip Panto* for the applicant.
Lionel Edwards Q.C. and *G. F. Dearbergh* for the liquidator.

The cases cited in argument are referred to in the judgment.

WYNN-PARRY J., having stated the facts, continued: It is common ground that at the commencement of the winding up the debt, whatever its amount, was statute barred. The applicant seeks to overcome that difficulty by alleging that there exists an acknowledgment or acknowledgments within section 23 and section 24 of the Limitation Act, 1939. A number of documents were referred to, but it appears to me that the applicant must either succeed or fail according to the correct view as to the effect in the circumstances of the two balance-sheets which are in evidence, namely, the balance-sheet of the company as at December 31, 1951, and the balance-sheet of the company as at December 31, 1953, either of which would be, as far as time is concerned, sufficient for the applicant's purpose, as the winding up under the Act commenced on September 2, 1955. I proceed on the basis that, having regard to the state of the authorities, there is a sufficient indication upon the face of the balance-sheets of the amount owing to the applicant. At all material times there were only two directors of the company, of whom the applicant was one, and that is the difficulty which stands in his way.

The state of the authorities appears to be this: In *In re Coliseum (Barrow) Ltd.*[1] Maugham J. clearly took the view that, other things being equal, a statement made in the balance-sheet of a company that the company owed a specific sum to a shareholder to whom that balance-sheet was sent in the ordinary way, would have amounted to a sufficient acknowledgment within the authorities; and it was found as a fact that the balance-sheets were in each year duly presented by the directors to the shareholders at the annual general meeting, and were duly passed by the company.

The difficulty in the way of the directors in that case was that they were interested, as the applicant is in this case, and that without their signatures to the balance-sheet in question section 113 of the Companies (Consolidation) Act, 1908, would not have

[1] [1930] 2 Ch. 44.

1958

Trans-planters (Holding Company) Ltd., *In re.*

Wynn-Parry J.

been complied with. Maugham J. expressed the difficulty in these words [2]: "The difficulty in the present case is that the promise, "if any, is a promise by the directors, as a board acting on behalf "of the company, to pay to themselves the amount of the "directors' fees, and it seems to me that this is not, in the "circumstances, a promise to pay on behalf of the company. "Having regard to the position which a director, as agent of the "company, necessarily occupies in relation to the company, it "would not have been competent action to the board, acting as a "board, to authorize the giving of a definite promise to pay to "themselves." At that date, namely, 1930, the position was that the Statute of Limitations, 1623, which was in force, contained no provision keeping alive by acknowledgment a claim liable to be barred thereunder. But, as Maugham J. pointed out,[3] the courts have from time to time held that if there has been a promise to pay after the six years, or during the course of the six years, that promise to pay would give rise to a new cause of action; and, therefore, but for the difficulty to which I have referred, that the directors were interested in the matter, no doubt an effective promise could have been spelt out. In this case the same type of difficulty arises, because the applicant was one of the two directors, and he signed the documents, namely, the two balance-sheets to which I have alluded, which are relied upon as acknowledgments.

It is made clear from the judgment of Atkinson J. in *Ledingham* v. *Bermejo Estancia Co. Ltd.*[4] that for such purposes as this there is no difference between a promise to pay and a mere acknowledgment. The judge thus refers to the matter in his judgment [5]: "There is this further point. It is said that "Maugham J. was dealing with an acknowledgment that had to "be one from which a promise to pay could be inferred. The "Limitation Act, 1939, has made a mere acknowledgment suffi-"cient, and it is said: 'There is a difference now because all "'you want now is an acknowledgment, and you have not to "'consider whether the circumstances are such as to amount "'to a promise to pay. You do not need the promise to pay. "'It is only an acknowledgment, an acknowledgment made to "'the creditor, and upon that the principle of that decision "'ought not to apply.' I have difficulty in seeing the distinction "there. I think that, if a trustee, cannot rely on a promise to "himself, it would be difficult to say he could rely on an acknow-"ledgment which he makes to himself. So I am not disposed "to draw that distinction."

I must apply that reasoning to the case before me, and it therefore comes to this, that the difficulty mentioned by Maugham J. in the earlier case remains a difficulty even if all that is relied upon is a mere acknowledgment. In those circumstances, it does not appear to me possible for the applicant to

[2] [1930] 2 Ch. 44.
[3] Ibid.
[4] [1947] 1 All E.R. 749.
[5] Ibid. 753.

rely upon these two documents as acknowledgments because two directors have signed them, having regard to the fact that over the material period he himself was interested in the loan.

Another point was taken, and that was that the balance-sheets had a certificate in each case by the auditors certifying the correctness of the contents of the balance-sheets which, as I have said, contained on the face of them reference to the loan; and some reliance was sought to be placed on the judgment of Lord Goddard C.J., giving the judgment of the court in *Jones* v. *Bellgrove Properties Ltd.*[6] In that case a balance-sheet was presented to the shareholders at an annual general meeting of the company which was signed by chartered accountants described as agents of the company, and by two directors, containing the statement: "To sundry creditors, £7,638 8s. 10d.," and the plaintiff attended the meeting as a shareholder. The plaintiff was owed a sum of some £1,800, the balance of moneys lent to the company by him. The debt did not accrue within six years of an action brought by the plaintiff against the company to recover the debt. The annual general meeting was held within that period. In those circumstances, the Court of Appeal dismissed an appeal from Birkett J.[7] holding "that the balance-sheet "contained an acknowledgment to the plaintiff, in writing, signed "by the agents of the company," and that, therefore, by virtue of sections 23 and 24 of the Limitation Act, 1939, the debt was recoverable. At the beginning of his judgment Lord Goddard C.J. said[8]: "I wish to make it clear that our decision is based on "the special facts of this case." The court held (and this is in accordance with the view of Maugham J. in the earlier case) that a balance-sheet can amount to an acknowledgment within the meaning of the Limitation Act, 1939. But Lord Goddard proceeded upon this basis[8]: "Evidence was given that at the "annual general meeting of the defendant company on Decem-"ber 31, 1946, at which the plaintiff was present in his capacity "as a shareholder of the company, the accounts of the defendant "company for the years 1939 to 1945 inclusive were presented "to the meeting. Those accounts were signed by the company's "accountants as agents for the defendant company, and by two "directors of the company." That statement is in accordance with the statement of facts to which I have referred; and, in my view, in considering this judgment, one should not go further than the language used by the court. Therefore, one must proceed on the basis that the accountants signing the balance-sheets did so as agents for the defendant company. That is far from supporting the view that a certificate by the auditors to a company will have any such effect as the signing of the balance-sheets by those accountants in *Jones* v. *Bellgrove Properties Ltd.*[9] In the present case, the only part which the

[6] [1949] 2 K.B. 700; 65 T.L.R. 451; [1949] 2 All E.R. 198.
[7] [1949] 2 K.B. 701.
[8] Ibid. 703.
[9] Ibid. 700.

1958

TRANSPLANTERS (HOLDING COMPANY) LTD., *In re.*

Wynn-Parry J.

auditors play are as auditors to give the necessary certificate; and the mere fact that they are described as chartered accountants is nothing more than purely descriptive matter. Their signatures are appended in their capacity as auditors.

In my view, an auditor of a company is (apart from any special contract, and there is none in this case) not an agent of the company, at any rate for the purpose of being able to bind the company by merely signing the normal certificate at the foot of the balance-sheet. To hold otherwise would, I think, be contrary to the Companies Act, 1948. No doubt, for certain purposes, the auditors may be regarded as servants of the company, so that the court will not, by mandatory injunction, force upon the company auditors whom the shareholders do not desire to act: see *Cuff* v. *London and County Land and Building Co. Ltd.*[10] But apart again, as I say, from any special contract, the relations between the company and its auditors are governed by the provisions of the Companies Act, 1948, and their duty, as expressed by section 162 (1), is to make a report to the members on the accounts examined by them, and on every balance-sheet and every profit and loss account, and their report is to contain statements as to the various matters mentioned in the Ninth Schedule. That scheme seems to me designed to produce this result, that a skilled professional man or a firm of skilled professional men is or are appointed in order that there is to be before the company all the requisite information indicated in the Act, and that by their certificate they pledge themselves that they have properly performed their statutory duty. But I cannot spell out of their certificate anything which would amount to an acknowledgment within sections 23 and 24 of the Limitation Act, 1939, because I cannot spell out of their relations with the company, as to be extracted from the Companies Act, 1948, any authority to do anything in the nature of giving an acknowledgment within the Limitation Act, 1939, or any authority to do more than to perfom the duties laid upon them as auditors by the Companies Act, 1948.

On both those grounds, therefore, I hold that this application fails, and in those circumstances it is unnecessary for me to consider further a point as regards the rate of interest on the loan which was adumbrated by Mr. Edwards, or an objection by Mr. Lindner that that point was not raised in the notice of objection.

I must dismiss the application with costs.

Order accordingly.

Solicitors: *Bernard Oberman & Co.; Hillearys.*

J. G. R. M.

[10] [1912] 1 Ch. 440; 28 T.L.R. 203.

[PROBATE, ETC., DIVISION.]

* DONALDSON *v.* DONALDSON.

1958
June 11.

Karminski J.

Husband and Wife—Maintenance—High Court—Quantum—Husband's capital made over to mistress to invest in business—Business run by both—Husband ordered to pay whole of private income to wife and children—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

A husband who had failed to persuade his wife to divorce him so that he could marry his mistress commuted in 1957, so far as possible, his service pension and made over to his mistress the sum he so obtained, together with his service gratuity. The amount, which represented the whole of his realizable capital, was over some £7,500, and with this sum the mistress purchased and equipped a mink farm. The husband lived with her and worked at the farm, receiving no wages although fed and housed by her. The business, having only recently been started, was not yet showing a profit: there was a reasonable chance that it might begin to do so by about the end of 1959. The husband received £385 a year pension (which he had been unable to commute) and some £90 from a policy, making his total income £475. In August, 1957, he ceased to make any provision for his wife, and altered adversely the schooling arrangements for his two children. The wife herself had virtually no income, and it was not disputed that the husband had, in the circumstances, been guilty of wilful neglect to maintain. The question to be determined was therefore that of quantum:—

Held, (1) that, if a man had assets which really provide him with his living the court should have regard to the realities and deal with them as part of his income. There was no objection to ordering a husband to provide maintenance out of capital where appropriate. In the circumstances, it would be appropriate to order the husband, whose interest in the farm at the moment was limited to the provision of his living in kind, to pay to his wife and two children the whole of that part of his income which came to him direct, namely, the pension and policy money;

(2) that the order should be an interim order so that it might readily be increased as future circumstances permitted;

(3) that although the court could have no sympathy for a husband who had gone out of his way to deprive his wife, and to some extent his children, of any maintenance, it must nevertheless make a practical approach to the problem, and it would be inappropriate (on the assumption that the mistress would allow him to raise a charge) to propose the raising of a loan upon the farm to pay for the children's education, since the result might be the failure of the mink farm business and, therefore, the loss of an income from which the wife and children might be paid.

N. v. *N.* (1928) 44 T.L.R. 324; *J.* v. *J.* [1955] P. 215; [1955] 3 W.L.R. 72; [1955] 2 All E.R. 617 applied.

APPLICATION by wife for periodical payments under section 23 of the Matrimonial Causes Act, 1950, on the ground that her husband had wilfully neglected to provide reasonable maintenance for herself and the two children of the marriage, boys aged 14 and 9.

The facts are set out in full in the judgment:

1958

DONALDSON
v.
DONALDSON.

H. S. Law for the wife.
Joseph Jackson for the husband.

In addition to the case cited in the judgment references were made to *Jagger* v. *Jagger* [1] and *Scott* v. *Scott.*[2]

KARMINSKI J. This is an application by a wife, Mrs. Elizabeth Mary Donaldson, under section 23 of the Matrimonial Causes Act, 1950. She complains that her husband, Group Captain Oliver Russell Donaldson, has wilfully neglected to provide reasonable maintenance for herself and for the two infant children of the marriage, and she asks that an order may be made accordingly.

The facts of the case are at least somewhat unusual. The parties were married in April, 1940, and they seemed to have lived together quite happily until about 1956. There are two children of the marriage, both boys, one aged 14 and the other 9. In 1956 the husband became enamoured of another lady who, I gather, was at the material time serving in the Women's Royal Air Force in Cyprus with him. More latterly, he has lived with her as man and wife in Devonshire and she has, indeed, adopted his name. I shall refer to her, when necessary, as Mrs. Sonia Donaldson, which is the name under which she now goes. There is no doubt whatsoever that the husband was most anxious that his wife would divorce him so that he could marry the other lady. Mrs. Sonia Donaldson has, in fact, borne a son as a result of her cohabitation with the husband.

Having failed to persuade his wife to petition this court for a dissolution of the marriage, the husband took some drastic steps. He had retired in 1957 from the Royal Air Force with the rank of Group Captain and he was of course entitled, after some 20 years or more of distinguished service, to receive a pension and a gratuity. What he did was this: the gratuity of some £2,200 was paid to him when he left the Royal Air Force; in June, 1957, he commuted a part of his pension for a cash payment of £4,213; and in January, 1958, he commuted a further part of his pension for a cash payment of £1,116; so that he received in all, by way of cash payments from the R.A.F., some £7,529. These sums he made over to Mrs. Sonia Donaldson. They are, in fact, the whole of his realizable capital. With that not inconsiderable fortune in her hands, Mrs. Sonia Donaldson bought a mink farm near Honiton in Devonshire, and stocked it not only with mink but with such further dead stock and equipment as is necessary for carrying on that particular form of agricultural activity.

The husband still has some income in his hands, namely, £385 a year from the remainder of his pension; being a portion, I understand, which he was not allowed to commute into cash, and he has a policy which produces, for the time being, £90 or so. So that he has altogether an income of his own of £475; but for

[1] [1926] P. 93; 42 T.L.R. 413. [2] [1951] P. 245; [1951] 1 All E.R. 216.

the rest he has parted with everything he has in favour of Mrs. Sonia Donaldson. The farm belongs to her, so does the bank account; though by her own wish she cannot draw a cheque on her own bank account unless he countersigns it.

The husband receives no wage or other emoluments in respect of his activities on the mink farm, though he is fully engaged there and, I do not doubt, works on it to the best of his ability. He lives free, and he is fed and housed by Mrs. Sonia Donaldson. He has not, in fact, paid anything to his own wife since about August, 1957, and I have no difficulty at all in finding him guilty of wilful neglect to maintain her—indeed, it is fair to say that the contrary was never argued.

The question in this case is what, if anything, he should pay his own wife. I turn for a moment to the position of the children. At present the elder boy is at Kings School, Worcester, and the husband has given notice that he will no longer be responsible for his fees there. The younger boy was at a boarding school, but is now at a local school near where his mother lives in Norfolk, and I have to do my best to see that adequate provision, or such adequate provision as I can order this man to pay, is made for these boys at a critical stage in their lives.

The wife has substantially no means of her own. She has a rather limited earning capacity in that she has, from time to time, earned modest sums in the hotel business as an employee, or in other domestic work of that kind, but the position is not an easy one for her. She is about 43 years of age (the husband is a little older) and she has to look after these two comparatively young boys. Fortunately, her position in that regard is somewhat helped by the fact that she lives with her mother in Norfolk, and the mother is apparently willing to help her to look after the children; but, because I regard the wife's earning capacity as extremely limited, I think I ought not really to take it into account.

The position of the husband is indeed somewhat obscure. It would be idle for me to pretend for a moment that I have any sympathy of any kind for him in his position. He has gone out of his way, for reasons which I think are not difficult to see, to try to deprive his lawful wife, and to some extent his children, of any maintenance. It is, I conceive, the duty of the court to discourage conduct of that kind so far as it possibly can, but I must try to have regard to the realities of the situation.

This man has, in fact, in the name of his mistress, invested the whole of his realizable capital in this venture of the mink farm. It is a fairly recent venture and I do not doubt that the farm is sufficiently equipped with live and dead stock; but the mink have only bred once, and not very successfully. As it happens the season appears to have been a bad one for that purpose, and I am quite satisfied that the earliest date at which any possible profit will come to this venture will be about Christmas of next year, 1959. By that time, if the season is successful,

1958

DONALDSON v. DONALDSON.

Karminski J.

there is at any rate a reasonable prospect of this venture beginning to show a profit.

In the meantime, the cash, as shown in the bank accounts, is beginning to run somewhat low. The last figure I have is June 5, 1958, which shows that Mrs. Sonia Donaldson's account was then £162 in credit. It has gradually run down, not because, I think, that she and the husband have been living in any way extravagantly, but because they have not only had to live themselves but have also had to provide the day-to-day expenses of this farm. The mink have to be fed with meat, preferably liver, which no doubt costs quite a lot in these days to provide. I have, therefore, to look at that position.

The property, which is owned by Mrs. Sonia Donaldson, is not in any way charged, and I have comparatively little doubt that some loan secured on this property could be arranged from the bank or from a building society, or perhaps from an insurance company. I am quite unable to say in the absence of evidence how much can be raised in this way, but I am prepared to assume that they would probably be able to raise £1,000, or perhaps a little more. So far as I can foresee this position, any loan of that kind will be absorbed in the running of the farm and in the maintenance of the husband's and Mrs. Sonia Donaldson's home until in about 18 months' time this farm may show some sort of profit.

I mention those matters because I was much impressed by Mr. Law's argument that I ought to order this man to provide something out of capital for the education, at least, of the elder boy. It is a very attractive argument because, as he rightly observed, this boy is at a public school and, if he is taken away at 14, the consequences to his education will undoubtedly be very serious. The younger boy is nine, and is perhaps in a slightly less precarious position from the educational point of view.

I was at one stage doubtful as to whether I could order a husband to provide maintenance for a wife or children out of capital. I think there is no objection, either in practice or in law, to such a course when the circumstances permit it. My attention was drawn to the judgment of Lord Merrivale P. in *N.* v. *N.*,[1] and in his judgment[2] Lord Merrivale P. dealt with the practical wisdom of the ecclesiastical courts who, he said, were not misled by appearances but looked at the realities. He summed up the matter in this way: "The court not only ascertained what money "the husband had, but what moneys he could have had if he "liked, and the term faculties describes the capacity and the "ability of the respondent to provide maintenance." That is the test which the Court of Appeal approved in *J.* v. *J.*,[3] when they upheld, on that matter, the very full and considered judgment of Sachs J.

[1] (1928) 44 T.L.R. 324.
[2] Ibid. 327.
[3] [1955] P. 215; [1955] 3 W.L.R. 72; [1955] 2 All E.R. 617.

In my view the position is this, that if a man has assets which really provide him with his living, as in *J.* v. *J.*,[3] the court should have regard to the realities and deal with them as part of his income. Indeed, in this case, I propose, without any kind of hesitation, to deal with the husband's interest in the mink farm which provides him, in kind, with his living, a roof over his head and his food; but I have to consider what Lord Merrivale P. called the realities; in other words, what the statute calls the ability to pay or, as the ecclesiastical courts termed it, the faculties. The court must try in cases of this nature to make a practical approach to the problem. If I say that this man is to provide a substantial sum for the education of one or both boys at boarding schools, the only possible way that I can see for him to raise the money is to get Mrs. Sonia Donaldson to charge the property and then himself to get the money out of her and to apply it for the education and advancement of these boys. I am quite ready to assume that his relationship with Mrs. Sonia Donaldson is such that, if he asked her, he could raise the money by a charge, and he would be able to use some of it, at least, to keep these two boys at school. There is, however, this difficulty; that, even if the husband were willing to follow that course, and if the loan were applied for the education of the boy or boys and not for the financing of the mink farm, then the mink farm venture seems likely to end in failure and, in turn, that will deprive the wife and the boys of the possibility, at least, of a substantial income.

What I have decided to do in this case, with some regret, is to deal with the position as I find it; namely, that at the moment the husband is getting nothing out of the farm other than his living (and not, I think, a very comfortable living), and to use only that part of his income which comes to him direct. I feel that I am justified here, under the particular circumstances of this case, to show the absolute minimum of consideration to the husband. I propose so to deal with the matter. In short, I propose this, that I shall take every single penny from him at which I can get. Unfortunately, the only sums available are the ones which I have already mentioned, namely, the pension and the insurance policy money. I shall direct that the whole of that be paid to the wife and the two boys. The proportion which I think would be most convenient, would be to give each boy a maximum under the small orders provisions of 30s. a week, and to direct that each shall receive £78 a year from the husband; that leaves me with £319 which will make £319 less tax for the wife. I direct that this shall be another interim order, because I want to make this as clear as I possibly can; as soon as I see my way to do so, I propose to increase this interim order to the maximum which circumstances will permit. The order will date from the date of the application, namely, December 13, 1957,

[3] [1955] P. 215.

1958

DONALDSON v. DONALDSON.

credit to be given for any sums paid under the existing interim order or otherwise.

I shall make an order as to costs.

Interim order accordingly.

Solicitors: *Bernard W. Main for Bliss, Sons & Covell, High Wycombe; Crane & Hawkins.*

J. B. G.

[COURT OF APPEAL.]

C. A.

1958 *June* 17, 18.

Jenkins, Sellers and Pearce L.JJ.

* WRIGHT *v.* BOYCE (INSPECTOR OF TAXES).

Revenue — Income tax — Employment — Perquisites or profits — Professional huntsman—Whether gifts received from hunt followers and others at Christmas time "profits of his employment" — Whether such gifts taxable—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sch. E, paras.* 1 *and* 2; *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

W. was a professional huntsman and was engaged by the master and was responsible to him. Voluntary gifts were made to W. at Christmas time, both in cash and in kind, by followers of the hunt and persons interested in it. There was a widespread custom among hunts (including that in question) to give the huntsman presents of cash at Christmas time. W. was assessed to income tax under Schedule E in respect of those gifts made in cash, and on appeal the special commissioners held that such gifts (other than those given by persons not connected with the hunt) were taxable since they accrued to him by virtue of his employment:—

Held, that the payments must be taken, prima facie, to have been made in pursuance of the custom of which the huntsman as such by virtue of his office or employment was the object, and to have been received by him in that capacity, and there was ample evidence on which the commissioners could so find; accordingly, the payments were "profits of his employment" within Schedule E.

Blakiston v. *Cooper* [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347 and *Moorhouse* v. *Dooland* [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1 applied.

Seymour v. *Reed* [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625 distinguished.

Decision of Vaisey J. [1958] 1 W.L.R. 593; [1958] 1 All E.R. 864 affirmed.

APPEAL from Vaisey J.[1]

The taxpayer, Joseph Wright, a huntsman, of Brigstock near Kettering, Northants, appealed to the special commissioners against assessments to income tax under Schedule E made upon him in respect of gifts made to him in the form of cash presents at Christmas time by members and followers of the hunt as follows: additional assessments in respect of gratuities only, 1948–49 £200; 1949–50 £200; first assessments, 1950–51 £341;

[1] [1958] 1 W.L.R. 593; [1958] 1 All E.R. 864.

1951–52 £353; 1952–53 £583; 1953–54 £709; 1954–55 £658. The question for the determination of the court as stated by the special commissioners was whether certain sums received by the taxpayer were taxable emoluments of his employment. The taxpayer had been successively huntsman of the Bathurst and the Woodland Pytchley, and it was contended on his behalf that the sums involved which were given to him at Christmas time by hunt members and followers were not taxable emoluments. On behalf of the Inland Revenue it was contended that the sums were a profit accruing to the taxpayer by reason of his employment as huntsman and were properly assessable to tax. The special commissioners dismissed his appeal, having found that, apart from certain gifts in kind and gifts which came to the taxpayer from persons not connected with the hunt by which he was employed during the relevant years under consideration, most gifts came to the taxpayer because he was employed as huntsman, and accrued to him by virtue of his employment as such, notwithstanding that the givers were influenced by personal regard for the taxpayer, such personal regard having its origin in the way in which he carried out his duties as huntsman. On appeal, Vaisey J. affirmed their decision.

The taxpayer appealed.

H. B. Magnus Q.C. and *R. A. Watson* for the taxpayer.
Cyril King Q.C. and *Alan Orr* for the Crown.

The following case not referred to in the judgment was cited in argument: *Calvert* v. *Wainwright.*[2]

JENKINS L.J. This is an appeal from a judgment of Vaisey J. dated March 6, 1958, whereby he upheld a decision of the special commissioners in favour of the Crown to the effect that the taxpayer, Joseph Wright, was taxable under Schedule E on certain voluntary payments made to him at Christmas in each of the seven years 1948/49 to 1954/55.

The taxpayer was employed as a professional hunt servant. He had been a hunt servant all his life and, in 1946, he was appointed huntsman to the Bathurst Hunt. He remained there from 1946 to 1952 or thereabouts and he then went from the Bathurst Hunt to the Woodland Pytchley Hunt. In his capacity as huntsman successively with these two hunts he was the senior member of the hunt staff and occupied a responsible position. It is important to observe that the taxpayer was engaged in the case of each hunt by the master and not by any body which could be said to be representative of the hunt as such. In each case the constitution of the hunt (as described in the case stated) may be said to have been nebulous in the extreme. As cases of this kind turn very much on the particular facts, it will be necessary for me to quote at some length from

[2] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475.

C. A.
1958
WRIGHT v. BOYCE (INSPECTOR OF TAXES).
Jenkins L.J.

the stated case, but, before I do that, I might perhaps indicate the points upon which Mr. Magnus for the taxpayer especially relied.

The payments in dispute were voluntary payments and, as I have said, the huntsman was employed by the master. The payments came from persons who can be succinctly described as followers or supporters of the hunt.

Mr. Magnus's main points which he put in the forefront of his argument were these: the taxpayer had no contractual title to the payments, that is to say, there was nothing in the terms of his engagements which said he would be entitled to receive and retain presents of money made to him by followers or supporters of the hunt at Christmas time; secondly, there is the point that, both with the Bathurst and with the Woodland Pytchley, the taxpayer was engaged as huntsman by the master at a weekly wage; and further, not only was there no contract about the presents of money at Christmas but nothing was said about them on the occasion of the taxpayer's engagement in either case. Then, as I have already said, the payments were made by persons other than the taxpayer's employer; they were, in fact, made by followers and supporters of the hunt and were purely voluntary payments in as much as the persons making them were under no legal obligation to do so.

Then, said Mr. Magnus, the taxpayer was well known in the district because of his employment as huntsman, and he had many personal friends in the area. The importance of that, said Mr. Magnus, is that it makes it possible to account for the voluntary payments made as having been made from motives of personal regard for the taxpayer. Then Mr. Magnus pointed out that there was no organized collection, there were no circulars and there was no solicitation of any kind with respect to these voluntary payments at Christmas and, finally, said Mr. Magnus, what was given by each donor was given purely spontaneously as a mere present.

As against these points I should mention that (as will appear from the case) there was—and is—a well-established practice in most hunts in this country, and in the Bathurst and Woodley Pytchley hunts in particular, to make presents of money to the huntsman at Christmas and presents of money in this case were made regularly each year. I am not saying that the payers were necessarily always the same persons; but the subvention was regularly made: the making of the payments took place every single Christmas during his employment and at the first Christmas just as much as at the last.

I should next refer to the case. Paragraph 3 shows that both in the case of the Bathurst Hunt and the Woodland Pytchley Hunt the taxpayer was engaged by the master.

"4. The appellant (who had been a hunt servant since boy-"hood) was engaged as huntsman of the Bathurst Hunt in 1946 "by the then master. He was engaged orally, at an interview,

" when he was told what his wages and other terms of his " employment would be; nothing was said about tips or Christmas " presents. In 1952 he was engaged as huntsman of the Wood- " land Pytchley Hunt by one of the joint masters, Captain " Goddard Jackson; this engagement was also oral; Captain " Goddard Jackson told him the wages and other terms of the " employment, and nothing was said about tips or Christmas " presents.

" 5. In each year when the appellant was huntsman to the " Bathurst Hunt and the Woodland Pytchley Hunt he received " presents of cash at or about Christmas time. Some of these " presents came to him from persons with whom he had come " into contact in his capacity as a hunt servant earlier in his " career, but who had no connection with the hunt to which he " was huntsman at the time the presents were given. These, " however, were few in number, and most of the presents of cash " given to the appellant at Christmas came from persons with " whom he was at the time in contact in his capacity as hunts- " man. Such persons would mostly be people who regularly rode " with the hunt, but would also include persons who only " occasionally rode, and persons who did not ride but had an " interest in the hunt. Many of these were personal friends of " the appellant, who, in his capacity as huntsman, had become a " personality of some note to a wide circle of people in the " district, not only to people who hunt, but also to people who " voluntarily assist in the work of the kennels, to farmers, and to " people who attend meets on foot. He also got presents in kind " from farmers.

" 6. It is a widespread custom in hunts in most parts of the " country (including the Bathurst and Woodland Pytchley Hunts) " for followers of the hunt to give the huntsman presents of " cash at Christmas time, and the usual occasion for the gifts is " the meet on Boxing Day. The custom is one of long standing " and well known to people who hunt, and soon becomes known " to people who take up hunting. There is no compulsion on " followers of the hunt to give such presents nor (in the case of " the Bathurst and Woodland Pytchley Hunts) was any form of " circular or reminder given to followers about it, or any organized " collection or cap, either on Boxing Day or at any other time. " There is no conventional amount to give; a person would give " a larger amount if he liked or respected the appellant, or a " smaller one or none at all if he disliked him. About half of " the persons riding at the Boxing Day meet would give the " appellant a present (where several members of the same family " were riding, the appellant generally receives one present from " the head of the family only); some people (particularly those " who could not attend the Boxing Day meet) give the appellant " a present before or after Boxing Day; if, however, there is no " meet on Boxing Day the appellant does not receive any " presents. For example, in one year when hunting was stopped

C. A.
1958
WRIGHT v. BOYCE (INSPECTOR OF TAXES).
Jenkins L.J.

"by frost from October to February and in another year when "the appellant was prevented by illness from hunting during the "Christmas season he received very few presents of cash."

I can omit paragraphs 7 and 8. The commissioners expressed their decision in these terms: "9.—(1) We, the commissioners "who heard the appeal, found on consideration of the evidence "before us that (with the exception of the gifts referred to in sub-"paragraph (2) below) the sums of money in question came to the "appellant because he was employed as huntsman and accrued "to him by virtue of that employment. In coming to this con-"clusion we did not overlook the fact that in the case of many "of the said sums the giver was influenced to some extent by "personal regard for the appellant, but we found that such "personal regard had its origin in the way in which the appellant "personally performed his duties as huntsman.

"(2) We held that the appeal failed in principle, but we "directed that in arriving at the amount assessable there should "be excluded from assessment the amount of any gifts which "came from persons who had no connection with the hunt with "which the appellant was employed in each of the relevant "years." The appeals against the assessments were disposed of on that basis. There was an adjustment made in respect of the payments referred to in subparagraph (2) of paragraph 9.

Those are the facts and the question is whether on those facts the payments voluntarily made at Christmas to the taxpayer by followers and supporters of, and, I should add, persons interested in, the hunt, were profits of his employment within the meaning of Schedule E. I do not think it is necessary to refer to the statutory provisions because I think it is not open to doubt that the expression "profits of his employment" sufficiently conveys the purport of Schedule E for the purposes of this case.

This, as will have been observed, is one of those cases where it is sought to tax payments made voluntarily on the part of the persons who made them. It is, of course, well settled that payments may be taxable in the hands of the recipient as profits of an office or employment although they are voluntarily made by the persons making them; even so they may be profits of the employment if, from the standpoint of the recipient, they accrue to him by virtue of his employment.

I am anxious to avoid much citation of authority, this being a topic which has already occupied a great deal of space in the reports. But I should refer to what was said by Collins M.R. in *Herbert* v. *McQuade*.[1] After reference to another case (*Inland Revenue* v. *Strang*[2]), he says[3]: "Now that judgment, "whether or not the particular facts justified it, is certainly "an affirmation of a principle of law, that a payment may be

[1] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.
[2] (1878) 15 Sc.L.R. 704; sub nom. *In re Rev. George Walter Strong*, 1 T.C. 207
[3] [1902] 2 K.B. 631, 649.

"liable to income tax although it is voluntary on the part of "the persons who made it, and that the test is whether, from "the standpoint of the person who receives it, it accrues to "him in virtue of his office; if it does, it does not matter "whether it was voluntary or whether it was compulsory on "the part of the persons who paid. That seems to me to be "the test; and if we once get to this—that the money has "come to, or accrued to, a person by virtue of his office—it "seems to me that the liability to income tax is not negatived "merely by reason of the fact that there was no legal obliga-"tion on the part of the persons who contributed the money "to pay it."

There is an almost equally well-worn passage from the judgment of Stirling L.J.[4]: "I think that a profit accrues by "reason of an office when it comes to the holder of an office "as such—in that capacity—and without the fulfilment of any "further or other condition on his part; and what we have to "determine is whether the sum in question does so come to "the holder of this office."

In *Seymour* v. *Reed*,[5] Viscount Cave L.C. made some observations which are often quoted and it will be necessary for me to read part of that passage. Viscount Cave said[6]: ". . . and it must now (I think) be taken as settled that they"—that is to say, the relevant words of rule 1 of Schedule E of the Income Tax Act—"include all payments made to the "holder of an office or employment as such—that is to say, "by way of remuneration for his services, even though such "payments may be voluntary—but that they do not include "a mere gift or present (such as a testimonial) which is made "to him on personal grounds and not by way of payment for "his services. The question to be answered is, as Rowlatt J. "put it, 'Is it in the end a personal gift or is it remuneration?' "If the latter, it is subject to the tax; if the former, it is "not."

Mr. Magnus, who said all that could possibly be said for the taxpayer in his interesting argument, dealt with the matter, in effect, in this way. He referred us at the outset to the well-known cases of *Herbert* v. *McQuade*[7] and *Blakiston* v. *Cooper*.[8] *Herbert* v. *McQuade*[9] relating to the clergy sustentation fund for augmentation of the stipends of clergy and *Blakiston* v. *Cooper*[10] being concerned with the customary Easter offerings made for the benefit of the vicar of a parish. In both those cases the sums received by the clergymen concerned were held to be taxable notwithstanding that the contributions to the funds from which they were derived were voluntarily made by the persons making them. That, according

[4] [1902] 2 K.B. 631, 650.
[5] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.
[6] [1927] A.C. 554, 559.
[7] [1902] 2 K.B. 631.
[8] [1909] A.C. 104; 5 T.C. 347.
[9] [1902] 2 K.B. 631.
[10] [1909] A.C. 104.

C. A.
1958
WRIGHT v. BOYCE (INSPECTOR OF TAXES).
Jenkins L.J.

to Mr. Magnus, is the background, if I may so describe it, of the principle that the question whether a payment voluntarily made is taxable in the hands of the recipient as profits of his employment depends on whether from the standpoint of the recipient it comes to him in that capacity.

Mr. Magnus said that this principle presented no difficulty in its application to cases such as these clergy cases because in each of those cases there was a definite machinery of collection and organization which really made it quite plain in what capacity the sum was received by the clergyman once it had found its way into the fund in question. Again, said Mr. Magnus, no difficulty arises where as in *Moorhouse* v. *Dooland* [11] the contract of service itself provides a right for the employee to receive and retain the voluntary payments in question. But, Mr. Magnus went on to point out, in this case there was no machinery or organization of collection at all; there is the bare fact that the taxpayer, during the relevant years of assessment, held the office or employment of huntsman first to one hunt and then to another; there is the bare fact that payments were voluntarily made to him at Christmas by followers and supporters of, and persons interested in, the hunt in question.

In a case such as that, said Mr. Magnus, it is plain that one must look and see why the payment was made because, until that has been found out, it is impossible to answer the question whether it was received by the recipient as holder of the relevant office or employment. Mr. Magnus has shown us references to the intention of the donors in some of the reported cases. He pointed out in particular that in *Seymour* v. *Reed* [12] all turned on an inference as to the intention of the donors who, in fact, were the people who had paid gate money to witness the benefit match. Applying that view of the matter to the present case, Mr. Magnus said that the Crown had not established its claim to tax, for, as there was no machinery of collection and no fund to identify or earmark the payments, as and when they were paid into the fund as made for a particular purpose, there was nothing here to show what the intention of the donors was.

Mr. Magnus's sheet-anchor was really *Seymour* v. *Reed* [13] and he said that the facts here (to put the matter at its lowest) were wholly consistent with the view that this was a *Seymour* v. *Reed* case,[13] that is to say, that the voluntary payments were made not to the taxpayer in his capacity as the holder of the employment of huntsman but to "Joe Wright" the man, in recognition of his skill and daring and so forth in carrying out his duties as huntsman. In Mr. Magnus's submission, once that is made good, then it follows from *Seymour* v. *Reed* [13] that the amounts are not taxable.

[11] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.

[12] [1927] A.C. 554.

[13] Ibid.

It must, I think, be remembered that *Seymour* v. *Reed*[13] was a case turning very much on its particular facts and it was, as I see it, a vital element in the case that the benefit match was held and the gate money was collected on the eve of the retirement of Seymour after a long and brilliant career as a county cricketer playing cricket for the county of Kent. It was a "once and for all" payment after very long service and after a long career spent in entertaining the public. It was made at the proper time for making a testimonial, that is to say, on the eve of the retirement of the person to whom it was being given. That was not so in the present case: these payments were made just as much at the first Christmas after the taxpayer's assumption of the office or employment of huntsman as at the last.

As to the contention that the motives of the contributors of the voluntary payments should be looked at (or the objects, perhaps one should say, that they had in view), I agree that, generally speaking, where there is no definitely determining factor, like a reference in the contract of employment of the person concerned, it is hardly possible to assess the quality of the payment without considering the position both of the payer and of the payee and it may well be that, where it is sought to tax a man on receipts of this general character, he can repel the claim to tax by proving that the persons who gave him the sums alleged to be taxable gave them to him on some entirely different account. But then I think the first test would still hold good: what was the quality of the payment from the point of view of the recipient?

In the case put, from the point of view of the recipient the payment would have nothing to do with his employment at all; it would have been made for the wholly extraneous purpose I am postulating.

It is little to the purpose to multiply citations in cases of this kind, where all that can be done is to deduce from the authorities such general propositions as they lay down. I do not think the general propositions are really in dispute; the difficulty concerns their application to the facts of the particular case. I should now briefly attempt to do that.

First of all, I would observe the evidence as to the existence of a wide-spread custom in the hunts in most parts of the country, including the two hunts with which we are concerned, to give the huntsman presents of cash at Christmas time. Pausing there, it is reasonably plain, I think, that that custom is a custom to make presents of cash at Christmas time to the person for the time being holding the office or employment of huntsman. It is the huntsman as such by virtue of his office or employment who is the object of the custom. Where a custom such as that exists, the usual occasion for the gifts being the meet on Boxing Day, and one finds people on Boxing

[13] [1927] A.C. 554.

C. A.
1958
WRIGHT v. BOYCE (INSPECTOR OF TAXES).
Jenkins L.J.

Day making payments to the huntsman, I should have thought those payments must be taken prima facie to have been made in pursuance of the custom; if they were made in pursuance of the custom, then, prima facie, they were not payments to the taxpayer as an individual but, in accordance with custom, payments to the huntsman for the time being who, at that particular Christmas Day or Boxing Day, happened to be the taxpayer. So that so far it appears to me that from the standpoint of the taxpayer the payments so received would be received by him in his capacity as huntsman or, in other words, by virtue of his office or employment as huntsman. It is important, further, to bear in mind that this custom produced a regular annual subvention (if I may use that expression) every Christmas from the date of the taxpayer's engagement as huntsman to the Bathurst Hunt.

That appears to me really to exclude this case from the *Seymour* v. *Reed*[14] class of case. I do not think any question of a testimonial or of admiration, respect or regard for the outstanding personal qualities of the taxpayer can well come into the matter. One does not, I apprehend, start giving testimonials to huntsmen so soon as they are engaged. The time when one would expect a testimonial is on the huntsman's retirement. I am far from saying that, if he did retire and on the eve of his retirement a testimonial by way of a collection of money was organized in his favour, that would necessarily be taxable, but the regular character of the subvention does, to my mind, strongly support the view that the payment is made to the holder of the office or employment as such and not to the particular individual holding it on personal grounds. The recurrent quality of the subvention, besides negativing the idea of a testimonial, is also in itself, I think, an indication that the taxpayer received these payments by virtue of his office or employment.

I would add this: it appears to me to be clear that the taxpayer's hope or expectation of payments pursuant to the custom was at all times a hope or expectation attached to the office or employment. He was in a position to hope for or expect the Christmas payments by virtue of his tenure of the office or employment of huntsman, and I should say again that from his point of view he got whatever he got under the custom by virtue of his tenure of the office or employment of huntsman. Of course, he had no legal title to receive any payment from anybody at Christmas. The matter depended on custom only, but it appears to me that he would have been not unreasonably aggrieved if, in fact, the custom had been discontinued. He might then quite legitimately have regarded his office or employment as huntsman to the hunt in question as having been docked of a customary profit.

[14] [1927] A.C. 554.

I return to Mr. Magnus's argument to the effect that each gift or payment must be considered individually and that it is impossible, in the circumstances of this case, to predicate of all or any of them that they were in respect of the taxpayer's office or employment. I may have said this before but, as to that, it appears to me that when the custom is established and payments are shown to have been made by followers or supporters of the hunt at the time when payments pursuant to the custom are customarily made, there being no indication that the payments were made otherwise than in pursuance of the custom, then the payments must be taken to have been made in pursuance of the custom as a matter of prima facie proof. It might have been open then to the taxpayer to contest particular payments and say this or that payment was made on some other account, but I think a prima facie case has been made out, as I have said, when the custom has been proved and payments apparently made pursuant to the custom have been proved.

In my judgment, there was ample evidence on which the commissioners could come to the conclusion at which they arrived and, in my view, their conclusion is wholly correct as also is the conclusion of the judge who dismissed the appeal which was before him.

Mr. Magnus has criticized the findings of the special commissioners as regards subparagraph (1) of paragraph 9 on the ground that, after holding that the sum of money in question came to the taxpayer because he was employed as huntsman and accrued to him by virtue of that employment, the commissioners go on to say: "In coming to this conclusion we "did not overlook the fact that in the case of many of the "said sums the giver was influenced to some extent by per-"sonal regard for the appellant, but we found that such personal "regard had its origin in the way in which the appellant per-"sonally performed his duties as huntsman." Mr. Magnus uses that as indicating that if the special commissioners had appreciated the effect of these words they could not have included them appropriately unless they were going to hold that this was, in effect, a *Seymour* v. *Reed* case,[15] for the motivation of the gift or payment in *Seymour* v. *Reed*[15] was this very matter; it had its origin in the particular brilliant way in which Mr. Seymour personally had performed his duties as a professional cricketer.

That seems to me to be hypercritical. No doubt the payments made under the custom would vary in amount according to the view taken by the contributor of Mr. Wright as a huntsman and possibly as a man. If Mr. Wright was a popular character and liked by a given contributor, that contributor might well make a more generous contribution than a man who happened to dislike Mr. Wright or to take a poor view of his ability as a huntsman;

[15] [1927] A.C. 554.

C. A.
1958
Wright v. Boyce (Inspector of Taxes).
Jenkins L.J.

but these matters, as it seems to me, go to the quantum of the payments and not to their character.

Although I said earlier that I would cite few cases, I should refer in that connexion to what was said by Lord Ashbourne in *Blakiston* v. *Cooper* [16]: "It was suggested that the offerings were "made as personal gifts to the vicar as marks of esteem and "respect. Such reasons no doubt played their part in obtaining "and increasing the amount of the offerings, but I cannot doubt "that they were given to the vicar as vicar, and that they formed "part of the profits accruing by reason of his office."

Similarly, in the present case I would say with Lord Ashbourne in *Blakison* v. *Cooper* [16] that if, as the special commissioners found, in many cases the giver was influenced to some extent by personal regard for the taxpayer, such reasons no doubt played their part, but I cannot doubt that the sums in question were given to the huntsman as huntsman, and I do not think anything is really added to the finding by the words: "but we found that such personal regard had its original in the "way in which the appellant personally performed his duties "as huntsman." That merely means that a person contributing in accordance with the custom might have a personal regard for the taxpayer originating in his appreciation of the efficiency with which the taxpayer performed his duties as huntsman and might on that account increase the contribution given by him pursuant to the custom, or perhaps make up his mind to make such a contribution which possibly he would otherwise have omitted to do.

I have now, I think, dealt with the essential points taken in Mr. Magnus's very able and careful argument. I hope I have done justice to it, but, for the reasons I have endeavoured to state, I have come to a clear conclusion that the decision of the special commissioners and the judgment of the judge in this case were right and, accordingly, that this appeal fails and should be dismissed.

Sellers L.J. I agree. As I am so much of the same opinion as my Lord and as we are upholding the judge, I hope it will not be thought to be any disrespect to the interesting and sustained argument of Mr. Magnus if I add no further reasons of my own.

Pearce L.J. I also agree and for the same reasons.

Appeal dismissed.

Solicitors: *Withers & Co.; Solicitor, Inland Revenue.*

J. A. G.

[16] [1909] A.C. 104, 108.

[QUEEN'S BENCH DIVISION.]

* *Ex parte* RIGBY.

1958
July 8.

Devlin and Ashworth JJ.

Justices — Indictable offence also triable summarily — Application by prosecutor for summary trial—No formal application—Plea taken by justices' court—Facts stated by prosecution—Whether implied application by prosecutor for summary trial—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 18 (1) (2).

An application for the summary trial of an offence may be "made" by a prosecutor within the meaning of section 18 (1) of the Magistrates' Courts Act, 1952, either expressly or by implication from his conduct.

James v. *Bowkett* [1952] 2 T.L.R. 100; [1952] 2 All E.R. 320; applied.

APPLICATION for leave to apply for an order of certiorari.

The following were among the facts deposed to in the affidavits in support of the application. The applicant, Albert Edward Rigby, was charged at Bow Street Magistrates' Court with, inter alia, unlawfully taking and driving away a motor-vehicle without the consent of the owner, contrary to section 28 of the Road Traffic Act, 1930. After the charges were read out the applicant was asked to plead and duly pleaded Guilty. Immediately after the plea was taken the facts were stated and counsel for the applicant addressed the court in mitigation. At no time prior to the plea or at any other time did the prosecutor apply to the court for the case to be tried summarily pursuant to section 18 (1) of the Magistrates Courts Act, 1952.[1] The magistrate sentenced the applicant to three months' imprisonment and disqualified him from holding or obtaining a driving licence for 12 months. An appeal to quarter sessions was pending.

The applicant applied ex parte for leave to apply for an order of certiorari to bring up and quash the order of the magistrate on the ground that, since the offence with which he was charged was triable summarily or on indictment, and thus fell within section 18 (1) of the Magistrates' Courts Act, 1952, and no application had been made by the prosecutor for summary trial, the magistrate had no jurisdiction and plea, sentence and order were bad.

Ian McCulloch for the applicant. The magistrate had no jurisdiction to try the case summarily unless application for summary trial was made by the prosecution under section 18 (1)

[1] Magistrates' Courts Act, 1952, s. 18: "(1) Where an information "charges any person with an offence "that is . . . both an indictable "offence and a summary offence, the "magistrates' court dealing with the "information shall, . . . proceed as "if the offence were not a summary "offence, unless the court, having "jurisdiction to try the information "summarily, determines on the appli-"cation of the prosecutor to do so. "(2) An application under the preced-"ing subsection shall be made before "any evidence is called . . ."

1958

Rigby, *Ex parte.*

of the Act of 1952. Such application must be made prior to plea because there can be no plea unless the court has jurisdiction. The prosecutor in *James* v. *Bowkett* [2] did not make formal application under section 28 (1) of the Criminal Justice Act, 1948, for a summary trial, and the court held that by opening his case the prosecutor had impliedly applied for summary trial. But the words of section 18 (1) of the Act of 1952 are different from and stronger than those of section 28 (1) of the Act of 1948. Section 28 (1) of the Act of 1948 provided that "if application . . . is "made . . . before the charge has been entered upon the court "may then determine to try the case summarily," whereas by section 18 (1) the court "shall . . . proceed as if the offence were "not a summary offence, unless the court . . . determines on the "application of the prosecutor" to try the offence summarily. That subsection is mandatory on the court.

[Devlin J. I do not see what grievance the applicant has. He has appealed to quarter sessions, and if this court should issue a writ of certiorari and quash the order he can be retried, and if he then appeals to quarter sessions he will be in exactly the same position as he is now. That is a relevant matter because certiorari is a discretionary remedy.]

It might well be that on a retrial a different sentence would be imposed. Further, there is a difficulty about the appeal to quarter sessions in that if the proceedings before the magistrate were a nullity, there is nothing to appeal against to quarter sessions which could do nothing to put the matter right.

[Ashworth J. Why does the reasoning in *James* v. *Bowkett* [2] not apply here?]

In that case both the prosecution and the defence had a right of election.

[Ashworth J. But why should the same implication not arise when it is only one side who has the right to make the application?]

In *James* v. *Bowkett* [3] the appellant was informed of his right under section 17 (1) of the Summary Jurisdiction Act, 1879, to be tried by a jury and elected to be tried summarily, whereas in the present case it is only the prosecution which can elect. *James* v. *Bowkett* [3] is only authority for the proposition that an application could be implied where both sides were willing that the case should be dealt with under section 28 (1) of the Act of 1948. Reliance is placed on the difference in wording in the new section.

[Devlin J. On the essential point, that is, what is said about the making of an application, the wording seems to me to be the same. In section 28 (1) of the old Act it is said "if application "in that behalf is made by the prosecutor before the charge has "been entered upon," and section 18 (2) of the Act of 1952 says: "An application under the preceding subsection shall be made "before any evidence is called." The whole question, therefore,

[2] [1952] 2 T.L.R. 100; [1952] 2 All E.R. 320.

[3] [1952] 2 All E.R. 320.

is what amounts to the making of an application, and in *James* v. *Bowkett* [3] it was held that where it was necessary for both sides either to apply or to consent they might do so either expressly or by conduct. That is, the express assent of the defence was sufficient and the conduct of the prosecutor was sufficient. What had to be determined in that case was what amounted to the making of an application. Here, as Ashworth J. put to you, where the question is only whether the application made by one side is sufficient, why does the same reasoning not apply? The essence of *James* v. *Bowkett* [3] is that the application can be made either expressly or by such conduct as inevitably leads to the inference that it is being made.]

In *James* v. *Bowkett* [3] the fact that no application was made did not affect the jurisdiction of the justices. Section 18 (2) of the Act of 1952 uses the word "shall." The court cannot be absolved from complying with the provisions of the Act: see the judgment of Donovan J. in *Reg.* v. *Salisbury and Amesbury Justices, Ex parte Greatbatch* [4] and it is submitted that by virtue of section 18 (1) the court has no jurisdiction and cannot proceed to try an offence summarily unless application is made.

DEVLIN J. The court will dismiss this application for reasons which have appeared obvious in the course of the argument. Leave is refused.

Application dismissed.

Solicitors: *Avery & Wolverson.*

J. F. L.

[3] [1952] 2 All E.R. 320.

[4] [1954] 2 Q.B. 142, 148; [1954] 3 W.L.R. 29; [1954] 2 All E.R. 326.

[CHANCERY DIVISION.]

* GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENTS (LEYTONSTONE) LTD.

1958
June 3, 4, 5, 6, 13.

Vaisey J.

[1956 G. 2126.]

Landlord and Tenant—Repairs—Covenant—"Structural repairs of a "substantial nature"—Meaning of "structural repairs"—Meaning of "substantial."

By clause 2 (3) of a lease of a cinema the tenant covenanted to keep the demised premises "in good and substantial repair and "condition and properly decorated . . . but nothing in this clause "contained shall render the [tenants] liable for structural repairs "of a substantial nature to the main walls roof foundations or "main drains of the demised building." By clause 3 (2) the landlords covenanted, except so far as the tenants were liable under

[Reported by MARGARET THOMAS, Barrister-at-Law.]

1958

Granada Theatres Ltd. v. Freehold Investments (Leytonstone) Ltd.

their covenants, to "repair maintain and keep the main structure "walls roofs and drains of the demised premises in good structural "repair and condition."

The roof being in disrepair and the cement rendering and brickwork of the front main elevation being defective, the tenants served a schedule of dilapidations on the landlords in respect of these, but the landlords did not execute the repairs. The tenants had the roof repaired themselves at a cost of £961, the work done including the repair of the front slated part. The landlords alleged that they had obtained a tender of £130 10s. for the work, and that £961 was excessive. The tenants claimed damages for breach by the landlords of their covenant to repair the roof and a declaration that the landlords were liable to repair the front elevation:—

Held, (1) that "structural repairs" meant repairs to a structure.

(2) That the measure of the obligation to repair was the nature of the antecedent disrepair rather than the nature of the repair.

(3) That the roof and front wall were parts of the structure, so that repairs thereto would be "structural."

(4) That the antecedent disrepair was considerable, and accordingly "substantial," so that the necessary repairs were the responsibility of the landlords and not of the tenants.

Palser v. *Grinling* [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1 applied.

(5) That as the evidence as to the cost of effecting adequate repairs was unsatisfactory, there must be an inquiry as to damages.

Action.

The tenants of a cinema brought an action against their landlords claiming £961 as damages for breach of covenants to repair the roof, being the cost they had incurred by doing the work themselves, and a declaration that, on the true construction of the lease, repairs to the front elevation were the responsibility of the landlords.

By clause 2 (3) of the lease the tenants were under an obligation "To keep the demised premises and the sanitary and water "apparatus and all additions and improvements thereto in good "and substantial repair and condition and properly decorated "and in a state in every respect fit for cinematograph entertain-"ments but nothing in this clause contained shall render the "lessee liable for structural repairs of a substantial nature to the "main walls roofs foundations or main drains of the demised "building." By clause 3 (2) the landlords covenanted "To "(except so far as the lessee is liable under the lessee's covenants "hereinbefore contained) repair maintain and keep the main "structure walls roofs and drains of the demised premises in good "structural repair and condition at all times during the said "term."

The tenants, who were successors in title under a lease granted in 1941, had acquired the cinema on December 13, 1954, and on January 31, 1955, they served a schedule of dilapidations on the landlords requiring them, as the tenants alleged in their statement of claim, to carry out structural repairs to the roofs and the front elevation. During May and June, 1955, the tenants redecorated

and refurnished the interior of the cinema and alleged that damage later caused to the interior by rain was due to the defective condition of the roof. They also alleged that, in spite of repeated requests, the landlords neglected or refused to repair the roof, and in October, 1955, in order to prevent further damage to the interior, they repaired the roof themselves. The slated roof over the front part of the auditorium was repaired, but the other part of the roof covered with asbestos sheeting remained unrepaired. The total cost of the work was £961. The landlords did not deny service of the schedule of dilapidations or that the tenants had done repair work to the roof, but they denied that the tenants had requested them to do the work and that the work done was necessary.

The landlords contended (1) that some of the roof repairs were not, and that none of the front elevation repairs were, repairs within the landlords' covenant in clause 3 (2) of the lease; (2) that such of the roof repairs as fell within clause 3 (2) were not necessary in order to repair, maintain and keep the main structure, walls, roofs and drains of the cinema in good structural repair and condition; (3) alternatively, that such of the roof repairs and of the front elevation repairs as were repairs within clause 3 (2) had become such repairs by reason of the neglect or failure of the tenants to carry out from time to time, as and when necessary, such repairs as ought to have been carried out by the tenants under clause 2 (3) of the lease, for an assignee was not relieved of liability merely because the premises had become out of repair before he took his assignment; (4) that they were not liable for the cost of the repairs carried out to the roof by the tenants; and (5) that their refusal to carry out repairs to the front elevation was not a breach of their obligations under clause 3 (2).

The tenants replied, inter alia, that even if individual items of disrepair occurring before the assignment to them had been the liability of the then tenants and not the landlords, at the time of the assignment these items had become "of a substantial "nature." At the first moment when the tenants became liable at all on the covenants of the lease, the repairs in question had accordingly ceased to fall within the tenants' covenant and fell within the landlords' covenant. The landlords might have a claim for indemnity against those in whom the lease was previously vested, but that could not affect the present tenants. Even if an assignee was liable to make good disrepair existing at the time of the assignment to him, this could be so only if the items of disrepair then fell within the tenants' repairing covenant. An assignee was not vicariously liable for breaches of covenant by his predecessors in title.

R. E. Megarry, Q.C., and *Oliver Lodge* for the plaintiffs.

H. Heathcote-Williams, Q.C., and *J. E. Vinelott* for the defendants.

1958

Granada Theatres Ltd. v. Freehold Investments (Leytonstone) Ltd.

The following case, in addition to those referred to in the judgment, was cited in argument: *Sotheby* v. *Grundy*.*

Cur. adv. vult.

June 13. Vaisey J. read the following judgment: This is a dispute between the tenants (plaintiffs) and the landlords (defendants) of a cinema now known as the Century Cinema and formerly as the Academy Cinema, situate in the High Road, Leytonstone, in the county of Essex. The lease is dated June 12, 1941, and made between parties who are respectively the predecessors in title of the landlords and the tenants. The question which I have to decide is: Which of the parties, the tenants or the landlords, are responsible to the other of them for certain external repairs to the building, some of which have already been carried out and others of which remain to be carried out in and to the building of the cinema, as I will presently explain.

The case is not without difficulty, and I confess that I have changed my mind more than once during the hearing, which has lasted for no less than four days of the present term. I have first to construe, and secondly to apply to the particular facts of the case, some words which at first sight might seem to be reasonably easy to interpret. They are these: "structural "repairs of a substantial nature."

It appears, rather surprisingly, that the expression "structural "repairs" has never been judicially defined, a fact to which attention is drawn in Woodfall on Landlord and Tenant, 25th ed., p. 770, para. 1732, and counsel in the present case have accepted that statement as correct. The writer of the textbook submits on the same page that "structural repairs" are those which involve interference with, or alteration to, the framework of the building, and I would myself say that "structural repairs" means repairs of, or to, a structure. It is sometimes said that repairs must always be either structural or decorative, and if that is the simple criterion, we are in this case certainly not dealing with decorative repairs.

Next, what is meant by the words "of a substantial nature"? In a South Australian case, *Terry's Motors* v. *Rinder*,[1] the word "substantial" is pilloried as a word devoid of any fixed meaning and as being an unsatisfactory medium for conveying the idea of some ascertainable proportion of a whole. In *Palser* v. *Grinling*,[2] a question arose as to what was a "substantial portion" of a rent, and the decision is summarized (not perhaps very helpfully) in the headnote,[3] saying that "substantial" does not mean "not "unsubstantial," but is equivalent to "considerable," and that the judge of fact must decide the matter according to circumstances in each case. See also *Thorneloe and Clarkson, Ltd.* v.

* [1947] 2 All E.R. 761.

[1] [1948] S.A.S.R.(Aus.) 167.

[2] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.

[3] [1948] A.C. 291, 292.

Board of Trade.[4] Again, what is a "structure"? And what ought to be regarded as part of a structure? We are dealing here with (1) the roof, and (2) one of the main walls of a cinema, and surely those are parts of the structure of the building. Indeed, it seems to me that the roof is an even more important part of a cinema than it is in the case of an ordinary dwelling-house, because any leakage of rain into the auditorium of a cinema is likely to be a much more serious matter than water coming into an attic or other upstairs apartment. I refer, of course, to a cinema on what I may call the ground floor.

With those preliminary observations, I turn to the lease, clause 2 of which contains the lessee's covenants. By clause 2 (3) the lessee is placed under an obligation "To keep the demised "premises and the sanitary and water apparatus and all additions "and improvements thereto in good and substantial repair and "condition and properly decorated and in a state in every respect "fit for cinematograph entertainments but nothing in this clause "contained shall render the lessee liable for structural repairs of a "substantial nature to the main walls roof foundations or main "drains of the demised building." That seems to place a general obligation on the lessees to effect all repairs excepting "structural "repairs of a substantial nature to the main walls roof," etc., of the demised building.

Clause 3 contains the landlords' covenants, and sub-clause (2), beginning with a heavily split infinitive, reads as follows: "To "(except so far as the lessee is liable under the lessee's coven-"ants hereinbefore contained) repair maintain and keep the main "structure walls roofs and drains of the demised premises in good "structural repair and condition at all times during the said "term."

That seems to impose a general obligation on the landlords to effect all repairs other than those to which the lessees are liable under clause 2 (3)—a singularly awkward piece of drafting.

Considering at this point the relevant words of the lease, I think it must be the nature of the disrepair rather than the nature of the repair which is the relevant matter. A comparatively small and unsubstantial or inconsiderable amount of structural disrepair might well be repaired so extravagantly as to make the repair of a substantial nature, and I think that the obligation here must be measured not so much by the nature of the repair as by the nature of the preceding or antecedent disrepair.

On the facts of the case I have to consider first certain repairs to the roof, some of which have been carried out and some of which still remain to be done; then I have also to consider certain repairs to a nine-inch brick wall and the cement rendering upon it. Of the antecedent disrepair of the roof and of the wall there can be no doubt at all. As regards the roof, the slated portion of it has in fact been repaired by the tenants at a total cost of

[4] (1950) 66 T.L.R. (Pt. 1) 1117; [1950] 2 All E.R. 245.

1958

Granada Theatres Ltd. v. Freehold Investments (Leytonstone) Ltd.

Vaisey J.

£961, and they claim to be repaid this sum by way of damages. The landlords disclaim responsibility altogether, but say that in any case this figure, £961, is excessive and represents an unreasonable, uneconomical and extravagant treatment of what was really quite an inconsiderable disrepair. The landlords have obtained a tender for doing the same work for a sum of £130 10s.; whether £961 is too much, or £130 10s. is too little, or what the right figure is, I do not know. The other part of the roof covered with asbestos sheeting still remains unrepaired, and no satisfactory estimate of the probable cost of repairing it is before me. I hold that so far as the roof is concerned, it is plainly a part of the structure, and any repairs to it are necessarily, in my judgment, structural repairs. Are they, however, "substantial"? Treating that word as equivalent to "considerable," and measuring the liability more by reference to the antecedent disrepair than by the repairs themselves, I think that they plainly are; with the result that they are excluded from the tenants' obligations under clause 2 (3), and fall into the landlords' obligations under clause 3 (2).

It was not disputed and must be taken to be admitted, that the nine-inch wall is one of the main walls of the building; that being so, it is in my judgment part of the structure of the building. The facts here are that a cement rendering has been applied to the front of that wall, and it is now peeling or falling or stripping off owing to the intrusion of damp or for some other reason; not only so, but the cement has taken away with it parts of the bricks to which it was intended to adhere, and here again we have, I think, a structural disrepair calling for a structural repair of a considerable or substantial and not a trifling or inconsiderable nature.

I hold that the repairing of the nine-inch wall by replacing the now detached rendering and restoring or replacing the bricks injured by the coming away of the rendering, is also excluded from the tenants' obligation (clause 2 (3)), and falls within the obligation of the landlords (clause 3 (2)).

In my judgment the structure, both as to the roof and as to the wall, is or was in a state of disrepair calling for structural repairs which I cannot regard as other than substantial. Not being able to accept either the £961 or the £130 10s. as an adequate measure of the damages recoverable in regard to the slated portion of the roof, I must refer the ascertainment of the proper amount to an official referee, or to the master, who will be asked to quantify the amounts properly to be allocated in the shape of damages to the disrepair of the slated roof and the asbestos roof, the costs of the said reference to be reserved. As regards the nine-inch wall, the tenants only ask for a declaration of the landlords' liability to which they are, of course, entitled.

Two points remain to be noticed. First, it is suggested that the items of serious disrepair which have given rise to the landlords' liability have been built up out of, and are the accumulated

consequence of, a series of trifling wants of repair which ought to have been attended to from time to time as such by the tenants against whom the landlords could set off claims for damages sufficient to wipe out the landlords' liability for the resultant items of serious disrepair. No authority for such a proposition has been found, and I express no opinion upon it because of the very short interval which elapsed between the tenants' acquisition of the property on December 13, 1954, and the service of the schedule of dilapidations on January 31, 1955. Secondly, where, in this case, does the onus of proof lie? A lease is normally liable to be construed contra preferentem, that is to say, against the lessor by whom it was granted. See *Taylor* v. *St. Helen's Corporation*,[5] and *Dickinson* v. *St. Aubyn*.[6] On the other hand, there is the usual onus imposed upon every plaintiff, resting in the present case upon the tenants. Assuming, without deciding, that the tenants as plaintiffs have an onus to discharge, I think they have in fact discharged it.

1958

GRANADA THEATRES LTD. *v.* FREEHOLD INVESTMENTS (LEYTONSTONE) LTD.

Vaisey J.

Inquiry as to damages.
Declaration accordingly.

Solicitors: *E. F. Turner & Sons; Harewood & Co.*

[5] (1877) L.R. 6 Ch.D. 264.

[6] [1944] K.B. 454; 60 T.L.R. 269; [1944] 1 All E.R. 370.

[QUEEN'S BENCH DIVISION.]

*REGINA *v.* NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER. *Ex parte* RICHARDSON.

1958
July 2.

Lord Goddard C.J., Slade and Devlin JJ.

National Insurance—Industrial injuries benefit—Injury arising in the course of employment — Whether arising out of employment — Burden of proof—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 7 (4).

Burden of Proof—Industrial injuries—Whether injury arising out of employment.

The applicant, a bus conductor, was attacked by a gang of disorderly youths and suffered injury. The National Insurance (Industrial Injuries) Commissioner refused an application for disablement benefit on the ground that although the accident occurred in the course of the employment it did not arise out of it. The applicant moved for an order of certiorari on the ground that the commissioner was wrong in holding that the onus was on the applicant to show that the injuries arose out of the employment and that, having regard to section 7 (4) of the National Insurance (Industrial Injuries) Act, 1946,[1] once it was found that the applicant was injured in the course of his employment there was a

[1] National Insurance (Industrial Injuries) Act, 1946, s. 7 (4): "For "the purposes of this Act, an accident "arising in the course of an insured "person's employment shall be "deemed, in the absence of evidence "to the contrary, also to have arisen "out of that employment."

1958

Regina
v.
National
Insurance
(Industrial
Injuries)
Commissioner.
Ex parte
Richardson.

statutory presumption in favour of the applicant that his injuries arose out of the employment:—

Held, that if there was evidence that the accident did not arise out of the employment then the presumption in section 7 (4) did not arise and it was left to the parties to prove their case in the normal way; and therefore, since the commissioner had found that the applicant had not been singled out for attack for any reason connected with his employment, the applicant had failed to prove his case and there was no ground for allowing the application.

Application for certiorari.

The applicant, Clifford Richardson, applied for an order of certiorari to bring up and quash a decision of the National Insurance (Industrial Injuries) Commissioner in which he refused the applicant's claim for industrial disablement benefit.

The following facts are taken from the decision of the commissioner: On August 7, 1954, the applicant, a bus conductor, was standing on the platform of his bus making up his waybill, ready to pay in at the depot, when two youths jumped on to the platform and one of them kicked the applicant in the stomach. The applicant fell to the floor and knocked his head on the stairs of the bus, receiving stomach and head injuries and injury to his eye. Before the incident the driver of the bus, noticing a number of youths who were standing in the roadway, slowed down the bus, and then, without a word of warning, the assault occurred. Ten youths were subsequently apprehended and charged with specific offences, for which they were duly sentenced. The gang of hooligans had not specifically singled out the applicant for assault. Before he was assaulted other persons had been set upon by some of the gang and assaulted.

On June 17, 1957, the applicant applied for a declaration that the incident was an industrial accident. The local insurance officer decided that it was not an industrial accident, on the ground that the accident did not arise out of and in the course of the applicant's employment. The applicant appealed from that decision on the grounds that he was at work at the time of the accident, that he was the only victim of the attack on the bus by the gang of "Teddy boys," that at the time he was carrying a sum of approximately £15 belonging to his employers, and that as he was at work in the uniform of his employers, he was singled out for the unprovoked attack. The commissioner found that the applicant was not robbed and it did not appear that robbery was the motive of the attack, which seemed to have arisen for no reason other than hooliganism. At the hearing of the appeal before the local appeal tribunal it was submitted on behalf of the applicant, that a man in uniform was increasingly subjected to assault. The tribunal found that the claimant was engaged on his ordinary work as bus conductor when the incident occurred, that he was in uniform, and in that was to be distinguished from bus passengers, and that there were ten assailants but that neither of the two passengers (who were on the bus) was attacked. The tribunal allowed the applicant's appeal on the ground that he was

exposed to risks greater than those received by ordinary passengers. He was in uniform, and it was accepted that because of that he was singled out for attack. The tribunal considered Decision No. R(1) 41/51 but distinguished it. On appeal the commissioner said that the sole question for him was whether the accident which befell the applicant when, without any provocation on his part, he was attacked and injured, arose out of his employment. That it arose in the course of his employment was not in dispute. The commissioner held that the test to be applied was set out in Decision No. R(1) 41/51, in which the majority of the commissioners said: "In our opinion the correct approach to "claims based on assault is as follows: As in all claims to benefit "under the National Insurance (Industrial Injuries) Act, 1946, "the claimant must show that the injury resulted from an "accident arising out of and in the course of his employment, "i.e., he must show that the employment was an efficient cause "(causa causans) of the accident. . . ." The commissioner also considered *Powell* v. *Great Western Railway Co.*[2] and *Challis* v. *London and South Western Railway Co.*[3] and certain unreported decisions of the commissioners. He found that the applicant was directly attacked by a man who was not a passenger and who had no intention of being one, but who, of his malice, desired to injure anyone whom he might chance to meet on the highway. The assault which took place had no causal connexion with the applicant's employment as a bus conductor, and therefore, it could not be said to have arisen out of his employment. There was no evidence to indicate that the applicant's employment exposed him to the special risk of assault by ill-disposed ruffians who were not passengers, and that the assault was wholly unrelated to the applicant being on the bus in the position of conductor. The commissioner was not satisfied that his employment made him a target for the assault, could see no material distinction between the present case and Decision No. R(1) 41/51, and held that the accident did not arise out of the claimant's employment.

The applicant applied for an order of certiorari to bring up and quash the commissioner's decision on the grounds (inter alia) that the applicant having been found to have been in the course of his employment when he sustained the injuries resulting in his disability, the commissioner erred in point of law in holding that the onus was on the applicant to establish that his injuries arose out of his employment; that having regard to section 7 (4) of the National Insurance (Industrial Injuries) Act, 1946, once it was found that the applicant was in the course of his employment, there was a statutory presumption in favour of the applicant that his injuries arose out of the employment; and that the onus was on the insurance officer to negative the presumption in favour of the applicant.

[2] (1940) 56 T.L.R. 264; [1940] 1 All E.R. 87.

[3] [1905] 2 K.B. 154.

1958

REGINA v. NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER. *Ex parte* RICHARDSON.

Stephen Chapman Q.C. and *John Stocker* for the applicant.

Rodger Winn for the Ministry of Pensions and National Insurance.

The following cases were cited in argument: Decision No. R(1) 41/51; Decision No. C.I. 3/49; *Bender* v. *Owners of S.S. Zent*[4]; *In re Highett and Bird's Contract*[5]; *Powell* v. *Great Western Railway Co.*[6]; *Holden* v. *Premier Waterproof and Rubber Co.*[7]

LORD GODDARD C.J. Mr. Chapman moves for an order of certiorari to bring up and quash a decision of the National Insurance (Industrial Injuries) Commissioner in a claim for industrial disablement benefit in which the applicant alleged that he had suffered an accident arising out of and in the course of his employment.

The applicant was an omnibus conductor in the service of the Salford Corporation. On the day in question a gang of disorderly youths endeavoured to stop the bus of which he was conductor. It is found in the commissioner's decision that they had assaulted other persons before they committed any assault on the applicant, and ten of these youths were subsequently apprehended and charged with specific offences for which they were duly sentenced. Two of them jumped on to the conductor's platform of the bus and kicked the applicant in such a way that he was seriously and permanently injured. Apparently there was no motive of robbery because no money was stolen. This was simply an outbreak of hooliganism, and the applicant was injured in that way.

The question is whether, in those circumstances, he is entitled to claim industrial injury benefit, because to claim such benefit the insured person must suffer injury caused by accident arising out of and in the course of his employment. The commissioner has held that the accident did not arise out of his employment, although it arose in the course of his employment, because he held, on the evidence before him, that it was not shown that this man was specially singled out because he was wearing a particular uniform, or he might have had money on him, or any particular circumstance connected with his employment. He held that it was an attack made on him as a person in the street, as these youths had been attacking other people.

Certiorari is moved for here on the ground that the commissioner misdirected himself with regard to the law because the onus of proof was put on the applicant, whereas the onus of proof according to Mr. Chapman's contention was on the insurance officer. It comes down in the end, as Mr. Chapman has conceded, to the true construction of subsection (4) of section 7 of the National Insurance (Industrial Injuries) Act, 1946. Subsection (4)

[4] [1909] 2 K.B. 41.
[5] [1903] 1 Ch. 287.
[6] 56 T.L.R. 264.
[7] (1931) 47 T.L.R. 169.

provides: "For the purposes of this Act, an accident arising in "the course of an insured person's employment shall be deemed, "in the absence of evidence to the contrary, also to have arisen "out of that employment." Those are the words of the section, and therefore let it be conceded that if a person proves merely, and there is no other evidence except, that he suffered an accident in the course of his employment, then it is to be deemed, it is taken to be proved, that it arose out of the employment. But if there is evidence to the contrary by whoever it is given, that is to say, the facts which are before the commissioner can amount to evidence to the contrary, then the presumption or the deeming disappears, and if once that deeming disappears it is then for the applicant to prove that the accident did arise, not only in the course, but also out of, his employment. The words of the section are not "in the absence of proof to the contrary" or "unless the contrary is proved," but "in the absence of "evidence to the contrary," and that has been held before now by the Industrial Injuries Commissioners, and, in my opinion, quite correctly, to mean no more than this, that if there is evidence before the commissioner that the accident does not arise out of the employment, then there is no presumption at all, and it is left to the parties to prove the case in the ordinary way. It is always necessary to bear in mind that, where this court is asked to grant certiorari, this court has no power to sit as a court of appeal on the facts. The only ground on which we are asked to grant certiorari in this case is that, on the face of the decision, there is an error of law. The error of law which is alleged is that the commissioner misdirected himself with regard to the onus of proof and held that there was an onus on the applicant instead of there being an onus on the insurance officer. That does not seem to me, with all respect to Mr. Chapman's argument, to be right. It is not here a question of the onus of proof. The question is, Was there evidence to the contrary? and it is left to the applicant to make out his case. The commissioner on the evidence before him, there being, in my opinion, evidence which would prevent the deeming which otherwise would arise to apply, has come to the conclusion that the accident did not arise out of his employment. It is not for this court to sit as a court of appeal upon him as to that. In my opinion, there is no error of law on the face of this decision, and, in my opinion, for these reasons this application fails.

SLADE J. I agree. I think section 7 (4) on its true construction either creates a conclusive presumption or gives rise to no presumption at all. In this case it was admitted that the accident arose in the course of the employment. Evidence was given that it did not arise out of the employment. Therefore, there was no conclusive presumption established under the section and, as I have said, in my opinion it creates no rebuttable presumption.

1958

REGINA v. NATIONAL INSURANCE (INDUSTRIAL INJURIES) COMMISSIONER. *Ex parte* RICHARDSON.

DEVLIN J. I also agree. I think the short point is whether the word "evidence" in section 7 (4) of the Act in its context means proof or whether it means evidence in the sense of a very familiar expression, "evidence fit to be left to the jury." In my judgment it means the latter. I do not think that if the decision of the commissioner were looked at by itself it would be a perfect statement of the legal position. We are told that this question of the true interpretation and effect of section 7 (4) was not specifically argued before him. If it had been, no doubt he would have put the matter a little differently. But he did refer in his decision to an earlier decision in 1951 (Decision No. R(1) 41/51), and that, in turn, refers to a decision of 1949 (Decision No. C.I. 3/49) to which Lord Goddard C.J. has referred. That decision of 1949 appears to me to put the matter entirely correctly and in the sense which this court is putting upon the construction of the section. I think the right view of the matter is, that the commissioner must be taken to have addressed himself to the question of whether there was evidence to the contrary and to have satisfied himself that there was; and, as Lord Goddard C.J. has pointed out, there was evidence of an indiscriminate attack which is referred to in the decision. Accordingly, his decision is to be interpreted as meaning that section 7 (4) did not apply because, there being evidence to the contrary, there was no presumption at all as to the burden of proof.

Application refused.

Solicitors: *G. Howard & Co.; Solicitor, Ministry of Pensions and National Insurance.*

C. J. E.

[CHANCERY DIVISION.]

1958 *July* 16.

* PRACTICE DIRECTION (PAYMENT OUT).

Practice and Procedure—Chancery Division—Payment out of court—Application—Widow or married woman—Affidavit of no settlement—R.S.C., Ord. 55, *r.* 2 (1).

The judges of the Chancery Division have directed that it shall no longer be necessary to require from a widow or a married woman and her husband an "Affidavit of no settlement" before making an order for payment out to her of a fund in court.

MAURICE WILLMOTT.
Chief Master.

July 16, 1958.

[COURT OF APPEAL.]

* GOODYEAR TYRE AND RUBBER CO. (GREAT BRITAIN) LTD. *v.* LANCASHIRE BATTERIES LTD.

C. A.

1958
July 4, 8.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1958 G. 430.]

Restrictive Practices—Conditions as to resale prices—Individual enforcement—Notice of restriction—Whether express notice of actual conditions essential—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 25.

Contract—Formation—Notice of conditions—Quasi-contract.

The plaintiffs, who were manufacturers of motor-car tyres, sought an interlocutory injunction to restrain the defendants from selling the plaintiffs' products at prices below those fixed by the plaintiffs' price list and contrary to the conditions of sale thereby imposed. The British Motor Trade Association circulated a large number of traders (amongst whom were the defendants) setting out first, the general effect of section 25 of the Restrictive Trade Practices Act, 1956,[1] and, secondly, stating that certain manufacturers and concessionaires (among whom were the plaintiffs) supplied their products for resale subject to a condition that those products were sold at a certain price, details whereof could be obtained on application to the respective manufacturers and concessionaires whose addresses were given. The defendants received one of these circulars on May 31, 1957. In February, 1958, the defendants offered for sale some of the plaintiffs' products at a discount of 2s. in the pound on the price as shown in the plaintiffs' price list. Upjohn J. dismissed a motion for an interlocutory injunction to restrain the defendants on the ground that section 25 (1) had not been complied with because the circular was not an express notice of the actual terms and conditions sought to be enforced. The plaintiffs appealed:—

[1] Restrictive Trade Practices Act, 1956, s. 25: "(1) Where goods are "sold by a supplier subject to a "condition as to the price at which "those goods may be resold, either "generally or by or to a specified "class or person, that condition may, "subject to the provisions of this "section, be enforced by the supplier "against any person not party to the "sale who subsequently acquires the "goods with notice of the condition "as if he had been party thereto. "(2) A condition shall not be en-"forceable by virtue of this section "—(*a*) in respect of the resale of "any goods by a person who acquires "those goods otherwise than for the "purpose of resale in the course of "business, or by any person who "acquires them, whether immediately "or not, from such a person; (*b*) in "respect of the resale of any goods "pursuant to an order of any court, or "by way of execution or distress, or "by any person who acquires them, "whether immediately or not, after "such resale. (3) Nothing in this "section shall be construed as en-"abling any person to enforce a con-"dition imposed in pursuance of any "restriction which is declared by an "order of the Restrictive Practices "Court for the time being in force "under Part I of this Act to be con-"trary to the public interest. (4) "Without prejudice to any other relief "which may be granted in proceed-"ings against any person in respect "of a breach or apprehended breach "of a condition which is enforceable "against him by virtue of this sec-"tion, the court may, if it thinks fit, "upon proof that goods sold by the "plaintiff have been resold by the "defendant in breach of any such "condition, grant an injunction re-"straining the defendant from resell-"ing in breach of any such condition "any goods already sold or thereafter "to be sold by the plaintiff, whether "of the same description as the goods "proved to have been resold as afore-"said or of any other description."

C. A.

1958

Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

Held, (1) that, on the true construction of section 25 (1) of the Act of 1956, "notice of the condition" did not require that express notice had to be given of the exact terms; and that as the defendants had had express notice that the tyres must not be resold at less than the appropriate price fixed by the manufacturers and concessionaires coupled with explicit directions as to how details of that appropriate price could be obtained, they had had sufficient notice of the condition to satisfy section 25 (1).

County Laboratories v. *J. Mindel Ltd.* [1957] Ch. 295; [1957] 2 W.L.R. 541 and 746n.; [1957] 1 All E.R. 806 and 861n. distinguished.

(2) That the principles which were deducible from the "railway "ticket cases" applied, for although those were cases of express contract, section 25 (1) was in substance dealing with contracts and putting the ultimate trader with notice into the position of an original contractor.

Thompson v. *London, Midland and Scottish Ry. Co.* [1930] 1 K.B. 41 applied.

National Phonograph Company of Australia v. *Menck* [1911] A.C. 336; 27 T.L.R. 239 and *Columbia Graphophone Co. Ltd.* v. *Murray* (1922) 39 R.P.C. 239 distinguished.

Decision of Upjohn J. [1958] 1 W.L.R. 655; [1958] 2 All E.R. 324 reversed.

Appeal from Upjohn J.

The defendants, Lancashire Batteries Ltd., were dealers in motor accessories and carried on business, among other places, in Accrington, Lancs, under the name of Tower Battery Depot. The plaintiff company were manufacturers of motor-car tyres, and in common with a number of other manufacturers had imposed a price restriction as part of the conditions of sale of their goods. The conditions of sale were contained in a trade price list, over 30 pages long, containing details of retail and wholesale prices for the products manufactured or marketed by the plaintiffs. At the end of the list was a section, covering more than one page, on which were set out the conditions of sale so far as relevant. They were: "(4) Notice of conditions. Pur- "chasers of all products manufactured, sold or supplied by the "company, undertake and agree to bring fully to the notice of all "traders . . . the terms of these conditions of sale. (5) Price "Maintenance. (a) No person shall sell or supply any of the "company's products to any trader at prices and/or terms "directly or indirectly higher or lower than the prices specified "in the company's current trade price lists and/or the terms "for the time being authorized by the company. (b) No "person shall sell or supply any of the company's products "to any commercial vehicle user (other than a commercial "vehicle user whose name and discount category appear in the "register of users approved by the company), or to any other "person whatsoever, except a trader, at prices and/or terms "directly or indirectly higher or lower than the prices specified "in the company's current retail price lists and/or the terms for "the time being authorized by the company. . . . (6) (a). No

"person shall advertise or publicly offer for sale any of the com-
"pany's products to any person whatsoever (including traders or
"commercial vehicle users) at prices directly or indirectly higher
"or lower than the company's current retail prices."

The British Motor Trade Association sent out a circular to a large number of traders including the defendant company and its headquarters in Darwen; these were received on May 31 and November 19, 1957, and by the Tower Battery Depot at Accrington on June 24 and November 25, 1957. For the purposes of the motion the relevant edition of the circular was that dated April, 1957, received by the defendants on May 31, 1957. The amendments made in the later editions of the circular were not material to the question at issue. The document in question, which was headed "Restrictive Trade Practices Act, 1956," read, in so far as it is material, as follows: "Lists and addresses of manufacturers
"and concessionaires who prescribe conditions as to price for
"their respective specified products. Important notice under the
"Restrictive Trade Practices Act, 1956. To: All traders in
"motor goods TAKE NOTICE THAT . . ." [the document then set out the general effect of section 25 of the Act and continued:]
"(2) The undermentioned manufacturers and concessionaires
"have authorized the British Motor Trade Association to give
"notice on their behalf that they each individually supply for
"re-sale each of their new products of the kind or kinds specified
"in the schedule subject to conditions as to price, including a
"condition that they shall not be resold or offered for resale at
"a price other than the appropriate price prescribed by the
"manufacturer or concessionaire concerned, plus the actual
"amount of purchase tax (if any) for which such products are
"liable and such delivery charges as the manufacturer or con-
"cessionaire may prescribe." Paragraph (3) pointed out that section 25 of the Act provided that action might be taken against those who infringed the price stipulations. "(4) Details of the
"conditions as to price prescribed for any of the specified pro-
"ducts may be obtained on application to the manufacturer or
"concessionaire concerned, quoting details of the goods in
"question." The schedule contained a long list both of tyre manufacturers (including the plaintiffs) and of manufacturers of motor-cars and motor accessories, and under the heading "Speci-
"fied products" was mentioned: "All Goodyear tyres, tubes
"and flaps."

In February, 1958, the defendants offered for sale certain motor accessories at a discount of 2s. in the pound, and advertised the fact in the "Evening Telegraph" of February 12, 1958. The matter came to the notice of the plaintiffs, who thereupon communicated with the British Motor Trade Association, who sent an investigator to make a "trap order." In the events which happened the investigator purchased two Goodyear Suburbanite Ultra-grip tyres at a discount of 10 per cent. These tyres were listed in the trade price list for retail sale at £6 18s. each cover.

C. A.
1958
Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

By their writ the plaintiffs claimed an injunction to restrain the defendants, whether acting by themselves or by their servants or agents, from reselling or offering for resale any tyres, tubes or other goods manufactured and sold by the plaintiffs at prices other than the respective prices prescribed by the plaintiffs for the resale of such goods.

Upjohn J. dismissed the motion and the plaintiffs appealed.

G. T. Aldous Q.C. and *S. J. Waldman* for the plaintiffs.
D. Mervyn Davies for the defendants.

In addition to the cases referred to in the judgments, the following were cited in argument: *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*[2]; *Thorne* v. *Motor Trade Association*[3]; *Taddy & Co.* v. *Sterious & Co.*[4]; *Hood* v. *Anchor Line (Henderson Bros.) Ltd.*[5]; *Chloride Electrical Storage Co. Ltd.* v. *Silvia Wireless Stores*[6]; *Columbia Graphophone Co. Ltd.* v. *Thoms*[7]; *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*[8]; *Port Line Ltd.* v. *Ben Line Steamers Ltd.*[9]

Lord Evershed M.R. This appeal has raised a question of some importance upon the meaning of section 25 (1) of the Restrictive Trade Practices Act, 1956. [His Lordship read subsection (1) and, having stated the facts, continued:]

It will be observed that the circular is issued by the British Motor Trade Association, stating that they are agents of each of the manufacturers. No point has been taken as to the validity of that claim, and it must, therefore, be taken that the British Motor Trade Association was in truth the agent of the plaintiffs, among others, to make the statements made in the circular. It is, of course, plain enough that those paragraphs fall considerably short of informing a reader by themselves of all the precise conditions as to price which affected the resale of Goodyear tyres in the hands of a retailer. In order to discover the full import of those conditions it is necessary to turn to the trade price list issued by the plaintiffs. [His Lordship referred to the parts of the list set out above, read paragraphs 4, 5 (*a*) and (*b*) and continued:]

The vital paragraph for present purposes is (5) (*b*), because that is the one which affects sales by retailers. It will be noted that there are two features about it, which no doubt are necessary but might be said to be special. They make exceptions in cases of sales to traders as therein mentioned, and the paragraph also refers to prices being higher or lower "directly or "indirectly." The reason for the latter obviously is that it

[2] [1915] A.C. 847; 31 T.L.R. 399.
[3] [1937] A.C. 797; 53 T.L.R. 810; [1937] 3 All E.R. 157, 323n.
[4] [1904] 1 Ch. 354; 20 T.L.R. 102.
[5] [1918] A.C. 837; 34 T.L.R. 550.
[6] (1931) 48 R.P.C. 468.
[7] (1924) 41 R.P.C. 295.
[8] [1926] A.C. 8, 108; 42 T.L.R. 86.
[9] [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

would include, among other things, cases of sales where other goods are taken in part exchange or where the terms of sale are by way of hire purchase. In other words, it is not quite so simple as the case referred to in argument where a man buys over the counter in a tobacconist's shop a packet of 20 Players' cigarettes. To such a transaction part exchange and hire purchase would not be applicable. It follows, therefore, that a full comprehension of the price conditions is quite a complex subject, and it is no wonder that the trade price list contains as many pages as it does. But what I have read emphasizes the main issue which has been debated before us and which is whether it is sufficient for the purposes of this motion (and it is only with that that we are concerned) that the defendants had the notice as contained in paragraphs (2) and (4) of the British Motor Trade Association circular? Or, in order to comply with the requirements of section 25 (1), should the defendants, if they are liable to restraint by the court, have been given full notice of the exact terms and conditions as they are found in the trade price list?

It was the view of the judge, as it was the argument of Mr. Mervyn Davies before us, that a proper reading of the terms of subsection (1) meant that the latter of the two alternatives I have posed was the correct answer to the question; in other words, to use the language of the judge, the defendants could not be liable to procedure for an injunction unless it could be shown that they had knowledge of the actual terms of the relevant condition. With the utmost respect to the judge, I have not been able to share that view. I refer again to the subsection to observe first of all that it is dealing with a specific kind of condition: "Where goods are sold by a supplier subject to a condition as "to the price at which those goods may be resold," etc. Then the subsection proceeds to say that that condition (viz., the price condition) may be enforced against (in this case) a retailer, provided that the retailer acquires the goods or has acquired the goods with notice of the condition. Again, that is the price-regulating condition. It obviously, therefore, would not be good enough, as I conceive, for a retailer brought before the court for an injunction to have been told only "There are conditions of "some sort affecting these goods." He must have notice of *the* condition—that it is the condition as to price fixing—with which the subsection is concerned.

The judge, in reaching his conclusion, rejected the argument that the case could be treated as governed or at least sufficiently guided by certain decisions of the courts in regard to patented articles. *National Phonograph Co. of Australia* v. *Menck* [1] was one. *Columbia Graphophone Co. Ltd.* v. *Murray* [2] was another. It is no doubt true that those cases and others like them are authority for the view that if someone acquires for resale a patented article, he does so upon terms that he is treated as being

[1] [1911] A.C. 336; 27 T.L.R. 239. [2] (1922) 39 R.P.C. 239.

C. A.

1958

Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

Lord Evershed M.R.

licensed to resell, and he is bound accordingly, upon any resale, to observe any conditions which the patentee may have imposed and of which he has notice, in the sense that the fact or existence of the condition has been brought to his mind, even though (see the latter case I mentioned, the *Columbia Graphophone* case [2]) he may only be told that there are conditions, without being told what their exact terms were. The judge did not feel that these patent cases formed a safe guide, on the ground (and I respectfully agree) that they really depend upon the special proprietary right which by statute a patentee has in regard to goods manufactured in accordance with the patent. But Mr. Aldous in this court has drawn our attention also to other cases in which conditions and the terms of conditions have become relevant for consideration, namely, what one may loosely call the "railway ticket" cases. One of those (and I refer to one because it will suffice) was a decision in this court of *Thompson* v. *London, Midland and Scottish Ry. Co.*[3] There, a passenger had taken an excursion ticket, on the back of which was found a notice that the excursion ticket was subject to certain specified conditions which could be discovered from looking at other documents issued by the railway company. The plaintiff herself was unable to read, and some of the matters in issue turned upon that fact. In truth, however, the ticket had been acquired for her as her agent by a niece who could read. The question (so far as relevant) was whether she must be treated as bound by the published conditions, although all she had been told, via her agent, was that the contract of carriage was subject to those conditions and that if she wanted to find out exactly what they were, she must get hold of this other literature and read it. It was held by this court that the finding of the jury in the case in favour of the company was justified and that the notice that she had received, in the form as I have stated it, sufficed. I shall return to that case a little later; but, for the present purposes, the point I think which is of value is that you may have sufficient notice of a condition to be bound by its terms although you have not been told or had put into your hands or under your nose a full statement of exactly what the terms of that condition are.

I think also Mr. Aldous was justified in reminding us of the situation in regard to this type of condition before this Act came into force. Certain methods had been adopted by manufacturers, by way of what are called "black lists," of dealing with traders who disregarded their own attempts at price regulation; but that was something which was, of course, outside the scope of legal action. The difficulty which had faced a manufacturer or supplier seeking (via the courts) to restrain sales by, for example, a retailer otherwise than at the listed prices was that there was no contract, no contractual nexus, between the manufacturer and the retailer; or, if some form of contract was brought into existence, then it was found there was no consideration for it.

[2] 39 R.P.C. 239.

[3] [1930] 1 K.B. 41.

upon which a manufacturer could enforce these conditions. Obviously section 25 (1), is to be judged against that background, and the particular significance of what I have been saying lies in the last seven words: "as if he" (that is, the retailer) "had "been party thereto"; that is, to the contract relating to the supply of goods.

So I come back to the first question (and the main question) which we have to decide: What is the scope or limit of the words "with notice of the condition"? Prima facie, it would appear to me that if Parliament had meant that the retailer must know the actual terms of the condition, as the judge seems to have thought, Parliament would have said so. The word "notice" to a lawyer, in my judgment, means something less than full knowledge. It means, no doubt, that the thing of which a man must have notice must be brought clearly to his attention. What, in different cases, may be sufficient notice is a matter which will be decided when those cases come before the courts; but in this case it seems to me that two things are clearly established: first, that the defendants had been told and knew (had been expressly told and clearly knew) that tyres which had been manufactured and supplied by the plaintiffs had had imposed upon them by the plaintiffs a condition as to price, including a condition that they should not be resold at other than the appropriate price which the manufacturer had prescribed. That is clear. They had, furthermore, been told (see paragraph (4) of the circular) that the details of the condition, that what was the appropriate price in any given case for the resale of those tyres, could be obtained on application to the manufacturer at the address which was stated in the same circular. In my judgment, that constituted in this case "notice of the condition" within the requirement of section 25 (1).

It was complained by Mr. Mervyn Davies that so to read the subsection was to read into it the words "existence of the" as though the subsection had said, not merely "with notice of "the condition," but "with notice of the existence of the "condition." But I think there are two answers to that. One is that his own argument would appear equally to require to be read into the subsection the words "the exact terms of" before the words "the condition." I think it also would require to be substituted for the word "notice" the word "knowledge"; and, if the judge was right, the adjective "actual" must also be understood in addition to the word "terms." A second answer is that what I am saying requires, in my judgment, no reading in of anything. "Notice of the condition" means, prima facie, I should have thought, "notice of the fact of the condition." That is what it says; and the only question is whether the notice which here was had was clear enough to indicate and bring to bear on the mind of the defendants the condition sought to be enforced. I think that the railway ticket cases do provide some assistance. They show what in certain circumstances will be notice of something by which one is later to be regarded as bound. It is, of

C. A.
1958
Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.
Lord Evershed M.R.

course, quite true that in the railway ticket cases the individual concerned and sought to be bound was making a contract of carriage and the notice on the back of the ticket was part of the contract. It was one of the terms of the contract. But then I come back to the significance of the last words of the subsection, "as if he had been party thereto"; for the presence of those words seems to me to justify approaching this case by asking the question: supposing the defendants here had made a contract with the plaintiffs for buying these two tyres and this circular had been one of the terms of the contract, would that have been sufficient notice of the condition within the meaning of the subsection? As I have said, I think these railway ticket cases lend substantial support to the view that it would have been. Indeed, as I understood Mr. Mervyn Davies's argument, if there had been such a contract, then this circular would have been sufficient notice, as that phrase is used in the subsection. Indeed, I understood Mr. Davies to go further and say that if his clients had in fact received not the whole of the trade price list but the end pages of it, headed "Conditions of Sale," that would have qualified as notice of the condition within the subsection, particularly (as I understand) because then it would have been made plain that there were exceptional cases—sale to a trader, for example—and it would have also brought to the mind of the defendants the significance of the words "directly or indirectly." But it still would not, of course, have informed the defendants what the actual price, expressed in pounds and shillings, was; and I find great difficulty, if the retailer is not to have full knowledge of the whole of the actual terms, in seeing where the line can properly be drawn. Fortunately, it is quite unnecessary in this case to attempt any precise statement of it. The question here is: Did these defendants, in the circumstances here proved, have notice of the condition as specified in the subsection? It certainly cannot be said that this circular said anything that was incorrect. It said that the price prescribed was the "appro-"priate" price; and that would, I should have thought, cover all the special cases in which the appropriate price might have been a somewhat special price or one different from the ordinary price. However that may be, I have, for the reasons I have stated at some length out of respect for Upjohn J., come to the conclusion that it is not right here to say that the words "notice of the "condition" must be interpreted as meaning "express notice "of the actual terms of the condition."

In the course of his judgment, Upjohn J. referred to an earlier decision of Harman J., known as *County Laboratories Ltd.* v. *J. Mindel Ltd.*[4] That case concerned the sale of a toilet article, a bottle of "Brylcreem," by the defendant which had been manufactured by the plaintiffs, and an attempt was made there to justify bringing proceedings against the defendant on the ground

[4] [1957] Ch. 295; [1957] 2 W.L.R. 541 and 746n.; [1957] 1 All E.R. 806 and 861n.

that he had sold this bottle at a price other than the list price. The ratio of Harman J.'s rejection of the plaintiff's claim in that action seems (as I follow it) to be that the defendant there did not and could not know that this bottle of "Brylcreem," having regard to the date of its manufacture or supply, was in truth covered by the price condition at all. In the present case, no such question of date has arisen. In those circumstances, the *County Laboratories* case [4] is not directly applicable to this case, and I prefer to say nothing further about it.

Mr. Mervyn Davies, by way of cross notice, also raised certain other questions. He intimated (but did not pursue the point) that the judge should not have drawn a certain inference of fact about these particular tyres; but that need not be further pursued, for reasons already indicated.

Finally, Mr. Davies said that, after all, his clients (as their name perhaps indicates) are not at all regular dealers in motor tyres. I think, according to Mr. Davies, they have only sold about twelve such tyres in the course of a year, and are not likely to sell more or as many hereafter; moreover, this is a case in which the breach of the condition was established by means, not of a genuine trading transaction, but of what is called a "trap order"; and therefore no injunction ought to be granted upon motion. As I ventured to point out to Mr. Mervyn Davies, the plaintiffs' concern is not so much that of defeating these defendants as that of trying to maintain fairly with their other customers these price conditions. Here there was an advertisement announcing quite boldly and without qualification a proposal to give a 10 per cent. discount on, among other things, motor tyres. It may be that this is a matter which is not at all likely now to be repeated by the defendants. Still, in my judgment, the plaintiffs having established (as I think they have) that the case is within the subsection, they are properly entitled to an injunction—on, of course, the usual terms on which injunctions are granted in the Chancery Division pending a trial. But it may be that it will be proper to consider, after my brethren have delivered their judgments, the taking of some form of undertaking, instead of the punitive injunction, from the defendants.

I think, for the reasons I have stated, the appeal should be allowed.

ROMER L.J. I agree, and I have very little to add.

It is, of course, quite true that as a general rule the equitable doctrines of constructive notice are not to be extended to purely commercial transactions. So much was decided in *Manchester Trust* v. *Furness* [5] and *Greer* v. *Downs Supply Co.*,[6] but it appears to me that no question of constructive notice arises in the present case. Either the defendants had express notice of the relevant price restrictions relating to Goodyear tyres or they

[4] [1957] Ch. 295.
[5] [1895] 2 Q.B. 539.
[6] [1927] 2 K.B. 28.

C. A.

1958

Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

Romer L.J.

had no notice at all. The notice relied on by the plaintiffs is the circular which was issued in April, 1957, by the British Motor Trade Association to which the Master of the Rolls has already referred. The defendants admit that that circular gave them notice that there was a restricted price for the Goodyear tyres, and that indeed is obvious from the terms of the circular itself. But the question is whether the notice which is contained in this circular, in addition to being an express notice, was sufficient for the purposes of section 25 of the Act of 1956. I do not go through the notice again, because my Lord has referred to it sufficiently in his judgment, but I will merely observe that after summarizing the effect of section 25 of the Act in paragraph (1), paragraph (2) gave express notice to the recipients of the circular, who were all traders in motor goods, that the manufacturers and concessionaires referred to in the schedule to the circular had imposed price restrictions on the goods specified in the schedule. Paragraph (4) informed the traders in perfectly clear terms that they might obtain details of the conditions as to the price prescribed for any of the specified products on application to the manufacturer or concessionaire concerned. The schedule gave the names of the manufacturers and concessionaires on whose behalf the circular was issued, their addresses and the products in respect of which conditions as to price had been prescribed.

The defendants say that that circular is insufficient for the purposes of section 25, because section 25, in referring to "notice "of the condition" means that nobody is to be affected by the section unless he had notice of the contents or terms of the price condition. The plaintiffs, on the other hand, say that the section only requires that notice should be given of the fact that there is a condition as to price, at all events when the notice contains directions as to how information as to the details can be obtained. That, in substance, is the issue between the parties, and it has to be decided in the light of the facts of this particular case. It appears to me that very considerable guidance is to be obtained on that question from cases which I gather were not brought to the attention of Upjohn J., cases which my Lord has conveniently referred to as the "railway ticket cases." For my part, I have obtained special assistance in the matter from *Thompson* v. *London, Midland and Scottish Ry. Co.*[7] I think that case and its fellow cases do tend to show quite clearly that in a case such as the present it is sufficient that notice should be given of the fact that there is a condition as to price if, as is the case before us, it is coupled with explicit directions as to how the details of the condition can be ascertained. It is true that the railway ticket cases were cases of express contract, but it does not seem to me that that fact detracts from the guidance which

[7] [1930] 1 K.B. 41.

one can gather from them in relation to the present case, especially having regard to the fact that section 25 is in substance dealing with contracts and putting the ultimate trader with notice into the position of an original contractor. But, for my part, even without the assistance that is to be derived from the railway ticket cases I should still, as a matter of mere construction of section 25 by itself, have preferred the meaning which is attributed to it on behalf of the plaintiffs rather than that which the defendants contend for. It seems to me, as a matter of commercial common sense, that a trader should be regarded as having notice of a price condition provided that he is told that such a condition exists and is further told how he can get details of the condition.

Accordingly, I agree with my Lord in thinking that this appeal should be allowed; and I have nothing to add to what he has said upon the cross notice of appeal or upon the relief which is appropriate to our decision.

ORMEROD L.J. I am of the same opinion. The short point in the case is whether the circular issued by the British Motor Trade Association of April, 1957, gave to the defendants sufficient notice of the condition as to price restriction so as to bring them within section 25 (1) of the Restrictive Trade Practices Act, 1956. It is not disputed that the circular was received by them and that it was given by the British Motor Trade Association in their capacity as agents for the plaintiffs. Therefore, the defendants concede that they did in fact receive such notice as was given by the circular. It follows that the defendants had notice of the fact that there was a condition that the plaintiffs' goods should not be resold or offered for resale at a price other than the appropriate price, or, to follow the words of the subsection, they had notice that the goods had been sold by a supplier subject to a condition as to the price at which those goods might be resold. If the question were being considered of the terms of a contract between the plaintiffs and defendants, then there can be no doubt, and indeed it is admitted by Mr. Davies, that the defendants would be bound by the terms, notice of which was set out in the circular. There is ample authority for that proposition, if such were needed, in what have been called in this case "the "ticket cases" to which full reference has been made by my brethren.

It would seem, therefore, on the face of it, that if the notice contained in the circular was sufficient to establish the terms of a contract between the parties, it should also be a sufficient notice under section 25 (1) of the Restrictive Trade Practices Act. The judge took a different view. He took the view that, as the statute restricted to some extent freedom of trading, it must be strictly construed and, in his view, the section required express notice of the actual terms and

C. A.

1958

Goodyear Tyre and Rubber Co. (Great Britain) Ltd. v. Lancashire Batteries Ltd.

Ormerod L.J.

conditions sought to be enforced. In my judgment, this is too narrow a construction to put upon the section. As the Master of the Rolls has pointed out, the section does not specify knowledge of the condition. The operative word is "notice." The object of the section is to put a person dealing with goods in the same position as he would have been if he had been a party to the contract with the original supplier, provided that he has notice of the condition in question. In my judgment, the notice which the section contemplates is notice of the fact of a condition as to the price at which the goods may be resold. It is unnecessary, I think, again to deal with the actual terms of the circular beyond saying that, in my judgment, it is clear (and it is not disputed by the defendants) that the circular does contain a notice of such condition. In those circumstances, it appears to me to follow that the defendants, when they purchased these goods for resale, did so with notice of the condition as to price restriction.

I agree that the appeal should be allowed.

Appeal allowed. [The following undertaking was given by the defendants "not to resell or offer for resale any tyres, "tubes or other goods manufactured by the plaintiffs and sold "by them after November 2, 1956, at prices other than the "respective prices prescribed by the plaintiffs for the resale "of such goods: provided that this undertaking shall not extend "(*a*) to the resale by the defendants of any goods acquired by "the defendants otherwise than for the purpose of resale in "the course of business or acquired by the defendants whether "immediately or not from a person who has acquired such "goods otherwise than for the purpose of resale in the course "of business, or (*b*) to the resale of any goods pursuant to an "order of any court or by way of execution or distress or "to any goods acquired by the defendants whether immediately "or not after such resale."]

Leave to appeal to the House of Lords refused.

Solicitors: *Osmond, Bard & Westbrook; Gregory, Rowcliffe & Co. for Read, Roper & Read, Manchester.*

E. D.

[COURT OF APPEAL.]

*LYONS v. CENTRAL COMMERCIAL PROPERTIES LONDON LTD.

C. A.

1958
May 13, 14, 16; *July* 7.

Morris and Ormerod L.JJ. and Harman J.

[Plaint No. 2604.]

Landlord and Tenant — Business premises (Security of tenure)—Discretion to grant new tenancy—Application for new tenancy—Landlord's notice of opposition, alleging breaches of covenant to repair—Contract for sale of tenant's interest, including any granted under Act, to third party—Breaches of covenant proved—Nature of judge's discretion to grant new tenancy—Irrelevance of contractual arrangement—Whether re-hearing appropriate—Misdirection not vitiating conclusion—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*a*).

The tenant of certain business premises which a third party was seeking to acquire in order to carry out a redevelopment scheme involving also adjoining properties, applied to his landlord for a new tenancy under the Landlord and Tenant Act, 1954.[1] The landlords served a notice of opposition stating that the tenant had committed breaches of his covenant to repair contained in his lease. Before the application was heard, the tenant contracted to sell to the third party his interest in the property, including anything which might be granted to him if his pending application succeeded; but the sale had not been completed when the application was heard. The landlords had been a party to the negotiations from time to time but at the date of the hearing negotiations between them and the third party had stopped, and

[1] Landlord and Tenant Act, 1954, s. 24 (1): "A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions "of this Part of this Act; and, sub-"ject to the provisions of section "twenty-nine of this Act, the tenant "under such a tenancy may apply "to the court for a new tenancy— ". . . (*b*) if the tenant has made a "request for a new tenancy in "accordance with section twenty-six "of this Act."

S. 29 (1): "Subject to the provi-"sions of this Act, on an application "under subsection (1) of section 24 of "this Act for a new tenancy the court "shall make an order for the grant of "a tenancy comprising such property, "at such rent and on such other "terms, as are hereinafter provided."

S. 30 (1): "The grounds on which "a landlord may oppose an applica-"tion under subsection (1) of section "24 of this Act are such of the follow-"ing grounds as may be stated in the "landlord's notice under section 25 of "this Act or, as the case may be, "under subsection (6) of section 26 "thereof, that is to say—(*a*) where "under the current tenancy the tenant "has any obligations as respects the "repair and maintenance of the hold-"ing, that the tenant ought not to be "granted a new tenancy in view of "the state of repair of the holding, "being a state resulting from the "tenant's failure to comply with the "said obligation; (*b*) that the tenant "ought not to be granted a new "tenancy in view of his persistent "delay in paying rent which has "become due; (*c*) that the tenant "ought not to be granted a new ten-"ancy in view of other substantial "breaches by him of his obligations "under the current tenancy, or for "any other reason connected with the "tenant's use or management of the "holding . . ."

S. 31 (1): "If the landlord opposes "an application under subsection (1) "of section 24 of this Act on grounds "on which he is entitled to oppose it "in accordance with the last fore-"going section and establishes any of "those grounds to the satisfaction of "the court, the court shall not make "an order for the grant of a new "tenancy."

C. A.

1958

Lyons
v.
Central
Commercial
Properties
London
Ltd.

the future was obscure. At the hearing breaches of covenant were admitted, but the tenant sought to explain them by the fact that both before and after his application had been put in, the redevelopment scheme had been in the air, and if it had been carried out it would have involved alteration or demolition of the property, and he undertook to remedy the breaches. The judge refused the application, finding that serious breaches had been proved and that the tenant had done nothing for over a year to remedy them. After commenting that the action was brought not to secure the sitting tenant but to secure the premises for the third party, the judge concluded by saying that the applicant was "not the sort of person who was likely to be a tenant to whom he would give relief." On appeal:—

Held, (1) that in considering the contractual arrangement with the third party the judge had taken account of extraneous matters whilst exercising his discretion, and to that extent had misdirected himself, but it did not follow that the conclusion which he had reached was necessarily wrong.

(2) (Morris L.J. dubitante), that the findings as to the relevant matters were such that the court in the proper exercise of the discretion could reach only one conclusion, namely that a new tenancy should not be granted and that, accordingly, the case should not be remitted but the court should refuse to order a new tenancy.

Per Morris L.J. The matter ought to be sent back for a rehearing, for it was not clear that if the extraneous matter had been excluded, the judge would, in a proper exercise of his discretion, necessarily have found that a new tenancy ought not to be granted.

Per Harman J. The discretion vested in the court under section 30 (1) (*a*) is limited to considering the past conduct of the tenant as a tenant, and must be distinguished from the wide discretion conferred by sections 33 and 35.

Appeal from Judge Andrew, sitting at Bow County Court.

The following statement of the facts is taken substantially from the judgment of Morris L.J.

The landlords, Central Commercial Properties London Ltd., were the freeholders of premises known as 62, High Street, Walthamstow. In 1935 their predecessors in ownership, Hanway Estates Ltd., granted a lease of the premises to Mrs. Hannah Lyons, the mother of the applicant, for a term of 21 years from March 25, 1935, at a rent of £250 a year. The lease contained repairing covenants binding the lessee. The premises consisted in part of a shop. It was only to be used for the trade or business of a hosier and draper and general outfitter. The remaining parts of the premises were only to be used for such trade or business, or as a private residence. The premises were not to be assigned nor was there to be underletting or parting with possession, without the previous consent in writing of the lessor—which consent was not to be withheld to an assignment or underletting of the premises to a respectable and responsible person.

The applicant became the underlessee of the premises for the term of his mother's lease less the last three days. The applicant was the owner of certain freehold land which lies to the rear of

No. 62 High Street and which is also to the rear of the premises on either side of No. 62 High Street.

In the autumn of 1954 tripartite negotiations were started between the applicant of the one part, the landlords of the second part and a company called Littlewoods Mail Order Stores Ltd. (hereinafter called Littlewoods) of the third part. Littlewoods owned nos. 58, 58A and 60 High Street. The lease of the premises had about 18 months to run when the negotiations began. These proceeded on the lines that the applicant would assign his lease to Littlewoods, and would convey the freehold land at the back to them: that Littlewoods would then surrender the lease to the landlords, who would then grant a new lease (for 21 years at £550 a year) to Littlewoods. A new lease was drafted and a copy of the proposed new lease was before the court at the hearing of the appeal. The agreement of the landlords to this plan was marked by their giving written consent to the assignment of the head lease to the applicant: for during the negotiations it was realized that all that the applicant had was an underlease for the term of his mother's lease less the last three days.

Those negotiations did not result in any concluded agreement, not because of any unwillingness on the part of the landlords but because the applicant in about March, 1955, became aware of his rights under the Landlord and Tenant Act, 1954. The negotiations at that stage were, therefore, halted. The landlords then instructed surveyors to inspect the demised premises, and in June, 1955, they served a schedule of dilapidations upon the applicant. The next step was that, under the provisions of section 26 of the Landlord and Tenant Act, 1954, the applicant, on August 30, 1955, made a written request for the grant of a new tenancy to commence on the expiry of the current lease, that is, March 25, 1956. By a notice given under the provisions of the same section, and dated October 28, 1955, the landlords intimated that they would oppose an application to the court for the grant of a new tenancy, and stated their ground of opposition to be that the tenant had failed to comply with his obligation to repair and maintain the premises. By originating application dated December 8, 1955, the applicant applied to the court for the grant of a new tenancy. The answer of the landlords was dated December 15, 1955. By this time there had been a resumption of the tripartite negotiations and, accordingly, the court was asked in January, 1956, to adjourn by consent the hearing of the application sine die.

Negotiations had been resumed in November, 1955. Though the general plan still involved that Littlewoods should become the tenants of the landlords, there were certain important variations in the proposed arrangements. The applicant was to assign his lease to No. 62 High Street to Littlewoods, and to sell to them the freehold land at the back: Littlewoods were then to surrender the lease to the landlords, and to convey the back land to them free of charge, and also to convey to them free of charge the

C. A.
1958
Lyons
v.
Central Commercial Properties London Ltd.

adjoining freehold premises consisting of Nos. 58, 58A and 60 High Street, which Littlewoods already owned: the landlords were then to grant a lease to Littlewoods of the whole site consisting of Nos. 62, 60, 58 and 58A High Street and the freehold land at the back: the letting was to be by a 99 years' building lease at a rent of £1,000 a year. The scheme was, therefore, that Littlewoods, being given possession of the whole site, would demolish the existing buildings and erect one new building.

Before the scheme could be agreed, it was recognised that it was for Littlewoods to come to terms with the applicant and to arrange for his departure. A contract of sale between Littlewoods and the purchasers, and the applicant as vendor, was eventually agreed on June 27, 1956. Littlewoods were to purchase for £5,000. The property to be purchased was described as follows: "Firstly all that messuage shop and premises situate on the south "side of High Street in the Parish of Walthamstow in the County "of Essex and known as 62 High Street Walthamstow aforesaid "as demised by a lease dated April 15, 1935 and made between "Hanway Estates Ltd. of the one part and Hannah Lyons of the "other part for the term of 21 years from March 25, 1935, at "the yearly rent of £250 and subject to the covenants and con-"ditions on the part of the lessee therein contained And secondly "the freehold land at the back of 60/66 (even numbers) High "Street, Walthamstow in the County of Essex as registered at "H.M. Land Registry with possessory title under Title No. "EX 35275."

There were certain riders to the contract, one of which included the words: "There is included in this sale any new "lease or tenancy agreement granted to the vendor pursuant to "the Landlord and Tenant Act, 1954, or otherwise in respect "of the leasehold premises hereby agreed to be sold and all the "rights of the vendor in respect of such leasehold premises con-"firmed by the said Act." The property was sold with vacant possession, and completion was to be on August 14, 1956.

Some delay took place and the applicant remained in possession. The delay was not occasioned by the applicant but resulted because of negotiations to obtain a right of way over certain adjoining freehold land in order that there could be a side entrance to the new projected building so as to avoid loading and unloading taking place in the street. Because of the delay the applicant and Littlewoods arranged a variation of the terms of their contract of June 27, 1956. Completion was to be on the expiry of a two months' notice which either party was to be at liberty to give: the deposit, consisting of 10 per cent. of the £5,000, was to be released to the applicant: and the applicant was to make a stated payment per month until completion.

By the beginning of February, 1957, the negotiations had reached a stage when a building agreement between Littlewoods and the landlords had been prepared. The landlords had signed their part and were ready to exchange: Littlewoods had not

signed their part. Then for some reasons which were not stated a telegram was sent on Littlewoods' instructions as follows: "Informed today our clients still in state of negotiation. Com- "pelled to state all offers (if any) to exchange documents "withdrawn."

At the time of the hearing of the appeal the position as regards the plan between Littlewoods and the landlords was not clear, but all parties recognized that the claim of the applicant for a new lease of No. 62 High Street had merely been postponed, though it had been expected that agreement would be reached between the landlords and Littlewoods on the lines which were being negotiated, in which event the applicant and his claim would disappear. After the negotiations broke down in February, 1957, the applicant's claim remained, though because of the terms of the agreement of June 27, 1956, it existed for the benefit of Littlewoods.

The claim eventually came before the judge at Bow County Court in December, 1957. The applicant gave evidence to the effect that he had established a profitable business which possessed a considerable goodwill, and that he proposed to continue to trade until such time as Littlewoods wished to take over: he expressed the hope that Littlewoods would defer giving the two months' notice which they were entitled to give to him. It was disclosed by the applicant that Littlewoods were paying the costs of the application.

The judge dismissed the application and the applicant appealed.

H. Heathcote-Williams Q.C. and *Gerson Newman* for the applicant.

Maurice Lyell Q.C. and *Anthony C. Goodall* for the landlords.

The following cases were referred to in argument: *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[2]; *Briddon* v. *George*.[3]

Cur. adv. vult.

July 7. MORRIS L.J. (having stated the facts as set out above). As the only ground which the landlords had given for opposing a new lease was that the applicant had failed to comply with his obligation to repair, the issue before the judge depended in the main upon a consideration of section 30 (1) (*a*) of the Landlord and Tenant Act, 1954. The opening words of that section are as follows: "The grounds on which a landlord may "oppose an application under subsection (1) of section 24 of "this Act are such of the following grounds as may be stated "in the landlord's notice under section 25 of this Act or, as "the case may be, under subsection (6) of section 26 thereof,

[2] [1958] Ch. 437; [1958] 2 W.L.R. 1.

[3] [1946] 1 All E.R. 609.

C. A.
1958
Lyons
v.
Central Commercial Properties London Ltd.
Morris L.J.

"that is to say—(*a*) where under the current tenancy the "tenant has any obligations as respects the repair and main-"tenance of the holding, that the tenant ought not to be "granted a new tenancy in view of the state of repair of the "holding, being a state resulting from the tenant's failure to "comply with the said obligation; (*b*) that the tenant ought not "to be granted a new tenancy in view of his persistent delay in "paying rent which has become due; (*c*) that the tenant ought "not to be granted a new tenancy in view of other substantial "breaches by him of his obligations under the current tenancy, "or for any other reason connected with the tenant's use or "management of the holding."

[His Lordship read sections 29 (1) and 31 (1) and continued:]

The question in the present case was, therefore, whether the landlords could establish to the satisfaction of the judge that the applicant "ought not" to be granted a new tenancy in view of the state of repair of the holding being a state resulting from the applicant's failure to comply with his obligations as respects the repair and maintenance of the holding. It is clear from the facts of this case that there was a considerable period, during the negotiations, when any question of disrepair of the holding was of no practical consequence at all. The plan was and the expectation was that the building would be demolished. But when negotiations broke down and the application of the applicant came to be restored, then the issue as to disrepair revived. But if the landlords and Littlewoods again renew negotiations, the state of the premises may again become of secondary importance to the landlords. After the negotiations had broken down the landlords wrote a letter to the applicant which was dated July 8, 1957, and which was in the following terms: "I expect that you are quite often in the West End and "I am wondering if you would care to call here for a chat with "me, in the near future, bringing your solicitor if you wish. "There is a baffling and very unsatisfactory position in respect "of No. 62 High Street and the adjoining property acquired by "Littlewoods Mail Order Stores. I am anxious to clear it all "up without further delay and I believe that a chat with you "would go a long way towards it, likewise that it could not be "other than mutually beneficial. As I am quite often out, or "otherwise engaged, could I trouble you to telephone me a day "or two in advance, to fix a convenient time?"

The applicant gave evidence that after receipt of that letter he had an interview with the managing director of the landlords. The note of the evidence reads as follows: "He asked me "whether I was sure of my position with Littlewoods to com-"plete a deal which had fallen through with the landlords. He "asked me whether I would disclose my documents and I agreed "to do so and authorized my solicitors to that effect. There "was no suggestion that my application for a new tenancy was "in danger."

At the hearing before the judge much evidence was given in regard to the state of repair of the premises. The applicant expressed willingness to give an undertaking to carry out all the work for which he was liable under the lease. The judge refused the application and in the course of his judgment he said: "I have had the advantage of hearing Mr. McFarlane for "the landlords and Mr. Jennings for the applicant. Both "are well-known surveyors and have great experience. Mr. "McFarlane says the premises are very bad indeed and would "cost £1,533 to put into conformity with the covenants in the "lease. According to Mr. Jennings not nearly so serious and his "figure was £530. Even Mr. Jennings has had to confess serious "breaches, and it is perfectly plain that there are breaches "of covenant both as to outside and inside and painting "as well. He (Mr. Jennings) said the tenant should have "carried out painting in 1955. Even Mr. Lyons said 'I have not "'bothered about covenants of my lease.' His counsel has "undertaken on his behalf to do all repairs necessary in order to "comply with the lease, and he contends that the landlords will "not, therefore, suffer. Counsel has stated that as long as "negotiations were going on and that the premises were "certainly going to be altered only natural that the tenant "would spend as little as possible. I entirely agree, and I have "to agree if this were a case of a small man who would lose "his livelihood, I would have said despite the breaches I would "grant a new lease. The Act was passed to protect tenants. "The facts do not fall within the usual framework, because of "the name of Littlewoods appearing. I have come to the con-"clusion that this action is brought not to secure the sitting "tenant but to secure the premises for Littlewoods; the purpose "of the Act was to secure the sitting tenant. There were "severe breaches of covenant. Although the tenant had nearly "a year to remedy the breaches he did not do so. The applicant "is not the sort of person who is likely to be a tenant to whom "I should give relief."

With every respect I think, as Mr. Heathcote-Williams submitted, that there are certain difficulties in that reasoning. It seems to me that the judge was considerably influenced in reaching his conclusion by the circumstance that Littlewoods came prominently into the story, and that a new lease might enure for their benefit. But if the applicant in the exercise of his statutory rights was in a position to obtain a new lease, his rights ought not to be defeated because of any contractual arrangements that he may have made with Littlewoods. No question as to the meaning or effect or enforceability of those arrangements arises for consideration in these proceedings.

I consider, therefore, that the application should go back for rehearing unless it can be said that the finding of the judge that there were serious breaches of covenant concludes the issue adversely to the applicant. The question arises whether any and

C. A.
1958
Lyons
v.
Central
Commercial
Properties
London
Ltd.
Morris L.J.

if so what nature of discretion is given to the court by the words of section 30 which have been quoted above.

Mr. Maurice Lyell submitted in the first place that although the words "that the tenant ought not to be granted a new "tenancy" denoted a discretion, the discretion given to the court was merely a discretion to determine as to the substantiality of a tenant's failure to repair and maintain. Mr. Lyell submitted that if the court in its discretion determined that a failure was serious or substantial, then the court was inevitably obliged to refuse to grant a new tenancy. I do not feel able to accept that submission. If that had been the intention of Parliament, it would have been easy to enact that one ground of opposition should be that the tenant had been guilty of serious failure to repair. It is to be noted that paragraph (*c*) of section 30 (1) reads: "that the tenant ought not to be granted a new tenancy "in view of other substantial breaches by him of his obligations "under the current tenancy, or for any other reason connected "with the tenant's use or management of the holding." This wording suggests that the discretion to be exercised (denoted by the words "ought not to") is a discretion which falls to be exercised after the time when "substantial" breaches are proved. Were it otherwise, it would have sufficed to enact that a ground of opposition should be that the tenant had been guilty of other substantial breaches of his obligations.

This approach is further suggested by a consideration of the wording of paragraph (*b*), namely—"that the tenant ought not "to be granted a new tenancy in view of his persistent delay "in paying rent which has become due." The words "ought "not to be granted a new tenancy" are really given no meaning if the position is that a new tenancy must be refused as soon as it is shown that there has been persistent delay in paying rent. It would have been simple to enact, had it been so intended, that a ground of opposition should be that a tenant has been guilty of persistent delay in paying rent.

I, therefore, consider that a measure of discretion is given to the court which may be exercised after it is shown that a tenant has failed to comply with obligations to repair and maintain, or has persistently delayed in paying rent which has become due, or has been guilty of other substantial breaches of his obligations under the current tenancy. It is to be noted that the discretion is one whereby a tenant may be deprived of that which under the Act he was in a position to receive. The discretion does not operate to give something, but to take away something.

Mr. Lyell alternatively submitted that the discretion vested in the court is limited so that a court must only consider such matters as may be explanatory of past defaults, or may be of an exculpating nature in regard to past defaults, or may be indicative that in the future there will be good behaviour in

regard to the honouring of obligations. Linked with this submission Mr. Lyell urged that the judgment of the judge showed that he had found that there were "severe" breaches, but did not show that there were circumstances which palliated or mitigated the breaches. Mr. Lyell submitted, therefore, either that the judgment should be read as deciding that discretion should be exercised against the applicant, or that on the facts as found the only proper conclusion was that a new tenancy ought to be refused.

Mr. Lyell's analysis of the scope and function of the discretion which is to be exercised is very helpful. But where Parliament has not precisely defined, I would hesitate to adopt any particular formula as being all embracing or which might be thought to be restrictive or definitive. I do not think that it is desirable to say more than that once a court has found the facts as regards the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future that is being considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him.

I find it impossible to resist the conclusion that the judge was much influenced by the circumstance "of the name of "Littlewoods appearing." But the question arises whether on a different approach there would inevitably be an exercise of discretion so as to refuse a new tenancy. Though the breaches were described as "severe," the judge said that if it had been a case of a small man who would lose his livelihood, he would have said, despite the breaches, that he would grant a new lease. Though the reference to the "small man" is not defended by counsel as denoting any justifiable test, the passage may indicate that the judge was not of opinion that, because of the state of disrepair, he would necessarily exercise a discretion against the applicant.

So far as the recent period is concerned, there was a rather special history, and it must be an important feature of the story that the landlords were ready to make arrangements with Littlewoods, and were even in July, 1957, telling the applicant that the deal with Littlewoods might be completed. If the case had been dealt with on the footing that the applicant, who had carried on a successful business on the premises for about 20 years, was applying for a new lease for himself, then even though there was a state of disrepair, I do not consider that the facts showed that the applicant would inevitably encounter an adverse exercise of discretion which would defeat his application.

Had the matter rested with me, I would have thought that the appropriate course was to remit the case for further hearing before

C. A.
1958
Lyons
v.
Central
Commercial
Properties
London
Ltd.

the judge, while expressing no view as to what should be the outcome. It might or might not be that after such further hearing the result would be the same. But, as my Lords are of the opinion that on the judgment of the judge the tenant ought not to be granted a new tenancy, and as on this view the result reached by the judge was correct, it follows that the appeal fails.

Ormerod L.J. I agree. The applicant in this case applied to the court for the grant of a new lease under the Landlord and Tenant Act, 1954. The landlords, in view of section 30 (1) (*a*) of the Act, opposed the grant on the ground that the tenant had been guilty of a breach of his covenant to repair, and the county court judge has upheld the objection, and refused to make an order for a new lease. The question at issue in the appeal is whether the judge has taken into account extraneous matters in coming to his decision; and it is necessary to consider what, if any, discretion is vested in the judge in considering objections which fall within section 30 (1) (*a*). The first three paragraphs of section 30 (1) have already been read, and I do not propose to repeat them here.

It is clear from the words of the section that there is a measure of discretion as regards the state of disrepair. The words are "ought not to be granted a new tenancy in view of the state of "repair of the holding." Paragraphs (*b*) and (*c*) respectively refer to the "persistent delay" of the tenant in paying rent, and "other substantial breaches" by the tenant of his contractual obligations. These provisions seem to indicate that the neglect to repair to which the section refers should be substantial. But the word "ought" in the section in my judgment implies that the discretion of the judge is not confined to the consideration of the state of repair. Without attempting to define the precise limits of that discretion, the judge, as I see it, may have regard to the conduct of the tenant in relation to his obligations, and the reasons for any breach of the covenant to repair which has arisen.

For example, in the present case there were negotiations proceeding at one time for the sale of the premises to Littlewoods, which if successful would have resulted in the premises being demolished. It might well be regarded as unreasonable to expect the tenant to expend money on repairs during such negotiations. On the other hand, there would appear to be no reason for failing to carry out the repairs after the negotiations were terminated. The object of paragraphs (*a*), (*b*) and (*c*) of section 30, as I see it, is to enable the judge to refuse to grant a new lease to a tenant who has shown himself to be unsatisfactory in the performance of his obligations under the contract of tenancy.

It is clear from his judgment that the judge considered the lack of repair to be serious, but he took into consideration the fact that the tenant had contracted to assign his interests in the premises to Littlewoods. He said: "I have come to the con-"clusion that this action is brought not to secure the sitting

"tenant but to secure the premises for Littlewoods." It was argued that in spite of this passage in his judgment, the facts as found by him were such that there could be no proper exercise of his discretion other than to refuse to make an order for a new lease.

The contract with Littlewoods had, in my view, no bearing on the case. The question was one to be tried between the landlords and the existing tenant, and it was his breaches and his conduct which were material. It remains to be decided whether the case should be sent back for reconsideration by the judge, or whether on the material before this court an order should be made. It is true that the judge said: "If this were a case of a small man "who would lose his livelihood, I would have said despite the "breaches I would grant a new lease." It may be said that this is an indication that he might, if the case were sent back to him, exercise his discretion in favour of the tenant, although it may very well be that in saying this the judge was regarding himself, as he indicated early in his judgment, as having an overall discretion similar to that given by the Rent Acts. On the other hand, he found that there were severe breaches of covenant; that although the tenant had had nearly a year to remedy the breaches, he did not do so, and his final observation was: "The applicant "is not the sort of person who is likely to be a tenant to whom I "should give relief."

In these circumstances, in my judgment, this court can and should deal with the application and confirm the judge's refusal to make an order for a new lease. I would dismiss the appeal.

HARMAN J. I agree. The applicant admitted in the witness-box that he had an indemnity from Littlewoods for his costs, and it is evident that he has no financial interest in the appeal. He will get his £5,000 under his contract with Littlewoods whatever the result of the appeal; he is a mere trustee. It is clear, therefore, that in effect the appellant here is Littlewoods, using the name of the applicant, who still has such legal estate in the property as the Act of 1954 gives him. The substantial ground of appeal is that the judge, in dismissing the application, took the last-mentioned facts into account and was not entitled so to do, and thus misdirected himself and came to a wrong conclusion.

Section 31 of the Act of 1954 provides that if the landlord opposes an application for a new lease on one of the grounds set out in section 30, and establishes any of those grounds to the satisfaction of the court, it "shall not make an order for the grant of a new tenancy." The court, therefore, has no discretion if any of these grounds be established to its satisfaction. The ground relevant here is that under section 30 (1) (*a*), which has already been read by my Lord. It is to be observed that the words "ought not to be granted" are common to subsections (*a*), (*b*) and (*c*), which depend alike on the conduct of the tenant in

C. A.
1958
Lyons
v.
Central Commercial Properties London Ltd.
Harman J.

relation to the lease; the remaining subsections are concerned with the landlord.

Now it was proved before the judge that there were very serious breaches of the repairing and decorating covenants existing here. These went back at least to 1955, and the applicant's surveyor admitted that a great deal of the work specified in the schedule served by the landlords in June, 1955, was within the repairing covenants and ought to have been performed by the applicant, and that he had so advised him. None the less, no effort was made by the applicant, and none has yet been made, to comply with his obligations, and he actually went so far in the witness-box as to say that he had never bothered about the covenants in his lease. The excuse put forward is that while negotiations were going on with Littlewoods—that is to say, from the autumn of 1954 until March, 1955, and again from November, 1955, to February, 1957—there seemed no need to put into repair property which was likely to be demolished. The applicant and Littlewoods on his behalf offered to comply with all the covenants if a new lease were granted, and it was argued that in these circumstances a new lease ought to be granted.

Now it appears to me that if the judge with these facts before him had decided to refuse the application, his decision would have been unimpeachable. In my judgment, paragraphs (*a*), (*b*) and (*c*) of section 30 (1) must mean that where the tenant is proved during the currency of the former lease to have been a bad tenant, no new lease ought to be granted unless some exculpating circumstances are enough to excuse the tenant's misdoings. The court must look at the position at the time when the application comes before it—see *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*, *per* Birkett L.J.[1]—and if the landlord then satisfies the court that there have been substantial breaches either of repairing covenants or in payment of rent, or any other obligations under the tenancy, the court ought to refuse any lease under section 31 whatever promises may be made in the future. Of course, a landlord may have waived the breaches, as it is said was done here, or there may be a sufficient excuse as explained above.

In my judgment, the discretion vested in the court under section 30 (1) (*a*), (*b*) and (*c*) is a narrow one; it is limited to the question whether, having regard only to the grounds set out, a new tenancy "ought not" to be granted. This must mean, I think, whether, having regard to the tenant's past conduct as a tenant, it would be equitable to exclude the landlord from his property for a further term or to foist the tenant on him contrary to the contract.

A wider discretion appears to be conferred on the court once it has decided to grant a new tenancy. Under section 33 the

[1] [1957] Ch. 82, 84; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1 (C.A.).

court, in considering duration, is to have regard to what is reasonable "in all the circumstances," while under section 35 the terms of the tenancy, other than duration and rent, must be settled by the court having regard to the terms of the current tenancy "and to all relevant circumstances."

It appears to me that on a fair reading of the judge's judgment he was under the impression that he had the wider discretion, and that, considering himself entitled to have regard to all relevant circumstances, he did take into account in arriving at his conclusion the fact that the applicant was not the true applicant but a mere trustee. This seems to me to be the only inference that can be drawn from the judge's statement that "if "this were a case of a small man who would lose his livelihood, "I would have said despite the breaches I would grant a new "lease."

It does not, however, follow from the fact that the judge misdirected himself in this respect that he came to a wrong conclusion. Treating the applicant as the tenant, and looking at him only as a tenant, the judge was, as I have said, in my view amply justified in refusing a new lease, and the fact that he would have granted one, if circumstances had been other than they were, does not seem to me to vitiate his conclusion. He did, as his judgment shows, take into account the breaches of the repairing covenants, and the conduct of the appellant in that connexion.

The question for this court, then, is whether we ought to remit the matter to the county court judge for further consideration, leaving out of account the transaction of the applicant with Littlewoods, or whether we are in a position to come to a conclusion ourselves. For myself I think we are. All the facts are before us. I cannot see how the court could reach any other conclusion but that, having regard to the breaches of covenant, a new tenancy "ought not" to be granted to this tenant.

I may be permitted to add perhaps that it seems to me regrettable that the legislature should not have seen fit to trust the judiciary with a full discretion in matters of this kind. The present case shows the absurdity, for this application is not really the tenant's application at all, but Littlewoods' application. They are not the occupying tenants for whom the Act, as its long title shows, was intended to provide. Indeed, when considering the new tenancy under sections 33 and 35, to which I have referred, I think the court might well conclude that a new tenancy should only last for so short a time as would make it unacceptable.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. Davis & Co.; Forsyte, Kerman & Phillips.*

E. D.

[PROBATE, ETC., DIVISION.]

1958
July 17.

Sachs J.

* SCHLESINGER *v.* SCHLESINGER.

Husband and Wife — Alimony pendente lite — Judicial separation — Appeal pending—Appeal by wife against her own decree—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (1).

A wife, who had herself obtained a decree of judicial separation, gave notice of appeal to the Court of Appeal by which she sought to have her decree set aside and a rehearing ordered, on which she would seek a second decree of judicial separation on additional grounds. To avoid any risk of prejudicing her position in the event of an application for permanent alimony being held to amount to an approbation of the original decree, she applied, instead, for an order for alimony pendente lite:—

Held, that, since a notice of appeal revived the original lis, it did not matter which party filed that notice even though, as in the present cause, the wife by her appeal sought to have the decree in her favour set aside; the wife was, therefore, entitled to apply for alimony pendente lite.

Loveden v. *Loveden* (1810) 1 Phill.Ecc. 208, *Jones* v. *Jones* (1872) L.R. 2 P. & D. 333, *Dunn* v. *Dunn* (1888) 13 P.D. 91; 4 T.L.R. 399, *Bevis* v. *Bevis* [1935] P. 22; 50 T.L.R. 596 and *Cavendish-Bentinck* v. *Cavendish-Bentinck* [1949] P. 203; 65 T.L.R. 37; [1948] 2 All E.R. 285 applied.

M. v. *M.* [1928] P. 123; 44 T.L.R. 299 distinguished.

Summons adjourned into court for judgment on an appeal from the registrar relating to ancillary relief.

In December, 1953, the wife filed her petition for judicial separation on the grounds of her husband's adultery with two women, and on the grounds also of his cruelty. The petition contained a prayer for alimony pendente lite. A supplemental petition alleged adultery with two other women. During the period before the cause came on for trial various steps were taken in relation to the question of that alimony, but in fact no order was made. In the meanwhile the husband was paying to the wife £3,000 per annum free of tax, and £600 per annum free of tax in respect of each child (in addition to school fees, doctors' bills and so forth).

On May 12, 1958, the cause came on for trial before Davies J. and a decree of judicial separation was granted to the wife on the grounds of her husband's adultery with one woman named in the decree and two other women. On May 13, 1958, the wife, by her solicitors then on the record, issued a notice of application for an order for permanent alimony for herself and for the two children of the marriage.

On June 2, 1958, the wife caused herself to be placed on the record as appearing in person. On the same day she sought an appointment with the registrar for dealing with the question of alimony, which was arranged for June 16, 1958. On June 16, 1958, she gave notice of appeal to the Court of Appeal in relation to the decree which she had herself obtained. The

effect of that notice was to ask that the decree of May 12, 1958, be set aside, that there should then be a rehearing of the suit, and that a decree of an identical nature to that of May 12, 1958, be granted—but upon further grounds in addition to that on which the court acted on that date.

On the same day, June 16, 1958, the wife appeared before Mr. Registrar Kinsley upon the appointment which had been granted on June 2, 1958. There the wife (who, his Lordship observed, had clearly, since her solicitors ceased to be on the record, been by no means wholly deprived of assistance on legal points) asked the registrar to deal with the matter as on an application for alimony pendente lite. Her reason for so doing was that she was anxious lest her appeal should be prejudiced by any appearance on her part of seeking to take advantage of the decree of May 12, 1958, against which she was appealing. Upon this appointment the registrar also had before him an application on behalf of the husband, who was seeking to combat the application for permanent alimony, asking that the matter be adjourned for him to file an affidavit as to his means.

It was not entirely clear whether the registrar treated the matter before him as being partly the application of May 13, 1958, and partly the original request for alimony pendente lite, or what other view he took of the exact technical position. In practice, however, he had dealt with the matter as if both applications were at the same time before him. To facilitate any further proceedings after the hearing, whether by way of appeal or by way of the implementation of the order which would be made, an amendment of the summons of May 13, 1958, so that it covered in the alternative both alimony pendente lite and permanent alimony, was made at the suggestion of his Lordship during the hearing of this appeal.

After hearing the wife in person and the husband by his solicitor, the registrar came to the conclusion that the wife could no longer be heard to ask for alimony pendente lite and that the husband should have a reasonable opportunity to file an affidavit in relation to the claim for permanent alimony. In those circumstances he made an order which had the effect of ruling that there could be no further proceedings for alimony pendente lite and that the matter should be adjourned until July 21, 1958, the husband being given until that date the opportunity of filing an appropriate affidavit on the footing that the wife was proceeding for permanent alimony.

The wife appeared in person.
Victor Williams for the husband respondent.

Argument was in chambers.

SACHS J. stated the facts substantially as set out above and continued: The matter now comes before me on appeal with the

1958

Schlesinger v. Schlesinger.

Sachs J.

object of obtaining a decision as to what basis the registrar should adopt on July 21, 1958, for any decisions he may then have to reach. It is not intended here to deal with, and I do not propose to consider, any of the merits of the matter in which the wife says, and the husband denies, that she is entitled to alimony very far in excess of what has hitherto been paid her by way of voluntary allowance. In effect a ruling is required as to whether the wife's application on July 21, 1958, should properly be treated as an application for alimony pendente lite, or alternatively as an application for permanent alimony. Consideration was also requested of the question as to whether by reason of the wife's notice of appeal to the Court of Appeal the position has been reached that she cannot in effect get either—apparently on the grounds that on the one hand she has ceased to be entitled to alimony pendente lite but on the other cannot proceed with an application for permanent maintenance save upon the footing that she is so approbating the decree under appeal as to disentitle her to proceed therewith.

It is convenient here to note a point of procedure which arose when it was indicated that by reason of the points of law in issue the appeal would, after completion of argument, be adjourned into open court for judgment. Mr. Victor Williams, for the husband, claimed that as of right he could be heard again when the matter was listed in open court; but I ruled that no such right existed. On the other hand, I told him that if he desired to add any additional argument solely on a point of law today, he should, as a matter of courtesy, have leave, in the particular circumstances of this case, to put before the court any such submission as he might see fit.

I turn first to the question whether the wife can at this stage pursue any claim for alimony pendente lite. On this point it was submitted by Mr. Victor Williams, on behalf of the husband, on July 10, 1958, that no such claim can now be pursued because the wife has obtained a final decree of judicial separation and that the position is governed by *M.* v. *M.*[1] As against this the wife in person argued that that decision does not apply because in the present case there is an appeal pending, whilst in *M.* v. *M.*[1] that was not the position.

On this issue the registrar did not refer to any authority except *M.* v. *M.*[1]; and that was the only decision to which either party to this present appeal sought in the first instance to refer this court. In that case Lord Merrivale P. discussed the nature of orders for alimony pendente lite made by the ecclesiastical courts—and, indeed, in 1928 there was no statutory provision for such alimony in cases of judicial separation, a matter which has been changed by the advent of section 20 (1) of the Matrimonial Causes Act, 1950.[2] In holding in the case before him that

[1] [1928] P. 123; 44 T.L.R. 299.

[2] Amending in this respect s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925.

there could be no alimony pendente lite after the decree of judicial separation he had no need to consider, and there were not cited to him, authorities such as *Dunn* v. *Dunn*,[3] on the questions which arise when an appeal is pending. As Mrs. Schlesinger pointed out, in *M.* v. *M.*[4] there was no appeal pending and none apparently contemplated.

I now turn to the Matrimonial Causes Act, 1950. This Act, by sections 19 (1), 20 (1) and 22 (1), gives the court specific statutory powers to make orders for alimony pendente lite on petitions for divorce, nullity of marriage, judicial separation and restitution of conjugal rights respectively. In each instance the phrasing used is identical: as regards petitions for judicial separation it reads: "On any petition for judicial separation, the "court may make such interim orders for the payment of alimony "to the wife as the court thinks just."

Whilst these three subsections have been held to widen the court's discretion on quantum, neither they nor the Matrimonial Causes Rules, 1957, deal with the question of the periods during which interim orders may run. Accordingly it is proper for the court to look for guidance to the practice and procedure of the ecclesiastical courts before 1857 and the practice and procedure of this court as followed up to 1950 under provisions such as those of section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, in relation to alimony pendente lite.

There clearly being, in the present case, a lis pendens between the wife and her husband in the Court of Appeal, the first and most important question is whether that lis is the same as resulted in the decree granted by Davies J., or whether on the contrary it is technically a fresh and independent lis—the original lis being treated as terminated by such order of the court of first instance as would be final if there was no appeal. As long ago as 1810, Sir John Nicholl in *Loveden* v. *Loveden*[5] dealt with the question of alimony where an appeal by the wife had been declared on the very day after sentence of separation, and held that the declaration suspended the sentence and ordered payment of alimony as from the date thereof, and not from the later date of the return of the inhibition. When so deciding he stated[6]: "On principle I think it is due from the date of appeal. The "appeal suspends the sentence, but the suit still continues."

Similarly, after 1857 the position is that, both as regards suits for judicial separation and suits for divorce, the court has acted on the footing that upon an appeal the old lis is regarded as continuing and the court can make, but is not bound to make, an order for alimony pendente lite. After there has been a judgment of the court which but for the appeal would be regarded as final any previous order in relation to alimony pendente lite lapses and the matter has to be considered afresh. For instances where

[3] (1888) 13 P.D. 91; 4 T.L.R. 399.
[4] [1928] P. 123.
[5] (1810) 1 Phill. 208.
[6] Ibid.

1958

Schlesinger v. Schlesinger.

Sachs J.

the above principles have been applied one can turn to *Jones* v. *Jones*,[7] a suit for judicial separation, and *Dunn* v. *Dunn*[8] and *Bevis* v. *Bevis*,[9] suits for divorce.

It is further to be noted that in *Cavendish-Bentinck* v. *Cavendish-Bentinck*[10] Bucknill L.J.[11] expressly speaks of a notice of appeal as having "revived the lis"—where that notice of appeal was given by the husband against an adverse finding in a divorce cause, and that cause had, so far as the court of first instance was concerned, been determined by a final judgment. The concept of the appellate court being concerned with a revived lis (as opposed to some new and distinct lis) is indeed consistent with the decision there of the Court of Appeal that, as from the moment of the above notice, it was the lower court and not the appellate court that had power to deal with alimony pendente lite.

To my mind a notice of appeal "revives" the original lis, and it is the same lis which then continues albeit in an appellate court. It follows that it does not matter which party gives the notice of appeal; and despite the fact that in the present cause the wife is by her appeal seeking to set aside the decree she has herself obtained, the lis now before the Court of Appeal is thus no different from that pursued in the court of first instance.

Accordingly I accept the submission of Mrs. Schlesinger that the decision in *M.* v. *M.*[12] does not apply to the present case. Thus, its effect is accurately stated in Mr. Latey's work on Divorce, 14th edition, at p. 233, in the words "after a decree "of judicial separation, when there is no suit pending, the "court cannot make an order for alimony pending suit." It happens that the phraseology there used is closely parallel to that adopted as long ago as 1864 in Browne's Treatise on the Principles and Practice of the Court for Divorce and Matrimonial Causes, at p. 78.

It follows that the notice of application of May 13, 1958, having been amended to cover alimony pendente lite, the wife is entitled to pursue her claim for such an order when the matter comes once more before the registrar on July 21, 1958. On that occasion he will, no doubt, treat all affidavits that have been filed as available for deciding questions relating to that claim.

There remain the points which have arisen as to whether the wife can at this stage pursue a claim for permanent alimony, and if so what effect that pursuit would have on her pending appeal against the order when she obtained a decree. As the wife has throughout her argument reiterated that it is an order for alimony pendente lite which she desires, and as I have not had the benefit of such full argument on the further matters, it

[7] (1872) L.R. 2 P. & D. 333.
[8] 13 P.D. 91.
[9] [1935] P. 28; 50 T.L.R. 596.
[10] [1949] P. 203; 65 T.L.R. 37; [1948] 2 All E.R. 285.
[11] [1949] P. 203, 208.
[12] [1928] P. 123

does not seem necessary to deal with those points except to such extent as is proper in case the husband takes to appeal the issues now before me.

Section 20 (2) of the Matrimonial Causes Act, 1950, reads: "On any decree for judicial separation, the court may make such "order for the payment of alimony to the wife as the court thinks "just." As the court has pronounced such a decree, it is possible that on a proper interpretation of the above subsection the wife not only on May 12, 1958, became but still remains technically entitled to pursue a claim for permanent alimony. Suffice it to say that if so, her claim would in practice be alternative to that which she has for alimony pendente lite; that obviously, so long as there is a lis pendens, the court would, in common sense, be in most cases reluctant to make a permanent order; and that in the present case the wife is at this stage specifically not asking for a permanent order. Incidentally, on any question as regards amount, the husband financially is in a better position where the application is for alimony pending suit than he is in a case where it is for permanent alimony because normally the practice of this division is to order payment of lesser sums pending suit than it is when the matter comes to be dealt with on a permanent footing.

Next it seems in fairness to the wife right to mention the point argued as to the effect of making a claim for permanent maintenance. The wife, as I have mentioned, fears that if she continued to make such a claim and took any benefit under it, she might find herself debarred from pursuing her main appeal. At one stage Mr. Williams, on behalf of the husband, did, indeed, submit that the wife by asking for such an order would approbate the decree granted by Davies J. and debar herself from proceeding with that appeal. Later, however, he resiled from this submission and on behalf of his client argued that the wife's proper course here was to proceed with her application for permanent alimony and that she could safely do this without affecting her right to pursue the main appeal.

The principle upon which this question falls to be discussed is appropriately indexed in Mr. Megarry's Miscellany at Law under the heading of "Blowing hotter," an art in which the litigants in this case do not seem wholly unversed. That phrase is derived from the judgment of Greer L.J. in *Mills* v. *Duckworth*.[13] There the attitude of an appellant who desired to obtain an upward revision of the amount of damages awarded was said to be that of a man asserting: "I am not going to "blow hot and cold. I am going to blow hotter." Having regard to the decision in that case and to the speech of Lord Atkin in *Lissenden* v. *Bosch Ltd.*,[14] I am inclined to the view that in this particular instance the wife in law as well as in fact comes within the category of those who blow with

[13] [1938] 1 All E.R. 321.

[14] [1940] A.C. 412, 429; 56 T.L.R. 347; [1940] 1 All E.R. 425.

1958

SCHLESINGER v. SCHLESINGER.

Sachs J.

increasing heat. But in all the circumstances this issue is primarily mentioned so as to record the attitude adopted by counsel for the husband, in case that might become relevant to some future turn in the somewhat unpredictable course of this litigation.

In the result the wife's appeal is allowed and the matter will proceed on July 21, 1958, on the footing above indicated. In view of the probability that in due course the lis will end with the wife in possession of a decree of judicial separation, the sooner any necessary investigation of the husband's means takes place the better for all concerned.

Appeal allowed.

Solicitors: *Messrs. G. & G. Keith.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

1958
June 26, 27.

Devlin J.

* McNEILL AND ANOTHER *v.* JOHNSTONE.

[1958 M. No. 29.]

Damages—Personal injuries—Husband and wife—Wife in hospital at distance from home—Unpaid leave taken by husband to be near wife—Consortium—Whether husband entitled to recover loss of earnings during unpaid leave.

On May 30, 1957, a husband and wife sustained injuries in a motor accident caused by the negligence of the defendant. The husband was slightly injured, but the wife's injuries were serious and necessitated a month's hospital treatment. The husband was in the United States Air Force and the wife was treated at a United States Air Force hospital at Swindon. That hospital was some 160 miles from where the husband had his home, but the wife received free medical treatment there, and the hospital charges were lower than the cost of comparable treatment, had it been paid for, elsewhere. The husband took one month's unpaid leave while his wife was in hospital so that he might visit her and be with her while she was in hospital. In an action for damages in which the husband claimed to be entitled to recover as special damages his loss of earnings during that month:

Per curiam.. In the above circumstances the only basis on which the husband could claim to recover a sum in respect of his loss of earnings during the month's leave which he had taken without pay, was that it was recoverable as damage for loss of consortium on the ground that had the wife not been treated at Swindon the husband could have recovered the cost of her treatment elsewhere, and had he not visited her at Swindon he would have had a claim for loss of consortium during the time she was in hospital there, and if, therefore, he gave up his earnings in order to preserve his consortium he was entitled to recover the earnings as an alternative.

Quaere. Whether, in the circumstances, the loss of companionship amounted to loss of consortium.

Behrens v. *Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1; [1957] 2 W.L.R. 404; [1957] 1 All E.R. 583 explained.

Kirkham v. *Boughey* [1957] 3 W.L.R. 626; [1957] 3 All E.R. 153 distinguished.

Action.

On May 30, 1957, a car driven by the plaintiff, Royce Houston McNeill, a lieutenant in the United States Air Force, in which his wife, Elayne Roussell McNeill, was a passenger, was in collision with a car driven by the defendant, William M. Johnstone. The plaintiff received slight injuries in the collision but his wife was seriously injured and as a result required hospital treatment, which she received at a United States Air Force hospital at Swindon until June 26, 1957. That hospital was some 160 miles from Margate where the plaintiff had his home and near where he was stationed, but while there the wife received free medical treatment and the hospital charges were low.

The plaintiff and his wife, alleging negligence against the defendant, claimed damages for the personal injuries and loss suffered by them as a result of the collision. A sum of money paid into court in respect of the wife's claim was accepted in settlement, but so far as the plaintiff's claim was concerned liability was denied and his right to recover, and the amount of, a number of items of special damage set out in the statement of claim were disputed. The special damage which was disputed included, inter alia, a number of claims relating to expenses incurred by the plaintiff in going to and fro between Margate and Swindon and a claim for £120 in respect of one month's leave without pay which the plaintiff stated that he "had to "take . . . to attend to affairs and visit his wife."

The facts and items of special damage relevant to this report are fully set out in the judgment.

Marven Everett Q.C. and *R. G. Dow* for the plaintiff.
Ronald Hopkins for the defendant.

The following cases were cited in argument: *Kirkham* v. *Boughey* [1] and *Behrens* v. *Bertram Mills Circus Ltd.* [2]

Devlin J. In this case the plaintiffs on the record are Royce Houston McNeill, a lieutenant in the United States Air Force, and his wife, and they sue the defendant, a master sergeant in the United States Air Force, as a result of a collision which occurred between the cars they were both driving on May 30, 1957. A sum of money was paid into court in respect of the wife's claim and it was taken out, and the claim was thus disposed of. I am, however, concerned with the injuries she received and the treatment which she had to have for them, because they give rise to a large part of the husband's claim for special damage, and really the time that has been spent on this case has been spent almost entirely on the discussion of that claim. The injuries which the husband received, in contrast to

[1] [1957] 3 W.L.R. 626; [1957] 3 All E.R. 153.

[2] [1957] 2 Q.B. 1; [1957] 2 W.L.R. 404; [1957] 1 All E.R. 583.

1958

McNeill
v.
Johnstone.

Devlin J.

those of his wife, were fortunately very slight, and the point that arises as to liability is a very short one. I shall take that point first.

[His Lordship considered the evidence on the issue of liability, held that the defendant was wholly to blame for the accident, assessed the plaintiff's general damages at £30 and continued:] The real dispute has occurred over the special damage which consists almost entirely of the disbursements or costs which the plaintiff made or incurred in respect of his wife's injuries. Those injuries were serious. She went into hospital immediately after the accident and she was there for 27 days or just about four weeks. The accident occurred on May 30, and she came out of hospital on June 26. She was not fit immediately after that but had to go about on crutches for some time and was not able to follow her usual occupation.

It is convenient to take the special damage in four main groups. [His Lordship then considered claims not relevant to this report and continued:] Next there are a number of items which can all be grouped together because they are connected by a common principle and it is this group which has given rise to argument and some difficulty. The position after the accident was this. The plaintiff could, if he had felt so disposed, have sent his wife to a hospital or a nursing home near Margate where he had his home; no doubt there are nursing homes and hospitals there, and had he done so he could have presented to the defendant the nursing home's bill and the cost of the medical fees charged by the doctors for treating his wife, and there would have been no answer to such a claim. He did not do that, not because he was deliberately considering alternatives, but because the other alternative that was presented to him was the obvious one, that is to say, that the wife should go to the American Air Force hospital at Swindon, some 160 miles away, where she would receive free medical treatment and where the hospital charges would be very much less than they would be in any nursing home. If the wife had been sent to a nursing home at Margate the plaintiff, without any cost to himself, could have visited her as often as the visiting hours permitted, and during such periods as, for example, the period when although she was still in the care of the hospital it was desirable that she should get out of the hospital atmosphere for the week-end, he could have been with her, and have had her at home without any substantial charge. As it was she was at Swindon. She was a French girl who had not been to England before the marriage which was only some two months before the accident. She spoke English, but she was naturally a stranger in a strange land. Manifestly in those circumstances a husband would desire to be with his wife as often and for as long as he possibly could, and I would readily accept, as has been suggested, that a husband's presence would contribute to the health of his wife, and that without that and had she been left alone for a

period of four weeks when she was in hospital, her recovery might very well have been retarded.

In those circumstances, what the husband did was to take, in effect, a month's leave without pay. He went to Swindon and spent some time there and stayed cheaply at the bachelor officers' quarters; but he also went to and fro between Margate and Swindon to discharge business at Margate partly in connexion with the accident, but partly also other sorts of business. The result is that a variety of claims has come into existence which really all arise out of the fact that the wife instead of being in a hospital near Margate was in a hospital in Swindon.

The first of them is claim (*c*) for hospital charges which is admitted at £19, which is a great deal lower in all probability than it would have been for any comparable treatment that had to be paid for. Then there is (*e*) a small item of claim for charges for bachelor quarters at Swindon of £2, which is not disputed. Claim (*f*) is for £24, which is put down as the cost of five visits to Swindon to see the wife but as the evidence emerged it would be more rightly described as the cost of going to and fro between Margate and Swindon. Item (*g*) (i) is for £14 6s. which is the cost of staying at an hotel for a week end or a few days in the circumstances that I have already described, when it was thought desirable that the wife should have a change from the hospital. Items (*g*) (iii) and (iv) are two more hotel bills that arise out of visits made after the wife came out of hospital, when she went back to hospital to have a check-up and further treatment, which of course would not have arisen if she had been at the local hospital. Item (*i*) is the cost of petrol for two visits to Swindon £6, and item (*l*) the expenses of the journey to Swindon, for going back for the check-up and the further treatment and finally there is item (*m*) for £120, the amount which the husband would have earned if he had not taken his month's leave.

All those items add up to just under £200 and probably they represent a saving to the defendant but at any rate they are the alternative sum to what would otherwise have been charged to the defendant for nursing home fees and medical treatment. That, if I may so put it, is the practical way in which they are claimed. But, Mr. Hopkins although he admits, as I think rightly, that in the circumstances the plaintiff did what any husband might have been expected to do, queries whether it is recoverable as a matter of law.

If one investigates the law on the subject and seeks to relate this claim to some legal principle, it can only be this: that the sum is recoverable as damages for loss of consortium. Part of it may, of course, be recovered as visits to the hospital which contributed to the recovery of the wife; that is one ground which could be put forward, but it would be difficult to justify the whole on that ground. The real ground, as I say, would have to be loss of consortium and it would have to be put in this way: The husband was entitled to have the consortium of his wife—taking

1958

McNeill v. Johnstone.

Devlin J.

the consortium in the very widest sense of the companionship of his wife. He could very easily, in order to avoid loss of her companionship, have arranged for her to be treated in some hospital in or near Margate and no objection could have been taken had he sent in a bill for such treatment. It could not have been said against him: "You ought to have taken the cheapest possible "way of treating your wife and have sent her to Swindon. You "ought to have left her alone for months and not gone near her." The answer to that, as a matter of common sense, would be obvious. The answer to it as a matter of law must have been that his visits were necessary for her health or that he was entitled to have her companionship, or that if he had sent her to Swindon he would have had a claim, for general damages may be, but a claim nevertheless for loss of consortium during that period of one month. If he would have had a claim for that loss of consortium, it appears to me that he must have a claim for the alternative; that is to say that if he could have claimed damages of £100 for loss of consortium during a month—I take £100 as a notional figure—and can say: "In order to preserve "my consortium and therefore save the defendant paying me "£100, I gave up my earnings during that month so as to be "free to see my wife." he must be entitled to the earnings as an alternative.

That is in substance what I was trying to say (although I think that I cannot have said it very clearly) in the passage in *Behrens* v. *Bertram Mills Circus Ltd.*[1] which Diplock J. quoted in *Kirkham* v. *Boughey*,[2] which in turn has been cited to me in the present case. Perhaps I would be wiser not to have said anything more about it because it may be, speaking extempore, that I may make matters worse; but that is what I was seeking to say and I do not think that there is anything in the decision in *Kirkham* v. *Boughey*[3] which is inconsistent with that, because Diplock J. decided that case on the basis which he refers to expressly,[4] that the claim for damages in that case was not based on loss of consortium. On that basis I should, if I may say so respectfully, have reached the same conclusion as Diplock J. reached on the facts of *Kirkham* v. *Boughey*.[5]

Whether consortium can extend to companionship in the broadest sense of the word is, of course, a difficult point to decide. I considered in *Behrens* v. *Bertram Mills Circus Ltd.*[6] that in the very exceptional circumstances of that case it did. Whether I should have considered it in the present case to be equally applicable, I do not know. I think that Mr. Hopkins and his client who, of course, is an insurance company, have taken a very sensible view of the matter by not inviting me to go into the niceties of the law of consortium and deliver a careful and

[1] [1957] 2 Q.B. 1, 29; [1957] 2 W.L.R. 404; [1957] 1 All E.R. 583.
[2] [1957] 3 W.L.R. 626, 631; [1957] 3 All E.R. 153.
[3] [1957] 3 W.L.R. 626.
[4] Ibid. 630.
[5] [1957] 3 W.L.R. 626.
[6] [1957] 2 Q.B. 1.

elaborate judgment upon that point. The defendants have been saved a substantial sum by reason of the wife being treated at Swindon, and they are not disposed to say, therefore, that it would have been reasonable to expect that the husband would have remained away during the whole of that period. I think that they are also prepared to concede—if they do not then I find this on the evidence—that although the husband might have been able to see his wife from time to time at Swindon while still continuing with his duties—for I should have thought that some form of compassionate leave might have been given—he would not have been able to see her for anything like the length of time that he did. That being so they are willing that I should deal with this group of claims in a broad way.

Mr. Hopkins says, and I think rightly, that that does not mean that the whole amount of nearly £200 should be conceded. If the husband had been taking his leave simply to be near his wife and with that as his only object in view it is obvious that he would have remained in Swindon all the time. In fact, he journeyed back and forth and the expense of the journeying is quite considerable; he says also that the reason for that was that he had business to discharge which, I suppose, he could only discharge in Margate; but that must mean that while the primary object of taking his leave at that time was to see his wife, it was not the sole object.

I think I should take a broad view of these items. I shall leave undisturbed, as agreed, the £19 and the £2 in items (*c*) and (*e*), but with regard to the rest of the items which total roughly £180, I think if they are divided in half and I give half to the plaintiff it will about represent a fair apportionment that can properly be ascribed to expenses reasonably incurred solely by reason of the fact that his wife was in Swindon and not in Margate.

There remains one more group of items, quite small, which relate to the period after the wife came home when she was unable to look after herself and, of course, unable to look after her husband. [His Lordship then considered this head of special damages and concluded:] That deals with all the items of special damage and there will then be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: *Kingsford Dorman & Co., for Girling, Wilson & Harvie, Margate; Carpenters.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1958
June 6, 30.

Romer and Ormerod L.JJ.

* NELSON *v.* NELSON AND ANOTHER.

[1957: D: No. 94.]

Husband and Wife — Practice — Pleading — Petition — Amendment— Application for leave to add allegations of cruelty in petition founded on desertion—Applicability of ordinary rules as to amendment—R.S.C., Ord. 28, *r.* 1—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957, *No.* 619 (*L.* 4)), *r.* 82.

Notwithstanding the decisions in *Jayne* v. *Jayne and Prothero* (1869) 21 L.T. 401 and *Austin* v. *Austin* (1871) 41 L.J.P. & M. 8, there is now no practice in the Divorce Division which would prevent the court from applying the ordinary rules as to amendment of pleadings contained in R.S.C., Ord. 28, rr. 1 and 12 (which were made applicable, generally speaking, to matrimonial causes by rule 82 of the Matrimonial Causes Rules, 1957 [1]), and in the exercise of its discretion allowing amendment in a case where, after service of a petition praying for the dissolution of marriage on the ground of desertion, the petitioner seeks leave to add charges of cruelty, and notwithstanding that the ground for the charges was known to the petitioner at the time when the original petition was served.

Semble, that where the petition is founded on cruelty, the court would have jurisdiction to allow an amendment by adding further charges of cruelty if it was thought right and proper so to do in the interests of justice.

Jayne v. *Jayne and Prothero* (*supra*) and *Austin* v. *Austin* (*supra*) questioned.

APPEAL from Mr. Commissioner Robson.

The following statement of the facts is taken from the judgment of Romer L.J. The parties were married in 1922 and they ceased to live together in December, 1952, 30 years later. On March 21, 1957, the husband filed a petition for the dissolution of the marriage, founding himself exclusively on alleged constructive desertion by the wife. The court was told that the husband thought it improbable in the circumstances that the wife would defend the petition but, in fact, on July 31, 1957, she put in an answer denying the charge of desertion brought against her by her husband and making charges against him of desertion, adultery and cruelty, and she added a cross-prayer for dissolution of the marriage on those grounds. No reply to that had been put when the appeal was heard, but in February, 1958, the husband applied for leave to amend his petition by introducing charges of cruelty against the wife. As required by the Matrimonial Causes Rules 1957, r. 15, that application was supported by an affidavit sworn by the husband, which so far as material

[1] Matrimonial Causes Rules, 1957, r. 82: "Subject to the provisions of "these rules and of any enactment, "the Rules of the Supreme Court "shall, notwithstanding the provisions "of R.S.C., Ord. 68 thereof, apply "with the necessary modifications to "the practice and procedure in any "cause or matter to which these rules "apply."

reads: "That although I disclosed various acts of cruelty by my "wife against me to my solicitor before my petition was presented "I was advised by counsel to rely only on desertion in presenting "my petition at that time as allegations of cruelty would only "add to the cost of the divorce proceedings if the petition were "undefended. Counsel further advised me that if my wife "defended the petition I should seek leave to amend my petition "by making allegations of cruelty against her."

The amendments which he sought to make as set out in the notice of appeal were detailed and elaborate and charged the wife with various acts of cruelty starting from about the fifth year after the date of the marriage.

The application for leave to amend was contested by the wife and the registrar refused the application, saying that the petitioner could raise the charges of cruelty, if he thought proper to do so, in his reply. The petitioner then appealed from the registrar to the commissioner, who on March 21, 1958, dismissed the appeal, giving the following reasons: "If there had been no authority to "guide me I should have been inclined to allow this husband's "application to amend his petition. But I consider I am bound "by the decisions in *Jayne* v. *Jayne and Prothero*,[2] and *Austin* "v. *Austin*.[3] *Jayne* v. *Jayne and Prothero*[4] appears to have "been an application particularly without merit and might be "distinguishable but I can see no way of distinguishing *Austin* v. "*Austin*.[5] It was urged on me that the application in *Austin* "v. *Austin*[5] was made at a later stage in the case than in this "one and that it was an application to add cruelty to cruelty and "not, as in this case, cruelty to desertion. In my judgment those "are not differences which should affect my reading of that "decision. *Rowley* v. *Rowley*[6] was cited to me. It appears to "be a decision in direct opposition to *Austin* v. *Austin*,[7] but it "may have turned on special facts not clear in the report. *Austin* "v. *Austin*[7] was decided 12 years later and apparently has not "been overruled in over 80 years: in my judgment I am bound "by it rather than by *Rowley* v. *Rowley*.[8] *Brittain* v. *Brittain* "*and Camp*[9] was also cited to me. The headnote in the report "is to the same effect as *Rowley* v. *Rowley*,[10] but I can find "nothing in the report of the case to support the headnote. In "*Gillett* v. *Gillett*[11] an amendment to the petition was allowed "but it was not one which gave the petitioner a new ground on "which to obtain a decree, and the case does not appear to me "to be of any assistance to this petitioner. I, therefore, dismiss "the application."

The petitioner appealed.

[2] (1869) 21 L.T. 401.
[3] (1871) 41 L.J.P. & M. 8.
[4] 21 L.T. 401.
[5] 41 L.J.P. & M. 8.
[6] (1859) 23 J.P. 744.
[7] 41 L.J.P. & M. 8.
[8] 23 J.P. 744.
[9] (1859) 23 J.P. 455.
[10] 23 J.P. 744.
[11] [1952] W.N. 266; [1952] 1 All E.R. 1399.

C. A.
1958

NELSON
v.
NELSON.

Edwin F. Jowitt for the petitioning husband.
M. V. Argyle for the wife.

In addition to the cases referred to in the judgments, the following were cited in argument: *Emanuel* v. *Emanuel* [12]; *Clear* v. *Clear* [13]; *Burford* v. *Burford.*[14]

ROMER L.J., having stated the facts and read the registrar's note of his reasons for refusing the application for leave to amend, continued: Before considering the grounds on which the commissioner dismissed the application, it is convenient to note the powers which the court has of allowing amendments to pleadings in ordinary litigation. Those powers derive from section 43 of of the Judicature Act, 1925, and are embodied in R.S.C., Ord. 28, rr. 1 and 12. I think it is only necessary for the present purpose to refer to R.S.C., Ord. 28, r. 1, which is in the following terms: "The court or a judge may, at any stage of the proceedings, allow "either party to alter or amend his indorsement or pleadings in "such manner and on such terms as may be just, and all such "amendments shall be made as may be necessary for the purpose "of determining the real questions in controversy between the "parties." Then in the Annual Practice there is a note in this rule headed "General Principles" and a citation is made from *Tildesley* v. *Harper*,[1] in which Bramwell L.J. said: "My practice has always been to give leave to amend unless I "have been satisfied that the party applying was acting mala "fide, or that, by his blunder, he had done some injury to his "opponent which could not be compensated for by costs or "otherwise."

There is another citation from the judgment of Sir Balliol Brett M.R. in *Clarapede & Co.* v. *Commercial Union Association*,[2] where he says: "However negligent or careless may have been "the first omission, and however late the proposed amendment, "the amendment should be allowed if it can be made without "injustice to the other side. There is no injustice if the other "side can be compensated by costs."

By virtue of rule 82 of the Matrimonial Causes Rules, 1957, the Rules of the Supreme Court are, generally speaking, made applicable to matrimonial causes, and the rules relating to amendment, which I have mentioned, apply accordingly to matrimonial causes.

Against that background, the question arises whether, notwithstanding the application of the ordinary rules governing the amendment of pleadings, there is some special rule of practice in the Divorcee Division which, as the commissioner thought, presents an obstacle in the way of such amendments as the

[12] [1946] P. 115.
[13] [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353.
[14] [1955] 1 W.L.R. 1242; [1955] 3 All E.R. 664.
[1] (1878) 10 Ch.D. 393, 396.
[2] (1884) 32 W.Rep. 262, 263.

petitioner in this case seeks to introduce, namely, the introduction by amendment after the service of the petition of a different and distinct ground on which a prayer for dissolution can be founded, such ground having been known to the petitioner when his original petition was served.

In Rayden on Divorce, 7th ed. (1958), p. 283, the practice as to amendment is stated as follows: "When after a petition has "been filed it is desired to add further charges, the method to "be adopted varies according to three circumstances: (1) If all "the acts to be added occurred before the date of the petition "the method is by amendment, though amendments should, in "general, refer to acts as regards which evidence has been "obtained only since the petition was filed, particularly if the "further charges are of cruelty; but a petitioner was allowed "to amend his petition to allege certain acts of adultery against "his wife, all of which had been admittedly condoned, on the "ground that this was a matter of which the court should be "informed as it might be relevant not only to the general issues "involved but also to questions of maintenance and custody."

Among the authorities cited in support of the proposition that the amendment should, in general, refer to acts as regards which evidence has been obtained only since the petition was filed, particularly if the charges are charges of cruelty, are *Jayne* v. *Jayne and Prothero* [3] and *Austin* v. *Austin* [4] to which the commissioner referred. They are both short cases, and in order of date *Jayne* v. *Jayne* [5] comes first in 1869. The report is so short that I will read it in full: "This was a husband's suit for dissolution on the "ground of the wife's adultery with the co-respondent. The "respondent and co-respondent had both pleaded a simple denial, "and after the pleadings had been completed and issue joined, "Dr. Tristram, on behalf of the co-respondent, moved for leave "to add to his answer a charge of cruelty against the husband. "G. Browne, for the petitioner, contra. Lord Penzance J.O.: "The court is willing at all times to allow a wife to plead, though "she may have allowed the time to go by. But here both parties "have filed their answers, and cruelty is not a thing which ought "to be allowed to be pleaded at the last moment. I shall "certainly not allow the co-respondent to plead cruelty at this "stage."

Austin v. *Austin*,[6] which was decided in 1871, was: "A suit "by a wife for judicial separation on the ground of cruelty. The "respondent in January, 1871, had filed his answer, traversing "the charge, and the case had been set down for trial in Trinity "term, when the trial was postponed at the application of the "wife. It was now in the list for trial. Inderwick moved for "leave to amend the petition by adding two further charges of "cruelty. Searle contra: The amendment ought not to be

[3] 21 L.T. 401.
[4] 41 L.J.P. & M. 8.
[5] 21 L.T. 401.
[6] 41 L.J.P. & M. 8.

C. A.
1958
Nelson v. Nelson.
Romer L.J.

"allowed. The petitioner must have known at the commence-"ment of the suit of the alleged acts of cruelty now sought to "be charged." Lord Penzance said: "It would open the door "to a bad practice if I were to allow these charges of cruelty to "be added. Cruelty must be within the wife's knowledge at the "commencement of the suit, and she ought in her petition to "state once for all what complaint she has in this respect against "her husband. The motion must be rejected." It will be noticed that both in *Jayne* v. *Jayne* [7] and in *Austin* v. *Austin* [8] the applications for leave to amend were made almost at the last moment.

In point of fact, some years before those cases, in 1859, in *Rowley* v. *Rowley* [9] Cresswell J.O. had allowed an application by a wife petitioner to add a charge of cruelty to charges of adultery and desertion. The judge came to the conclusion that "a reasonable ground had been shown by the wife for having "omitted the charge of cruelty from her original petition." But I do not think it necessary to refer to that case beyond merely stating what I have just said.

That being the position, when the matter came before this court a month or so ago, the court felt some hesitation, notwithstanding the apparent applicability of the ordinary rules of amendment as prescribed by the Rules of the Supreme Court, in making an order which might be in conflict with some established or settled practice of the Divorce Division, and, consequently, the appeal was adjourned so that we might make inquiries into the matter. During the adjournment we have approached the highest authority on the matter and as a result we are now satisfied that, whatever may have been the position in the past, there is now no rule of procedure which is a fixed obstacle to our granting the petitioner leave to amend in the way in which he seeks to do by his notice of appeal.

The registrar before whom the matter came suggested that the petitioner should introduce the charges of cruelty which he desired to raise in his reply. That would not make them an issue in the cause, and on the hearing of the petition the husband would not be allowed to rely upon cruelty as a ground for seeking divorce. Any such reply would be a departure from the original proceeding and it would obviously be an inconvenient way of introducing the matter, and, presumably, if it were introduced in that way, the wife would apply for leave to file a reply.

There is also this further consideration. If the husband is precluded from introducing, by amendment, these charges of cruelty, it may well be—and I have in mind the decision of Pearce J. in *Duchesne* v. *Duchesne* [10]—he would be in great difficulty in relying on any suggestion of cruelty on the wife's

[7] 21 L.T. 401.
[8] 41 L.J.P. & M. 8.
[9] 23 J.P. 744.
[10] [1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.

part in any ancillary proceedings that might take place in those proceedings for divorce.

Bearing all these considerations in mind, and, in particular, bearing in mind that the obstacle that the commissioner thought might prevent the amendment does not, in fact, exist, it would seem that, as long as we are not in any way overruling the discretion of the commissioner, we are at liberty to do whatever we think is just and proper. If we do allow this amendment, it is plain that we shall not be overruling, in any way, the commissioner's discretion, because he made it quite clear in his notes of judgment, which I have read, that had he regarded himself as being at liberty to allow the application he would have done so.

It has not been sugested by Mr. Argyle, who very fairly presented the wife's case before us, that if the amendments are allowed she will be subjected to any injustice or meet with any difficulty which cannot adequately be compensated for by costs. Accordingly, as it is clearly desirable that all the issues as between this husband and wife should be before the court when the petition is heard, and as the husband has acted quite obviously in a bona fide manner in this case, and only refrained from introducing these charges of cruelty in his original petition for reasons which have been satisfactorily explained, I, for my part, think that he should be allowed to amend his petition in the way he desires to do.

As I say, this is a case not of adding additional charges of cruelty to similar charges already made, as was the case in *Austin* v. *Austin*.[11] It is obviously desirable that in such a case as that, all the charges of cruelty which are known to the petitioner should be introduced in the original petition. But, even if he failed to introduce them all, it appears to me that this court would have jurisdiction to allow an amendment by adding further charges of cruelty if it were right and proper so to do in the interests of justice. In any event this is not a case of charges of cruelty already made, but it is a case of adding an additional ground for dissolution of the marriage.

Having regard to the practice as we have now ascertained it to be, I can see no objection to the amendments being allowed, and inasmuch as we are not in any way overruling the discretion of the commissioner in making the order which the petitioner asked us to make, I would allow this appeal. Without expressing any view whatever as to the merits of the allegations of cruelty which the petitioner desires to raise, I think he should at least have the opportunity of introducing them in the petition and presenting them as part of his case when this petition comes on for hearing.

I would, accordingly, allow the appeal.

ORMEROD L.J. I agree that this appeal should be allowed. Had it not been for *Austin* v. *Austin*[12] I would have said that

[11] 41 L.J.P. & M. 8.

[12] Ibid.

C. A.
1958
NELSON v. NELSON.
Ormerod L.J.

this was essentially the type of case which was within the discretion of the commissioner, and he has made it clear that he would have allowed the appeal from the registrar, and permitted the proposed amendments, had he not considered himself bound by the decision in that case.

The only hesitation there has been on the part of this court has been caused by the question whether a practice of some 70 years would be disturbed by allowing the appeal. That appears not to be so, and in the circumstances I agree, for the reasons which have been fully expressed by my brother, that the appeal should be allowed. I am satisfied that the question of allowing the amendments is one for the commissioner, and none the less so because the facts which are sought to be alleged in the additional grounds to be added to the petition are facts which were within the knowledge of the petitioner at the time the petition was originally filed. That may or may not be, in the circumstances of any particular case, a ground for disallowing an amendment, but it is, I think, essentially a matter for the discretion of the judge.

Appeal allowed.

Solicitors: *Gibson & Weldon for Straw & Pearce, Loughborough; P. Alec Cook, Nottingham.*

E. D.

[CHANCERY DIVISION.]

1958
June 27.
Harman J.

* ESPRESSO COFFEE MACHINE CO. LTD. *v.* GUARDIAN ASSURANCE CO. LTD.

[1958 E. No. 85.]

Landlord and Tenant—Business premises (security of tenure)—Landlords' intention to occupy for own purposes—Intention—How shown—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*g*).

The application by tenants of business premises for the grant of a new lease as from March 25, 1958, was opposed by the landlords on the ground that on the termination of the current tenancy they intended to occupy the premises for the purposes of a business to be carried on by them therein within the meaning of section 30 (1) (*g*) of the Act[1]; the tenancy of the premises now

[1] Landlord and Tenant Act, 1954, s. 24: "(1) . . . the tenant under "such a tenancy [i.e. to which this "part of this Act applies] may apply "to the court for a new tenancy . . . "(*b*) if the tenant has made a request "for a new tenancy in accordance "with section 26 of this Act . . ." S. 26: "(1) A tenant's request for "a new tenancy may be made where "the tenancy under which he holds "for the time being . . . is a tenancy "granted for a term of years certain "exceeding one year . . . (6) "Within two months of the making "of a tenant's request for a new

occupied by the landlords expiring in June, 1960. The evidence was that the landlords had brought the premises with a view to a possible occupation by them, but had since become interested in obtaining a tenancy in other premises nearby which were in the course of construction. The tenants contended that, having regard to the time which might be taken up by their opposition to the landlords, when the landlords got possession of the premises they might no longer wish to occupy them, and that they could not therefore possess an "intention" to occupy within the meaning of section 30 (1) (*g*).

The board of the landlord company had in March, 1958, passed a resolution stating that they intended to occupy the premises; and at the hearing their counsel was prepared to give an undertaking that on obtaining possession of the premises they would occupy them:—

Held, that the landlords had to prove a real and honest intention at the present time to occupy the premises on obtaining possession, not an intention at some future date, and in the circumstances they had established their objection to the grant of a new tenancy.

Adjourned summons.

The Espresso Coffee Machine Co. Ltd., by this summons under section 24 (1) of the Landlord and Tenant Act, 1954, asked that their landlords, Guardian Assurance Co. Ltd., should grant them a new lease of business premises consisting of the ground floor and basement of 227–228, Strand, London, W.C., where they had offices, showrooms and a coffee bar. They asked that the new lease should be for a term of 14 years from March 25, 1958, the termination of the current tenancy, at a rent of £3,500 per annum exclusive of rates and otherwise on terms similar to those contained in the present lease; alternatively for a period and at a rent and on terms to be determined by the court.

The present tenancy was a term of 5¼ years from December 25, 1952, under a lease granted by the landlords to the British Bamboo Cane Co. Ltd. which had been assigned with the leave of the landlords at the end of 1955 to the tenants, who went into occupation at the beginning of 1956 and during most of that period had been trying to obtain a longer term.

By a notice dated September 24, 1957, the tenants served on the landlords a request under section 26 of the Act; by a counter-notice under section 26 (6), dated October 17, 1957, the landlords gave notice to the tenants that they intended to oppose an application to the court for a new tenancy on the ground stated in

"tenancy the landlord may give "notice to the tenant that he will "oppose an application to the court "for the grant of a new tenancy, "and any such notice shall state on "which of the grounds mentioned "in section 30 of this Act the land-"lord will oppose the application." S. 30: "(1) The grounds on which "a landlord may oppose an applica-"tion under section 24 (1) of this Act "are such of the following grounds "as may be stated in the landlord's "notice . . . under section 26 (6) "thereof, that is to say . . . (*g*) . . . "that on the termination of the "current tenancy the landlord intends "to occupy the holding for the pur-"poses, or partly for the purposes, of "a business to be carried on by him "therein . . ."

1958

Espresso Coffee Machine Co. Ltd. v. Guardian Assurance Co. Ltd.

section 30 (1) (*g*),—namely that on the termination of the current tenancy they intended to occupy the premises themselves for the purpose of a business to be carried on there by them.

The evidence was that the landlords had bought the freehold of 227, Strand, in 1951 with a view to its possible occupation by them as their "Law Courts" branch on the termination of the lease of the premises now occupied by them as that branch in Fleet Street, on June 24, 1960. It was also disclosed in evidence by the landlords that they were interested in obtaining a tenancy of the two upper floors of premises which were now being built at 199–203, Strand.

L. A. Blundell for the tenants.
Christopher French for the landlords.

Cases cited in argument not referred to in the judgment: *Fleet Electrics Ltd.* v. *Jacey Investments Ltd.*[2]; *Fisher* v. *Taylors Furnishing Stores Ltd.*[3]

Harman J. [having stated the facts continued:] The application for a new lease here was made on September 24, 1957, and was for a new lease beginning at Lady Day, 1958. The notice of opposition was served in due time and followed section 30 (1) (*g*) of the Act fairly closely, the ground alleged being that "on "the determination of the current tenancy we intend to occupy "the premises for the purpose of a business to be carried on by us "therein." There seems no doubt at all that this was at that time certainly the intention of the company. It had to have premises near the Law Courts, and its lease, from Barclays Bank, terminated in 1960. If that had been all, therefore, there would have been an unimpeachable answer to the claim, because under section 30 there are certain grounds on which a landlord may oppose an application, and, by virtue of section 31, if he can establish the ground on which he relies, the court is not entitled to make an order for the grant of a new tenancy; it is not a discretionary matter; the court is bound not to grant a new tenancy if the landlord proves his case.

The controversy here is whether the landlord has proved its case, it being admitted that the burden of so doing is on it. Its failure to do this is said to arise out of an affidavit made by the deputy general manager which discloses that the company is interested in other possible premises. A new building is being erected further down the Strand, at No. 199, by the Huddersfield Building Society, and there appears to be at least a possibility that the society will not require the whole of the building for its own occupation, but may be willing to let two upper floors which might be suitable for the landlord. The landlord has, through its agents, been negotiating for some time now with a view to seeing

[2] [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99.

[3] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

on what terms such a tenancy might be offered. There has been no finality at all, and there has not even been a draft contract or draft lease forwarded to the landlord.

Mr. Blundell's most ingenious argument is that the possibility of that chance materializing must have unsettled the minds of those in control of the Guardian Assurance Company, so whatever the company's intention was some months ago it has now no longer the necessary quality to rank as an intention under the Act.

Section 30 (1) (*g*) reads: " . . . on the termination of the " current tenancy the landlord intends to occupy the holding for " the purposes . . . of a business to be carried on by him therein." Section 30 (2) does not apply as the landlord purchased its interest more than five years before the end of the current tenancy. It is said that if the landlord can succeed in obtaining a lease of this future building at 199, Strand, that would be more suitable to its business, and it would be futile, in the circumstances, for it to go into occupation of No. 227 for whatever short period may elapse between the end of the current tenancy and the completion of the new building. Mr. Blundell does not deny that he intends to use every tactic open to him to stay in occupation. The law allows him various methods of delaying a final order in favour of his landlord, and he says it will be the end of the year at least, perhaps longer, before every legal artifice has been exhausted, even if he does not in this, or in some higher court, succeed; and that by the time he has finished with the landlord it will be so heartily tired of him and No. 227 that it will have no intention of ever going there at all. That may not be a very admirable attitude, but it is one which the law entitles the tenants to take up, and they unblushingly do so.

There have been a large number of cases about paragraph (*g*) of the subsection, which deals with intention; and it is said that I am bound to find that the intention is settled or is fixed or is unlikely to be changed. Those are various phrases that have been used in the Court of Appeal or the House of Lords as glosses upon the words of the Act. Judges, of necessity, have to find synonyms or other words for the words they construe, but other judges' synonyms do not bind their brother judges. What I have to find is an intention. I shall use some epithets of my own. It must be an honest intention, it must be a present intention, and it must be a real intention, but the only word I have to construe is " intention." Does the landlord intend, when it gets possession of this property, to occupy it?

The board of the company in March, 1958, passed a resolution on that subject, expressing their intention at that time. Mr. Blundell criticizes that on the ground that the directors had not then realized to the full the expedients to which they might be subjected by his clients. He said that if they had really thought about it, they would have realized they could not get possession this year, or at any rate not till the very end of the year; and

1958

Espresso Coffee Machine Co. Ltd. v. Guardian Assurance Co. Ltd.

Harman J.

as they had not thought of that, Mr. Blundell says that the resolution is of no value. I do not accept that view of it at all. What the resolution says is: "at the end of the current tenancy," and that means whenever that happens to be. I think that Mr. Blundell could well argue that the value of that expression of intention has rather to be looked at askance when one thinks that the end of the tenancy is not nearly so early as those who passed the resolution thought it would be. But I cannot see that the fact that they did not realize how long it might be before they went into possession disentitles me from giving any value to their expression of intention.

As I understand it, at the time of the resolution, the possibility of obtaining a lease of No. 199 had already been mooted. Nevertheless, the board expressed the intention to occupy No. 227, not contingently, in the event of nothing better turning up, but absolutely, and they were willing to offer an undertaking to the court, and authorized that to be done. I was reminded by Mr. Blundell that undertakings have been freely offered in analogous cases, notably in *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[1] which went to the House of Lords but also in the case of *Lennox* v. *Bell*,[2] where a landlord had offered to the county court, through her solicitor, an undertaking to carry on a greengrocer's business if she got possession, and the county court judge found as a fact that she would not be able to perform the undertaking even if she gave it; he thought that she was in fact motivated by spite against a neighbour, and that the whole thing was unreal. But here if the landlord, the Guardian Assurance Company, gives an undertaking, there is no question of its power to honour it, and I think that there is no doubt that it will honour it. It is not the sort of company whose undertakings in a suitable case the court would hesitate to accept. It is not suggested that it could not carry out the undertaking if it wished. Therefore, as counsel at the Bar today is still authorized to make this offer to me and to the applicants, I must take the offer at its face value. If that be the case, I do not see how I can any longer doubt that the intention today exists. Whether by the end of the year it will exist any longer, I do not know. The tenants may so harass the landlord that the landlord will change its mind; but that is wrapped in the future. The landlord may never get this lease at 199, Strand. If so, it seems fairly certain that it never will want to move from No. 227. But even if it does get the lease, it has declared to me, and is willing to undertake to make that declaration good, that it is its intention, if it gets possession of No. 227, to move into it. It has offered that undertaking, and I feel bound to accept from a company of this standing that expression of its intention. It has not got

[1] [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607.

[2] Lord Goddard C.J. May 31, 1957, unreported.

to prove that it will have the intention of occupying No. 227 next year or in six months' time. The date that is relevant is here and now, and the intention seems to me to be present here and now.

That being so, I am of opinion that the landlord has established its objection, and that it is mandatory upon me to refuse to grant a new tenancy, and that I do by dismissing this summons.

Summons dismissed.

Solicitors: *Charles Caplin & Co.; Trower Still & Keeling.*

I. G. R. M.

[CHANCERY DIVISION.]

* PYE-SMITH *v.* INLAND REVENUE COMMISSIONERS.

1958
July 7, 8.

Danckwerts J.

[1958 P. 302.]

Revenue—Estate duty—Surrender of life interest—Settlement—Release of equitable interest by life tenant—Bonus shares—Renunciation—Failure of trustees to renounce before release of equitable interest—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43 (1) (*as amended*).
Company—Shares—Bonus shares—When property passes to shareholder—Right to renounce.

The trustees of a marriage settlement made in 1904 held, as part of the wife's fund, 7,000 Ordinary £1 shares in S. O. & Co. Ltd. in the events which happened upon trust for the wife for life and then for the two children of the marriage in equal shares, subject to a power of appointment by the wife. In 1952 the £1 ordinary shares were subdivided into ordinary shares of 10s. each, and, pursuant to a resolution passed at a general meeting on July 30, 1952, an issue of one 10s. bonus ordinary share for every 10s. ordinary share held was made to the shareholders out of the capitilized profits of the company. On the same day a letter of allotment was sent to the trustees, who thus became entitled to 14,000 bonus shares of 10s. By a deed executed on or about August 9, 1952, and made between the wife, the trustees and the two children, who were sui juris, the wife surrendered her right to 10,000 of the new shares and directed her trustees to hold them upon trust for the children in equal shares absolutely, and she also released her power of appointment. On August 9 the trustees returned to the company the allotment letter, renouncing 10,000 shares and requesting split allotment letters for 5,000 shares to be sent to each of the children, in whose names the shares were eventually registered. The wife died on March 2, 1956.

On the hearing of a summons taken out to ascertain whether estate duty on the 10,000 renounced bonus shares became payable on

---

[Reported by MARGARET THOMAS, Barrister-at-Law.]

1958

Pye-Smith v. Inland Revenue Commissioners.

the death of the wife pursuant to section 43 (1)[1] of the Finance Act, 1940:—

Held, that, before the deed of release executed by the wife, the legal interest in the bonus shares had vested in the trustees and the equitable interest in the wife, so that estate duty became payable at her death pursuant to the subsection.

Adjourned summons.

The question in the originating summons taken out against the Inland Revenue Commissioners by the trustees of a marriage settlement was whether estate duty was payable under section 43 (1) of the Finance Act, 1940, on the death of the wife, the life tenant, on the ground that she had an interest in possession, limited to cease on her death, in certain shares where there had been a renunciation of those shares by the trustees within five years of the death of the life tenant.

Under her marriage settlement dated December 16, 1904, Winifred Caroline Ramage, the wife, took a life interest in the wife's fund, and a life interest after her death went to her husband, who predeceased her; there were the usual powers of appointment in favour of issue, and in default of appointment the property became divisible among the children of the marriage who attained twenty-one or, in the case of females, married, in equal shares. There were two children of the marriage, who at all material times were over twenty-one and, consequently had attained a vested interest under the settlement, subject to divesting by the exercise of the power of appointment.

The sequence of events was as follows. The trustees under the settlement had among the investments subject to the trusts 7,000 £1 ordinary shares in the capital of Samuel Osborn & Company Ltd. The company subsequently sub-divided those shares into 14,000 shares of 10s. each, and then carried out a transaction under which it capitalized certain moneys which it had and issued new shares fully paid-up by the appropriation of those moneys to those shares, on the footing that each holder of the ordinary 10s. shares became entitled to a bonus share also of 10s.

The relevant articles of the company's articles of association were articles 133 and 134, which had the cross-heading "Capitalization of Profits." Article 133 read as follows: "The

[1] Finance Act, 1940, s. 43 (1) (as amended by the Finance Act, 1950, s. 43 (1) and Sched. 7): "Subject to the provisions of this "section, where an interest limited to "cease on a death has been dis-"posed of or has determined, "whether by surrender, assurance, "divesting, forfeiture or in any other "manner . . . whether wholly or "partly, and whether for value or "not, after becoming an interest in "possession, and the disposition or "determination (or any of them if "there are more than one) is not "excepted by subsection (2) of this "section, then (*a*) if, had there been "no disposition or determination as "aforesaid of that interest and no "disposition of any interest expectant "upon or subject to that interest, the "property in which the interest sub-"sisted would have passed on the "death under section one of the "Finance Act, 1894, that property "shall be deemed by virtue of this "section to be included as to the "whole thereof in the property pass-"ing on the death . . ."

"company in general meeting may, upon the recommendation of "the directors, resolve that it is desirable to capitalize any "undivided profits of the company not required for paying the "fixed dividends on any preference shares (including profits carried "and standing to any reserve or reserves or other special account), "and accordingly that the directors be authorized and directed to "appropriate the profits resolved to be capitalized to the members "holding ordinary shares in proportion to the amounts paid upon "the issued ordinary shares held by them respectively, and to "apply such profits on their behalf, either in or towards paying "up the amounts, if any, for the time being unpaid on any "shares held by such members respectively, or in paying up in "full unissued shares or debentures of the company of a nominal "amount equal to such profits, such shares or debentures to be "allotted and distributed, credited as fully paid up, to and "amongst such members in the proportion aforesaid, or partly "in one way and partly in the other."

Article 134 was as follows: "Whenever such a resolution as "aforesaid shall have been passed, the directors shall make all "appropriations and applications of the undivided profits resolved "to be capitalized thereby, and all allotments and issues of fully "paid shares or debentures, if any, and generally shall do all "acts and things required to give effect thereto, with full power "to the directors to make such provision by the issue of fractional "certificates or by payment in cash or otherwise as they think "fit for the case of shares or debentures becoming distributable "in fractions and also to authorize any person to enter on behalf "of all the members holding ordinary shares into an agreement "with the company providing for the allotment to them respec-"tively, credited as fully paid up, of any further shares or deben-"tures to which they may be entitled upon such capitalization, or "(as the case may require) for the payment up by the company "on their behalf, by the application thereto of their respective "proportions of the profits resolved to be capitalized, of the "amounts or any part of the amounts remaining unpaid on their "existing shares, and any agreement made under such authority "shall be effective and binding on all such members."

On July 30, 1952, an extraordinary general meeting, of which notice had been sent to the shareholders on July 7, was held, and the following resolutions were passed: "1. That each of the "430,600 ordinary shares of £1 each in the capital of the com-"pany be subdivided into two ordinary shares of 10s. each.

"2. That the capital of the company be increased to "£1,500,000 by the creation of 1,800,000 new shares of 10s. "each of which (a) 400,000 shall be designated ordinary shares "ranking pari passu in all respects with the existing ordinary "shares of the company and so as to form one uniform class "therewith, and (b) the remaining 1,400,000 of the said new "shares shall for the time being be unclassified.

"3. That it is desirable to capitalize the sum of £293,014

1958

Pye-Smith v. Inland Revenue Commissioners.

"being as to £215 16s. 7d. the amount standing to the credit of "'capital reserve' and representing excess profits tax post-war "refund and as to £292,798 3s. 5d. part of the undivided profits "of the company standing to the credit of general revenue "reserve and accordingly that the directors be and they are "hereby authorized and directed to appropriate the said sum of "293,014 to the members holding ordinary shares at the time of "the passing of this resolution in proportion to the amounts paid "up on the issued ordinary shares then held by them respec-"tively and to apply the said sum of £293,014 on their behalf "in paying up in full 586,028 ordinary shares of 10s. each in "the capital of the company and that such 586,028 ordinary "shares be allotted and distributed credited as fully paid up to "and amongst such members in the proportions aforesaid, i.e., "one of such ordinary shares for every ordinary share then held "by such persons respectively, and the ordinary shares to be so "allotted and distributed shall rank for all dividends which may "be declared hereafter in respect of the financial year of the "company to July 31, 1952, and shall be treated for all purposes "as an increase of the nominal amount of the capital of the "company held by each such member and not as income."

On the same day, namely, July 30, there was a directors' meeting of the company's board, and the minute stated this: "It was resolved that, pursuant to the said resolution 3 the sum "of £293,014 be appropriated to the members holding ordinary "shares at the time of the passing of such resolution in pro-"portion to the amounts paid up on the issued ordinary shares "then held by them respectively, and be applied on their behalf "in paying up in full 586,028 ordinary shares of 10s. each, and "that, in accordance with the said resolution, 586,028 of such "ordinary shares be allotted and distributed, credited as fully "paid up, to and amongst such members in the proportions afore-"said and that, pursuant to the articles of association, Frank "Arnold Hurst be and he is hereby authorized on behalf of the "holders of the ordinary shares in the company's capital at the "time of the passing of the said resolution 3 to enter into an "agreement with the company providing for the said allotment, "and that the draft of the said agreement submitted to this "meeting be approved, and that the seal of the company be "affixed to such agreement and duplicate thereof as and when "the same shall have been signed by the said Frank Arnold "Hurst."

The agreement dated July 30 was thereupon signed by Frank Arnold Hurst, and the common seal was affixed.

"It was also resolved that 586,028 ordinary shares of 10s. "each in the capital of the company be allotted in accordance "with the provisions of the said agreement and that the letters "of allotment thereof, with forms of renunciation thereon, sub-"mitted to this meeting be sent out to the registered holders on "July 30, 1952."

The operative parts of the agreement were as follows: "1. The "company shall allot and issue to each of the persons named in "the schedule hereto or their nominees the number of new "ordinary shares of ten shillings each set opposite his or her name "in the second column of the said schedule and where in such "schedule several persons are bracketed as joint holders they shall "be considered as one person for the purposes of this agreement.

"2. The said shares shall be credited as fully paid up and "shall be accepted in satisfaction of the said capitalized sum."

Among the names of persons listed in the schedule to be allotted shares were those of the trustees of the settlement, the plaintiffs in the action.

The same day, July 30, 1952, the letter of allotment was sent out by the company's secretary and was received on August 1 by the trustees. It referred to the issue of the shares and contained these words: "Last day for splitting—September 3, 1952. Last "day for registration of renunciations—September 10, 1952. "Share certificates available on and after October 31, 1952." The letter was addressed to the trustees and it said: "Dear Sir "(or Madam), 1. I have to inform you that, pursuant to the "terms of the resolution passed today, you have been allotted "14,000 ordinary shares of 10s. each credited as fully paid up, "subject to the memorandum and articles of association of the "company in respect of your holding of ordinary shares at the "time of the passing of the resolution, in the proportion of one "new share for each ordinary share of 10s. held. 2. The right "to all or any of the shares comprised in this allotment letter "may, if you wish, be renounced in favour of one or more "persons. Instructions covering the various alternatives open "to you are printed on page 3 overleaf and should be carefully "followed. 3. The ordinary shares comprizing this issue will "rank pari passu with the existing ordinary shares for all divi-"dends hereafter declared on the ordinary shares in respect of the "financial year of the company to July 31, 1952. . . . 6. Pending "the issue of share certificates, transfers will be certified by the "company against surrender of allotment letters."

Inside the letter there was a form of letter of renunciation and also a form of registration application form intended for the nominee. The letter of renunciation, dated August 9, was filled in and signed by the trustees and in it they renounced their right to the within-mentioned shares allotted to them, in favour of the parties signing the registration form "Y" below.

Meanwhile, a document dated July 31, 1952, had been executed by Mrs. Ramage and was expressed to be made between Mrs. Winifred Caroline Ramage of the first part, the trustees of the second part, and the two children of the marriage, Hugh Pyesmith Ramage and Alice Pyesmith Ramage of the third part. It recited that the deed was supplemental to the settlement and that neither the husband nor the wife had ever exercised the joint power of appointment given to them by the settlement. The

1958

Pye-Smith v. Inland Revenue Commissioners.

husband died on April 16, 1938. It referred to the 7,000 shares in the company, and to the extraordinary general meeting of shareholders on July 30.

Recital (7) was in the following terms: "Mrs. Ramage "desires to disclaim all interest to which she would be entitled "by virtue of the settlement in ten thousand of the said new "ordinary shares of Samuel Osborn & Co. Ltd. to the intent that "her two children Hugh Ramage . . . and Alice Ramage shall "become immediately entitled thereto in possession and for this "purpose has requested the trustees to renounce ten thousand of "such new ordinary shares as to five thousand thereof in favour of "Hugh Ramage . . . and as to the remaining five thousand thereof "in favour of Alice Ramage which the trustees have agreed to do "on the execution of such release surrender and indemnities as "are hereinafter contained."

Mrs. Ramage released her power of appointment so that the interests of the children under the settlement ceased to be defeasible. The second paragraph was as follows: "Mrs. "Ramage hereby surrenders unto the trustees all that her life "interest in ten thousand new fully paid ordinary shares of ten "shillings each in Samuel Osborn & Co. Ltd. which but for the "provisions of this deed would become subject to the trusts of "the settlement to the intent that such life interest may be "merged in the capital of such shares and that the trustee shall "forthwith stand possessed of such shares in trust for Hugh "Ramage . . . and Alice Ramage in equal shares absolutely." In paragraph 3 there was a covenant of indemnity by the two children and Mrs. Ramage to indemnify the trustees in respect of the transaction. The document was executed by the other parties at various dates between August 2 and August 9, and his Lordship found that it could not have been effectively delivered and become operative until August 9, and that the intention of the transaction was that 4,000 of the 14,000 new shares were to be retained by the trustees while they should renounce the other 10,000 new shares which would be divided equally between the two children. His Lordship observed that under the arrangements made by the company, it was impossible for the shareholders to claim to have cash in place of the shares, although they could, if they wished, renounce their right to the shares and transfer the benefit of the renunciation to persons whom they nominated, in accordance with the provisions of the transaction. He found that the renunciation in favour of the children was for no consideration, and would have been a breach of trust if the trustees had not been indemnified by all the beneficiaries who were together interested in the whole of the equitable interest under the settlement. At the date of the death of Mrs. Ramage on March 2, 1956, each 10s. share was worth between 54s. and 56s. Applications were duly made by the two children as nominees of the trustees on August 21, 1952, on the appropriate forms, and in

due course 5,000 shares were registered in the names of each of them.

Denys Buckley for the plaintiffs.
E. Blanshard Stamp for the defendants.

The following cases were cited in the course of argument: *Sneddon* v. *Lord Advocate* [2]; *Attorney-General* v. *Oldham* [3]; *In re Pool Shipping Co. Ltd.* [4]; *In re Florence Land and Public Works Co.* [5]; *In re Saloon Packet Co.* [6]; *In re United Ports Co.* [7]; *In re V. G. M. Holdings Ltd.* [8]

DANCKWERTS J. stated the facts and continued: It is contended on behalf of the people interested in the matter against the Revenue that Mrs. Ramage never was the owner of these shares and never had an actual life interest in those new shares and, consequently, they would never have passed upon her death if that deed of release had never been executed. The argument put comes down to this, I think, that all that the trustees had was a right to these shares and that they could not be compelled to take the shares themselves and have a right to nominate somebody else. Therefore, it is said, one cannot treat Mrs. Ramage as having an equitable interest in the shares, because the trustees could not get specific performance against the company and the company could not get specific performance against the trustees until that final date when it was known to to whom the shares were eventually going to be allotted.

That seems to me to be wrong. It seems to me quite plain that the release was executed on the footing that Mrs. Ramage had an actual interest (for her life, of course) in these shares. It is true there is a rather odd passage in paragraph 2 of the deed of release, but what it actually says is: "Mrs. Ramage hereby "surrenders unto the trustees all that her life interest in ten "thousand new fully paid ordinary shares . . ."; it is true it says ". . . which but for the provisions of this deed would become "subject to the trusts of the settlement," thereby suggesting that they might not become subject to the trusts of the settlement owing to the operation of the deed; but, on the other hand, the paragraph continues, "to the intent that such life interest "may be merged in the capital of such shares and that the "trustees shall forthwith stand possessed of such shares in trust "for Hugh Ramage . . . and Alice Ramage in equal shares "absolutely."

To my mind, the effect of that paragraph was entirely on the

[2] [1954] A.C. 257; [1954] 2 W.L.R. 211; [1954] 1 All E.R. 255.
[3] [1940] 1 K.B. 599, 606; [1940] 2 K.B. 485; 56 T.L.R. 926; [1940] 3 All E.R. 450.
[4] [1920] 1 Ch. 251; 36 T.L.R. 53.
[5] (1883) 29 Ch.D. 421.
[6] (1868) 37 L.J.Ch. 49.
[7] (1872) L.R. 13 Eq. 474.
[8] [1942] 1 Ch. 235; 58 T.L.R. 131; [1942] 1 All E.R. 224.

1958

Pye-Smith v. Inland Revenue Commissioners.

Danckwerts J.

footing that the shares in fact do form part of the trust funds and, therefore, Mrs. Ramage is surrendering her life interest to the intent that, under the trusts of the trust fund, the two children become absolutely entitled. Moreover, it seems to me that, as a result of the resolutions passed by the company and the board of directors, and the agreement signed by Mr. Hurst on behalf of the ordinary shareholders, there was a binding agreement between the company and the ordinary shareholders for the allotment of the shares to the existing shareholders, though it is perfectly true that there was an option given to the ordinary shareholders to renounce their rights to have the shares issued to themselves and instead require them to be transferred to a nominee. Further, on July 30, it was by virtue of the allotment letter of that date that there was an allotment of 14,000 ordinary shares to the trustees, which included the 10,000 shares which are the subject of this case. It seems to me that, though it is perfectly true that the trustees were given a power to avoid the effect of the allotment in favour of somebody else, unless and until they did that, by virtue of all these contractual obligations the trustees were the owners in equity of the 14,000 shares allotted to them in pursuance of these arrangements and, therefore, Mrs. Ramage had in fact an equitable interest by the latest on August 1, 1952, in the 10,000 shares which are the subject of the present application. I do not think that it is necessary to refer to authorities to reach that result. It seems to me to be the effect of the documents and the transaction which was carried out.

Therefore, I am forced to the conclusion that, in the terms of section 43 (1) of the Finance Act, 1940, there was an interest limited to cease on the death of Mrs. Ramage which was disposed of and determined by the document in question, and if there had been no disposition or determination as aforesaid of that interest and no disposition, and so on, the property, that is, the 10,000 shares, in which the interest subsisted would have passed on her death under section 1 of the Finance Act, 1894.

Declaration accordingly.

Solicitors. *Preston, Lane-Claypon & O'Kelly for Pye-Smith & Pepler, Bath; Solicitor, Inland Revenue.*

[CHANCERY DIVISION.]

* LITHERLAND URBAN DISTRICT COUNCIL *v.* LIVERPOOL CORPORATION AND ANOTHER.

1958
March 3.

Harman J.

[1957 L. No. 585.]

Local Government — Powers — Transport — Free travel concessions for qualified persons—Contribution of one local authority to costs of another—How assessed—Public Service Vehicles (Travel Concessions) Act, 1955 (3 *&* 4 *Eliz.* 2, *c.* 26), *s.* 1 (4).

An urban district council took out a summons to determine how on the true construction of the Public Service Vehicles (Travel Concessions) Act, 1955, s. 1 (4),[1] the contributions which it had power to make to a corporation, who were responsible for operating a public service vehicle undertaking in the council's area, in respect of certain travel concessions to qualified persons, should be ascertained.

Held, that by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare-paying passengers and pass-holders, the share of the total cost of the undertaking attributable to each passenger journey whether made by a fare-paying passenger or pass-holder could be calculated, and that the contributions to be made by the plaintiffs should be computed on that basis.

ADJOURNED SUMMONS.

The Litherland Urban District Council, under R.S.C., Ord. 54A, r. 1A, took out this summons to determine the question whether on the true construction of the Public Service Vehicles (Travel Concessions) Act, 1955, and in particular section 1 (4) thereof, the extent to which the plaintiffs should contribute to any cost incurred by the Liverpool Corporation in granting travel concessions to qualified persons in connexion with the public service vehicle undertaking operated by the corporation in (amongst others) the local government area of the plaintiffs was to be ascertained (a) by reference to the amount of any expenditure incurred by the Liverpool Corporation in respect of its undertaking which would not have been incurred if the concessions had not been granted, or (b) by reference to the amount of revenue lost by the Liverpool Corporation in respect of its undertaking in consequence of granting the concessions, or (c) in some other way.

The Liverpool Corporation operated a public service vehicle undertaking in the following local government areas: (a) the City of Liverpool, (b) the county borough of Bootle, (c) the urban

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

[1] Public Service Vehicles (Travel Concessions) Act, 1955, s. 1 (4): "The council of a county borough or "county district in whose area "another local authority run public "service vehicles may contribute to "any cost incurred by that other "local authority in the granting to "qualified persons of travel conces-"sions in that area."

1958

Litherland Urban District Council v. Liverpool Corporation.

districts of Litherland and Huyton with Roby and Prescot, and (d) the rural districts of Whirton and West Lancashire. Some of the services were operated by the corporation jointly with a State-owned enterprise, but free travel concessions were not available on the latter services. It was the practice of the corporation to grant free travel facilities anywhere within the area of their undertaking to blind persons, to ex-servicemen and others suffering from certain disabilities. In addition, concessions were made to old-age pensioners of 70 years and upwards, and all these concessions were granted before, and were in operation by November 30, 1954. A dispute arose between the Litherland Urban District Council and the Liverpool Corporation as to the method of assessment of the contributions to be paid by the Litherland Urban District Council in regard to their share of the cost of the provision of such concessions. Evidence filed by the city treasurer of Liverpool on behalf of the corporation dealt (inter alia) with investigations made into the method of ascertaining the cost to the corporation of granting concessions in accordance with the Public Service Vehicles (Travel Concessions) Act, 1955. It appeared that the total number of fare-paying passengers travelling in a year was estimated from the number of tickets issued, and by comparing that with the amount of fares collected it was possible to ascertain the average fare for each passenger journey. The number of pass-holders was known, but as they were not normally issued with tickets, the average number of journeys made by each pass-holder was computed as accurately as possible by means of a census, although precise number of journeys was not known. It was then possible to calculate the loss of fares in respect of each pass issued. Similarly, by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare-paying passengers and pass-holders, it was possible to calculate the share of the total cost of the undertaking attributable to each passenger journey, whether made by a fare-paying passenger or pass-holder.

Michael Rowe Q.C. and *Denys Buckley* for the urban district council.

P. C. Lamb Q.C. and *Eric Griffiths* for Liverpool Corporation.

H. Lightman Q.C. and *J. V. Nesbitt* for a ratepayer of Litherland.

Harman J. This is an originating summons taken out, as the rules now provide, for the purpose of construing a statute. The statute to be construed is the Public Service Vehicles (Travel Concessions) Act, 1955, and the body which wishes the guidance of the court on the construction of the statute is the Litherland Urban District Council. Generally speaking, as the council comes to the court to ask whether a certain expenditure is or is not legal on the true construction of the Act, the proper respondent one would think would be a ratepayer within the area, and

one does indeed find such a ratepayer as a respondent. There is added as respondent the Corporation of Liverpool. That arises out of the curious circumstance that the payment to be made is one that is being asked by the Liverpool Corporation, though admittedly the corporation have no power to enforce the payment. It is, in fact, a permissive power on the part of the plaintiffs which they desire to exercise in a proper manner which will be unquestionable by any of their ratepayers, but which, as the matter stands, has also to be acceptable to the corporation. What the position may be between the plaintiffs and the corporation with regard to the subject-matter of payment is not here to be decided, and I say no more about it.

In and before 1954, a number of local authorities up and down the country were running bus or trolley bus or tram services, and it had become a comparatively common feature of those services that certain concessionary fares were allowed. I think that all transport undertakings have always allowed children to travel at half-price. Most of them, when obtaining powers to run such a service, have had enjoined upon them a duty to grant workmen's tickets at certain hours of the morning. But the concessions which were brought into issue before this court went beyond that and were concessions to persons disabled, ex-service men and others, and, secondly, to what Vaisey J., in a case which I shall mention in a moment, called "old people"—moreover, it was a certain class of old people, those entitled to contributory pensions.

In the case of the City of Birmingham, those concessions were challenged by a ratepayer and brought to issue in the court in a case reported as *Prescott* v. *Birmingham Corporation*.[1] Both the judge and the Court of Appeal in that case came to the conclusion that the scheme under which the Birmingham Corporation was operating was ultra vires and illegal. Having regard to the widespread use of schemes of this sort, this decision created a very awkward position in municipal finance, and, in order to clear the matter up, Parliament thought right to enact the statute which I have already mentioned.

The statute gives a kind of indemnity for past illegal acts, but it does more than that, for it provides, by section 1 (1), that any local authority operating a public service vehicle undertaking may "make arrangements" for the granting of concessionary fares. But the permission given was not unlimited. It was only to be given to persons qualified under section 1 (2), and it was only to legalize what were called "established travel concessions," that is to say, no new ones could be invented: they must be proved in the way the Act provides to have been in operation on or before November 30, 1954. "Qualified persons" are defined as, among others, "old people."

Liverpool Corporation had been one of those who had been granting certain concessions, and, therefore, were within the

[1] [1955] Ch. 210.

1958

Litherland Urban District Council v. Liverpool Corporation.

Harman J.

net cast by the *Birmingham Corporation* case,[2] and they took the proper steps to have their established travel concessions decided by the traffic authority in the way the Act provides, and continued to grant those concessions.

But in their case there is a complication: they run their buses not only within the area of the city, but in several areas outside the city, for instance, Bootle and in the plaintiffs' urban district. However the concessions should be described in terms of money, the figure of loss or the cost of it, falls on the ratepayers of Liverpool, and does not fall on the ratepayers of the district outside the city which has enjoyed the facilities. It was therefore thought right by Parliament, when legalizing these concessionary fares, to legalize also the contributions to be made by authorities outside the operating area by way of contribution as a matter of fairness and equity, and the present question centres entirely on that power.

Section 1 (4) runs as follows: [His Lordship read the section and continued:] In other words, that makes legal that which otherwise would not be within the power of the plaintiff council, namely, to pay a proper contribution for the facilities granted to those paying rates or those resident in their area. I am told that in fact in the Litherland area part of the service is provided by the Liverpool Corporation and part by a State-owned enterprise, and the concessions are not offered by the latter: so that, in fact, the citizens of Litherland do not get all the facilities which they might get if they lived within the city of Liverpool. Nevertheless, it is a valuable thing for the old people to be able to get into the centre of the city without paying a fare, and it seems appropriate that the plaintiff council should join in bearing their proportion of the expenditure as the burden arising out of that advantage.

The question is: what is the meaning of the words "any cost "incurred by that other local authority"? The other local authority in this case, of course, is the city of Liverpool. The travel concessions granted are travel concessions in the Litherland area, and what is questioned by the plaintiffs is what the cost of that is to the city corporation.

It seems clear enough that, if you are going to carry a proportion of your passengers free, it must cost something. If all passengers were carried free, clearly the whole expense of the transport undertaking would be borne out of the rates. If a proportion is carried free, a portion of the expense has to be borne out of the rates, and that may be said to be what it costs to grant the concession.

The way the city corporation put it in the negotiations which have preceded this action was, that it lost this or that amount of revenue by granting these concessions and that was the cost. To that, the retort was that loss of revenue is not cost: it is not an expense: that which you do not receive is not that which you

[2] [1955] Ch. 210.

pay. That seems to me to be quite a logical answer to the way in which the Liverpool Corporation preferred to put their case: but they also put it in another way. They suggested that the matter be regarded from the point of view of the expense of carrying passengers in the aggregate: so, for instance, if all the passengers carried in a given period are calculated on one side, and the expense of the undertaking for the same period is calculated on the other, the average amount which it costs to carry a passenger can be arrived at, and if a number of those passengers are carried for nothing, it is not, says the corporation, incorrect to say that the cost of so doing may be equated to the aggregate cost of carrying that number of passengers. In other words, the cost of granting travel concessions in the Litherland area to the qualified persons in that area is the expense of so doing, having regard to the fact that it costs you x pence to carry each passenger.

There are answers to that made by the plaintiffs, namely, that this postulates a number of totally assumed figures. For one thing, say they: it is not true to say that a person in Litherland will take the same average number of journeys, or the same average length of journeys, as a person living in the middle of the city. Still more is it uncertain whether the privileged class would walk, if they were not of that class, the same number of journeys which they do walk when they get them gratis, and that is an incalculable figure. Thirdly, the gross expenses of running the whole undertaking are not properly attributable to the privileged class in the urban district of Litherland. Therefore, they say, your figure is not cost at all but a mere estimate, and a speculative one at that.

There is another objection made by the plaintiffs to the way in which the city wish to cost their concessionary travel. They say: supposing that you could fill your bus on any given journey, the fact that one of the persons filling the bus is a person who travels on a pass and not on a ticket does not make any difference to the cost of the journey to the undertakers. Only if it could be proved that if the seat was not so occupied, it would be filled with a paying passenger, could it be postulated that a cost had been incurred. That is another instance of why the plaintiffs say the defendants' demands are of a completely speculative nature. What the plaintiffs say is that it must be shown to them, before they can be authorized under subsection (4) to pay, that the corporation have spent £x on extra buses, £y on extra conductors, and £z on extra petrol and oil, and so forth, and that these things are the cost to the city of the granting of travel concessions to the qualified persons of Litherland and no other.

Between those two views I have to decide. It is pointed out to me that the words "cost of granting the concessions" are to be found in subsection (5) and again in subsection (6), and that in subsection (8) the word "expenditure" seems to have taken the place of "cost." That must mean net expenditure, because in a sense the cost to the Liverpool Corporation of running the

1958

LITHERLAND URBAN DISTRICT COUNCIL v. LIVERPOOL CORPORATION.

Harman J.

bus service if it did break exactly even would cost the rates nothing.

I do not think "cost" here is expenditure in that sense. I think "cost" must mean gross cost and not the outgoings less the expenditure. Moreover, it is urged upon me by Mr. Rowe that in considering what "cost" means I ought to look at certain authorities, and notably *Ferrier* v. *Scottish Milk Marketing Board*,[3] where their Lordships had to deal with a similar expression. That was a case about the production of milk. The objector was saying that certain deductions made by the board did not represent the cost of operating the scheme, and their Lordships' House held him to be right. Lord Atkin said this[4]: "In the present case 'costs of operating the scheme' "in ordinary language must mean expenditure or liability which, "if not recouped, would fall upon the board; they cannot include, "in my opinion, sums which represent no expenditure or "liability of anyone but which are levied upon all milk pro-"ducers." Lord Macmillan says this[5]: "The critical words in "the present case—'the costs of operating the scheme'—are, "in my opinion, quite inapt to cover the compensatory levy which "the appellant challenges. That the respondents obtain a lower "price for milk sold for manufacturing purposes than is obtained "for milk sold in the liquid market is doubtless the case. But this "is an incident of the scheme, not a 'cost' of operating it. They "have not incurred any 'cost' by selling milk in the manufac-"turing market. There has been no disbursement on their part."

Those observations might be most relevant if I were eventually to deal with these matters on the primary view put forward on behalf of the corporation, namely, that "cost" here means that which is not received having regard to the concessions made. There is a formal sense of the word "cost" involving no expenditure—it is the cost of something done. If something is done free of charge, it will have cost the person doing it what might have been paid for it. But I do not think that "cost" here can mean that. I think it must mean expenditure. I do not myself see that it is not a legitimate way of finding the cost of operating the scheme to find what it costs to carry any particular passenger as a matter of average in the area of this undertaking. Having done so, you may say that, if you carry certain of them free, each one of them costs you that much. In the end it may turn out that whichever view is taken, it does not make very much difference. I think that is the way in which it should be done if it is legitimate to do it at all.

In my judgment, Parliament intended that cost should be ascertained in some such way. After all, it was the position produced by the *Birmingham* case[6] which Parliament was studying. In that case it was said that the cost of operating the scheme was an estimate of some £90,000. How that was arrived

[3] [1937] A.C. 126.
[4] Ibid. 130.
[5] Ibid. 137.
[6] [1955] Ch. 210.

at does not appear, but it was clearly not arrived at in the kind of way which the plaintiffs put forward as their view of the words in the Act. It is quite true there is an element of speculation which comes into the calculation, and it may be it is rather rough and ready, particularly having regard to the possibility that those who travel free will travel more because they do not have to pay. Nevertheless, it does not seem to me to be unfair to do it on an average basis. There is no other way of doing it, and with that the plaintiffs agree. They say that as no particular item can be put forward as an expense which has been incurred, they are not in a position to pay anything. In my judgment, that is not the true way of construing this Act of Parliament. I propose to accede to the argument of the Liverpool Corporation, not exactly as they preferred to put it during most of the proceedings, but in accordance with the alternative view put forward in the city treasurer's affidavit, where he says: "Similarly, by dividing "the total expenditure of the undertaking for the year by the "total number of journeys made by fare-paying passengers and "pass-holders, it is possible to calculate the share of the total "cost of the undertaking attributable to each passenger journey "whether made by a fare-paying passenger or pass-holder." That is a basis on which the matter might be fairly calculated. I propose to answer in that sense the question posed by the summons.

[The order as drawn up read as follows: "And this court "doth declare upon the true construction of the Public Service "Vehicle (Travel Concessions) Act, 1955, and in particular of "section 1 (4) thereof, that the extent to which the plaintiff "council may contribute to any cost incurred by the defendant "corporation in granting travel concessions to qualified persons "in connexion with the public service vehicle undertaking "operated by the defendant corporation in (amongst others) the "local government area of the plaintiff council ought to be ascer-"tained as equal to a part of the total expenditure incurred in "each year by the defendant corporation in operating the said "undertaking, bearing the same proportion to the whole of such "expenditure in that year as the actual or estimated number of "journeys travelled in exercise of any such concessions as afore-"said in that year on the said undertaking by persons resident "in the local government area of the plaintiff council bears to the "actual or estimated number of journeys travelled in that year "on the said undertaking by all members of the public."]

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co. for W. Boys, Clerk to Litherland U. D. C.; Cree, Godfrey & Wood for Town Clerk, Liverpool.*

[CHANCERY DIVISION.]

1958
July 2, 3, 16.

Roxburgh J.

* WESTMINSTER CITY COUNCIL *v.* LONDON UNIVERSITY KING'S COLLEGE.

[1958 W. No. 200.]

Rates and Rating—Charity—"New list"—Notices terminating allowances—Sent before expiration of first year of new list—Whether premature — Meaning of "has effect" — When rate "made"—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 9 (2) (*d*), (*e*)—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 54, 120—*Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (2), (3), (4), (5).

The plaintiffs were the rating authority of premises owned by the defendants to which the limitations on liability for rates conferred by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] applied. The plaintiffs as rating authority

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments, that is to say—(*a*) any hereditament occupied for the purposes of an organization (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education . . . (2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(*a*) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (*b*) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion: Provided that this subsection shall have effect subject to the provisions of the Fifth Schedule to this Act in cases falling within that Schedule. (3) Where paragraph (*b*) of the last preceding subsection has effect in the case of a hereditament, the rating authority may at any time give notice to the occupiers of the hereditament that, as from the end of a year specified in the notice, being a year ending not less than 36 months after the date on which the notice is given, the limitation imposed by virtue of that paragraph shall either cease to apply to the hereditament or shall be modified as mentioned in the notice; . . . (4) The rating authority for a rating area shall have power to reduce or remit the payment of any rate charged in respect of a hereditament to which this section applies for the first year of the new list or any subsequent year, including power further to reduce or to remit the payment of any rate in the case of which the amount chargeable is required to be reduced by virtue of the preceding provisions of this section. (5) The preceding provisions of this section, and the provision of the Fifth Schedule to this Act, shall have effect, with the necessary modifications, in relation to rates charged for a rate period forming part of the first year of the new list, or of any subsequent year, as they have effect in relation to rates charged for the first year of

of the area had by section 9 (2) (*d*) of the Rating and Valuation Act, 1925 (as amended by section 120 of the Local Government Act, 1948),[2] to begin the making of a new list in each year before February 1, by transmitting their estimates to the precepting authorities, who pursuant to section 9 (2) (*e*) had before March 11 to inform the plaintiffs of the amount in the pound to be levied under their precepts. Following that procedure on March 14, 1957, the plaintiffs passed a resolution providing for the amount of the new rate.

By a notice dated March 27, 1957, under section 8 (3) of the Act, the plaintiffs withdrew the limitations conferred by section 8 (2) as from the end of the year ending March 31, 1960. The defendants alleged that the notice had been served before the end of the first year of the new list (which was on March 31, 1957) contrary to section 8 (3) and was therefore invalid.

On a summons to determine the validity of the notice:—

Held, that the "making and levying of rates" within the meaning of section 8 (2) was used to describe the whole statutory process of raising money by means of a rate from start to finish; that that began before February 1 of each year, when it became the statutory duty of the rating authority to transmit an estimate of the amount to the appropriate authorities; that paragraph (*b*) of section 8 (2) "has effect," within the meaning of section 8 (3), at that date, and not when the new year begins; and that, therefore no notice after February 1, 1957, and a fortiori no notice after March 14, 1957, was premature. The defendants' objection to the validity of the notice accordingly failed.

St. Pancras Borough Council v. *University of London* [1957] 1 W.L.R. 778; [1957] 2 All E.R. 395; affirmed [1957] 1 W.L.R. 1214; [1957] 3 All E.R. 673 distinguished.

ADJOURNED SUMMONS.

The plaintiffs were the rating authority for the Parish of the City of Westminster. The defendants had, since a date long before April 1, 1956, and still were, the owners and occupiers of premises known as King's College, Strand, in the Parish of the said City. Most parts of those premises (hereinafter called "the section 8 premises") were premises to which section 8 of the Rating and Valuation (Miscellaneous Provisions)

"the new list or for any subsequent "year, as the case may be. . . ." The Fifth Schedule is headed "Adjust- "ment of rates payable by charitable "and other organizations."

[2] Rating and Valuation Act, 1925, s. 9 (as amended by the Local Government Act, 1948, s. 120): ". . . (2) The provisions . . . in this "subsection . . . shall have effect in "relation to any precepts issued by ". . . councils of counties in respect of "any period . . . after April 1, 1948— ". . . (*d*) For the purpose of enabling "councils of counties . . . to issue "their precepts in manner required "by this subsection, every rating "authority shall before February 1 "in each year transmit to every "county council . . . having power to "issue a precept to that rating "authority an estimate of the "amount, calculated in the prescribed "manner, which would be produced "in the next financial year by a "rate of a penny in the pound levied "in the rating area . . . (*e*) The "precept must be issued, or informa- "tion as to the amount in the pound "of the rate to be levied thereunder "must be given, to each rating "authority effected not less than 21 "days before the beginning of the "financial year . . . in which the "rate is to be levied . . ."

Local Government Act, 1948, s. 54: "(1) In London, as elsewhere, "every rate made by a rating "authority shall be deemed to be "made on the date on which it is "approved by the authority . . ."

1958

WESTMINSTER CITY COUNCIL v. LONDON UNIVERSITY KING'S COLLEGE.

Act, 1955, applied. The new valuation list provided for by the Act was duly completed in regard to the Parish of the City of Westminster and the first year of the new list (as defined in section 8 (2) of the Act) commenced on April 1, 1956. The defendants as occupiers of the section 8 premises were entitled to and were duly allowed in respect of that year the reliefs provided for by section 8 (2) (*a*) of the Act. As from the commencement of the first year of the new list the defendants became entitled in regard to subsequent years to the reliefs from rates on the section 8 premises provided for by section 8 (2) (*b*) of the Act, and it became the duty of the council in computing the rate to be made in respect of such subsequent years (and particularly for the year commencing April 1, 1957) to take such reliefs into consideration.

By a notice dated March 27, 1957, and served by post on the defendants on March 28, 1957, the plaintiffs gave notice pursuant to section 8 (3) of the Act that as from the end of the year ending March 31, 1960, the limitation imposed by virtue of paragraph (*b*) of section 8 (2) on the amount of rates chargeable in respect of the hereditaments set out in the Schedule thereto (being the whole of the section 8 premises) should cease to apply.

The defendants alleged that the notice was invalid on the ground that it was served before the end of the first year of the new list. The plaintiffs by this summons asked the court whether, on the true construction of the Act and in the events which had happened, the notice of March 27, 1957, was valid and had the effect under section 8 (3) of the Act of withdrawing from the defendants as from the end of the year ending March 31, 1960, the limitation on the defendants' liability for rates in respect of the said premises conferred by section 8 (2) of the Act.

J. A. Wolfe for the plaintiffs.
W. B. Harris for the defendants.

The case referred to in the argument is cited in the judgment.

Cur. adv. vult.

July 13. ROXBURGH J., reading his judgment, stated the facts and continued:

The defendants dispute the validity of the said notice on the ground that it was served before the end of the first year of the new list, which ended on March 31, 1957, and the plaintiffs submit to the court the question whether this objection is well founded. If the notice was premature, the defendants will obtain the benefit of the limitation for a further rating year.

Before approaching the question of construction involved, I must outline the statutory machinery for the making and levying

of a rate. This is a complicated task which I could never have undertaken without the great assistance given to me by counsel and those instructing them.

The new valuation list provided for by the Act of 1955 was duly completed in regard to the Parish of the City of Westminster, and the first year of the new list (as defined in section 8 (2) of the Act) commenced on April 1, 1956. During the currency of the first year of the new list, that is, before February 1, 1957, it was the statutory duty of the plaintiffs to initiate the making of a rate for the second rating year, which was to run from April 1, 1957, to March 31, 1958. Section 9 (2) (*d*) of the Rating and Valuation Act, 1925 (hereinafter called "the Act of 1925"), as modified and applied by section 120 (1) and (2) and section 121 (4) of the Local Government Act, 1948 (hereinafter called "the Act of 1948"), provides that every rating authority shall, before February 1 in each year, transmit to authorities having power to issue a precept to that rating authority an estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of a penny in the pound levied in the rating area.

The prescribed manner for making such an estimate is to be extracted from the Product of Rates and Precepts (London) Rules, 1948, and these rules involve taking into account any reductions in the amount of rates chargeable by reason of section 8 (2) (*b*) of the Act of 1955 in the second rating year. Before March 11, 1957 (still during the first rating year), the Precepting Authorities had to inform the plaintiffs of the amount in the pound to be levied under their precepts (see the Act of 1925, s. 9 (2) (*e*)).

The plaintiffs then proceeded to take steps which culminated in the following resolution passed at a meeting held on March 14, 1957, whereby it was ordered: "That, for the purpose of meeting "the liabilities falling to be discharged by the council during the "period commencing on April 1, 1957, and ending on March 31, "1958, a general rate of fourteen shillings and twopence in the "pound be made and approved for the said period; and that "the said general rate be levied, subject to the provisions of "section 8 of the Rating and Valuation (Miscellaneous Pro-"visions) Act, 1955, in accordance with the particulars contained "in the rate book and valuation list in force for the parish "of the City of Westminster during the said period; and that "the said general rate be payable in two instalments each "of seven shillings and one penny in the pound, on April 1, "1957, and on October 1, 1957, respectively, with additional "items of sevenpence in the pound over the area of Montpelier "Square (payable in instalments of fourpence in the pound "on April 1, 1957, and threepence in the pound on October 1, "1957), and twopence in the pound over the area of Hanover "Square (payable in instalments of one penny each on April 1, "and October 1, 1957)."

1958

WESTMINSTER CITY COUNCIL v. LONDON UNIVERSITY KING'S COLLEGE.

Roxburgh J.

Section 54 of the Act of 1948 provides that the rate shall be deemed to be made on the date on which it is approved by the local authority, and accordingly the purpose of the "making" of the rate for the second rating year was fulfilled before the notice was given. Within seven days thereafter the rate had to be published (see Act of 1925, s. 6) and before April 1 officers of the plaintiffs had to write out the rate books, giving effect therein to the reduction allowed by section 8 (2) (*b*) of the Act of 1955 (see Rate Accounts Regulations, 1953, reg. 5). Then after April 1 came demand notes, collection and recovery.

Section 8 of the Act of 1955 has already been discussed, and in part construed, by Wynn-Parry J. and the Court of Appeal in *St. Pancras Borough Council* v. *University of London*.[1] In that case the notice was served before the beginning of the first year of the new list, that is, on March 21, 1956, and both courts decided that it was premature. That decision, of course, binds me, but the question is to what extent, if at all, I am bound by the ratio decidendi adopted by Wynn-Parry J., because, if binding, it would cover the present case. Wynn-Parry J. said[2]: "... but clearly the provisions of paragraph (*b*) cannot "come into operation until the expiration of the first year" (that is, March 31, 1957) and accordingly he held that no notice could be given before then. He must have proceeded on the basis that the words "has effect" mean that the rates are due and presently payable. On that basis, and on that basis alone, could it be *clear* that the provision of paragraph (*b*) could not come into operation until April 1, 1957, and, on that basis, this case would be covered as well as that.

But that case took a materially different course in the Court of Appeal, though the actual decision was affirmed. Mr. Megarry's argument for the appellants is stated in the judgment of Lord Evershed M.R.[3]: "The real force, I think, of Mr. "Megarry's argument lay in the use of the three words 'at "'any time'; for (he said) 'at any time' means 'at any time.' "This Act came into operation on July 1, 1955, and so (he says) "it is providing that, at any time after the Act was part of "the law of the land, such a notice may be given." Lord Evershed M.R. rejected that submission, holding that the words "has effect" meant "has practical effect," and this conclusion forms no obstacle to Mr. Wolfe's argument here. No doubt Lord Evershed M.R. did show an inclination towards the ratio decidendi of Wynn-Parry J., but Mr. Wolfe's powerful argument would have been out of place in that case, and Lord Evershed M.R. expressly left the way open for him by confining his decision to a notice given before April 1, 1956. Romer and Ormerod L.JJ. agreed. Therefore I am free to re-examine the section in the light of counsels' arguments.

[1] [1957] 1 W.L.R. 778, 1214; [1957] 2 All E.R. 395; [1957] 3 All E.R. 673.

[2] [1957] 1 W.L.R. 778, 780.

[3] [1957] 1 W.L.R. 1214, 1217.

First of all (argues Mr. Wolfe) I must attend to the opening words of subsection (2), "For the purposes of the making and "levying of rates," which govern the whole subsection. With this I agree. What, then, constitutes the "making and levying "of rates"? Rates are "made" when the rating authority passes the appropriate resolution and this, as has already emerged, is required by statute to be done before the beginning of the rating year in question. But in my judgment the process of "making" necessarily starts much earlier, in fact not later than February 1, when the rating authority has to comply with its statutory duty of estimating the product of a penny in the pound rate in the next rating year.

The word "levy" is to be found in one of the earliest rating Acts, the Poor Relief Act, 1601, and is there used in a very narrow sense. But the word is frequently used in the multifarious rating Acts, and often bears a wide meaning. In my judgment the phrase "the making and levying of rates" is here used to describe the whole statutory process of raising money by means of a rate from start to finish. This interpretation fits well with paragraph (*a*).

Although the first year of the new list began on April 1, 1956, the process of making a rate for that rating year had begun before February 1, 1956, and part of the process of levying had begun before the end of March. Accordingly, paragraph (*a*) provides that the amount "chargeable" for the rating year 1956–57 shall not exceed the amount "charged" for the year 1955–56. I regard the contrast between "charged" and "chargeable" as significant, and in this connexion would refer to subsection (4).

The process of making a rate for the second year of the new list was bound to begin before February 1, 1957, because in making an estimate of the amount which a rate of one penny in the pound would produce, the rating authority was bound to take into account the hereditaments in respect of which the amount of rates "chargeable" (not "charged") was statutorily reduced by virtue of paragraph (*b*). Therefore even as early as February 1, 1957, the paragraph had "effect" and in my judgment no notice given after that date, and a fortiori no notice given after March 14, 1957, when the rate for 1957–1958 was actually "made," was premature.

Mr. Harris argued (adopting the ratio decidendi of Wynn-Parry J., to which the Court of Appeal had shown an inclination) that "has effect" means "has effect by creating a present "liability to pay," which did not happen until April 1, 1957. But this argument seems to me to ignore the opening words of the subsection, which are incapable of being confined to the present obligation of a ratepayer to pay, and indeed point to a process, and not to a liability at all.

If, before April 1, 1957, the rating authority finds King's College still in occupation, having had the benefit of the statutory

1958

WEST-MINSTER CITY COUNCIL v. LONDON UNIVERSITY KING'S COLLEGE.

Roxburgh J.

reduction in the first year still current, the rating authority is bound to apply paragraph (*b*) for the purpose of making and levying a rate for the second year beginning on April 1, 1957. Accordingly, before April 1, 1957, the paragraph has had "effect." Only the reduced amount is "chargeable" so long as subsection (1) remains applicable, and accordingly paragraph (*b*) has no effect upon the amount "charged," that is, payable on or after April 1, 1957.

Accordingly, the notice served on March 28, 1957, was in my judgment not premature; on the true construction of the Act, and in the events that have happened, the notice was valid, and had the effect under section 8 (3) of the Act of withdrawing from the defendants as from the end of the year ending March 31, 1960, the limitation on the defendants' liability for rates in respect of the premises conferred by section 8 (2) of the Act.

Declaration accordingly.

Solicitors: *Allen & Son; Slaughter & May.*

I. G. R. M.

[CHANCERY DIVISION.]

1958
July 24.

Upjohn J.

* WING *v.* SPRING.

PRACTICE NOTE.

Legal Aid—Costs—Order for costs against aided person—Variation—Procedure in Chancery Division—Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359) (*as substituted by the Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166), *reg.* 26), *reg.* 17 (4).

UPJOHN J. The proper practice in motions launched to vary an order for costs under regulation 17 (4) of the Legal Aid (General) Regulations, 1950, should be the same in this Division as in the Queen's Bench Division, but with one variation.

The practice in the Queen's Bench Division is set out in a note to *Corrick* v. *Northam.*[1] It is in these terms, so far as relevant[2]: "Where a party in whose favour an order for "costs has been made against an assisted person after a trial "by a judge of the Queen's Bench Division in London or on "circuit desires to apply 'to the court' under the Legal Aid

[Reported by MARGARET THOMAS, Barrister-at-Law.]

[1] [1956] 1 W.L.R. 488; [1956] 2 All E.R. 174.

[2] [1956] 1 W.L.R. 488, 489.

"(General) Regulations, 1950, reg. 17 (4)[3] (as amended) for "variation of the order, the application should be made by "notice of motion (R.S.C., Ord. 52) before the judge who made "the order, if convenient, or to the judge in charge of the "appropriate list."

That seems to me equally applicable in the Chancery Division, but with this variation. If it is not convenient for the judge who made the order to hear the matter, the application should be made to the judge in charge of the non-witness list in the appropriate group.

[3] Legal Aid (General) Regulations, 1950 (as substituted by S.I. 1954, No. 166, reg. 26), reg. 17: "(1) Where an "order for costs is made against an "assisted person, the determination "of the amount of his liability for "costs in accordance with section 2 "(2) (*e*) of the Act shall be made "at the trial or hearing of the action, "cause or matter: . . . (4) The party "in whose favour the order is made "may, within six years from the date "thereof, apply to the court for the "order to be varied on the grounds "that there has been a change in the "assisted person's circumstances since "the date of the order and on any "such application the order may be "varied as the court thinks fit; save "as aforesaid the determination of "the court shall be final.

[QUEEN'S BENCH DIVISION.]

*JEFFREY *v.* KENT COUNTY COUNCIL.

1958
July 22.
Paull J.

[1958 J. No. 1480.]

Fatal Accidents Acts—Damages—Voluntary payment—Acceptance by widow of lump sum on behalf of herself and infants—Whether binding—Jurisdiction of court—R.S.C., Ord. 22, *r.* 14 (1), (9).

Where, following the death of a person through the negligence of another, the administrator of the deceased person enters into an agreement with the person at fault to accept a lump sum to compensate all dependants, the agreement is not valid unless each of the dependants, who is sui juris and desires to claim, has approved of the agreement and the court has sanctioned the agreement as being for the benefit of any dependant who is an infant. R.S.C., Ord. 22, r. 14, applies this principle to the case where the settlement has been arrived at after an action has been started.

A widow, as administratrix of her deceased husband, agreed to accept from the defendants a sum of £4,350, in respect of his death, divided as to £3,650 in respect of her own loss and £300 and £400 respectively for her two infant children. Thereafter, she issued a writ against the defendants claiming damages under the Fatal Accidents Acts, 1846–1908, and before she had received a defence she issued a summons asking for a stay of proceedings on terms that the defendants paid into the county court in satisfaction of the claim the sum of £4,350 apportioned as agreed. The master, being dissatisfied with the amounts, including the widow's portion, which had been agreed, refused to agree the terms of settlement. The defendants appealed:—

1958

Jeffrey
v.
Kent
County
Council.

Held, that although, if the widow had agreed to take a sum (not as part of a lump sum, but individually), as being proportionate to the injury suffered by her, she would be bound by that agreement, in the present case the agreement, since it was for a lump sum to cover both her claim and that of the infants, bound nobody and was void.

Avery v. *London & North Eastern Ry. Co.* [1938] A.C. 606; 54 T.L.R. 794; [1938] 2 All E.R. 592 applied.

Condliff v. *Condliff* (1874) 29 L.T. 831 explained.

Per curiam: There was nothing to prevent the widow agreeing to take the sum of £3,650 to cover her loss, but such an agreement might result in the court giving considerably greater sums to the infants than those which were previously agreed if it came to the conclusion that the children's chance of being adequately supported by the widow had been affected.

Chamber summons adjourned into open court.

The defendants, the Kent County Council, appealed from the refusal of Master Diamond to approve the terms of settlement of an action brought by the plaintiff, Mary Jeffrey, under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846–1908, in respect of the death of her husband. Before the writ was issued, the defendants offered to pay the plaintiff, under the Fatal Accidents Acts, £3,650 in respect of her own loss and £300 and £400 respectively to her two children. The plaintiff, having accepted this offer, issued a writ against the defendants and then took out a summons asking for a stay on the terms that the defendants paid into the county court in satisfaction of the claim the total agreed figure of £4,350. The master refused to approve the figure and the defendants, while agreeing to increase the children's sums, appealed from the refusal to approve the plaintiff's portion, contending that the master's jurisdiction was confined to directing how the agreed sum should be administered.

H. T. Buckee for the defendants.

L. J. Davies for the plaintiff.

Cur. adv. vult.

Paull J. This is an action brought by a widow in her capacity as administratrix of her deceased husband's estate, claiming damages against the Kent County Council in respect of the death of her late husband. The deceased, in addition to leaving the widow, also left two children, a boy aged six and a girl aged three. The action is brought under the provisions both of the Fatal Accidents Act, 1846, and of the Law Reform (Miscellaneous Provisions) Act, 1934. So far as the claim is under the latter Act, no question arises. So far as the claim is under the Fatal Accidents Act, 1846, the claim is brought in the following circumstances.

After the death of the deceased, the defendants, acting, needless to say, in complete good faith, approached the plaintiff before any writ was issued by her and agreed to pay to her the total sum

of £4,350, of which £3,650 was to be in respect of her loss, £300 in respect of her son's loss and £400 in respect of her daughter's loss. The plaintiff considered these sums to be reasonable sums and accepted them in so far as she was able to do so without the consent of the court.

The plaintiff thereupon issued the present writ and served upon the defendants a statement of claim setting out the facts giving rise to the claim and giving the necessary particulars under the Fatal Accidents Acts. The statement of claim having been served, the plaintiff, without waiting for any defence, issued the summons which is now before me. The summons asks that the proceedings in the action should be stayed upon terms which include that the defendants do pay into the Dartford County Court in satisfaction of the claim under the Fatal Accidents Acts the sum of £4,350 to be apportioned in the manner to which I have referred above. This summons came before Master Diamond who was not satisfied that the amounts were adequate in the circumstances of the case. The defendants thereupon agreed to increase the children's sums to £450 and £550 respectively, but maintained that the master had no jurisdiction to refuse to pass the sum of £3,650, the widow's portion. The defendants contended before the master and contend before me that where there is a settlement and as part of that settlement the widow has agreed to take a definite sum, which is part of the whole sum, the jurisdiction of the court with regard to the widow's sum is only to say how the sum agreed as the widow's portion shall be dealt with, i.e., whether it shall be paid in whole or in part directly to the widow or, if not, into what court it shall be paid. The defendants agree the court has full jurisdiction to pass or refuse to pass the settlement so far as the infants are concerned.

So far as I am aware this question as to the court's jurisdiction is one upon which there is no reported authority and I have been informed by counsel that different courts have from time to time come to different conclusions.

I was referred to various provisions of the Rules of the Supreme Court and in particular to Order 22, r. 14 (1) and (9). I was also given an interesting historical review of the various forms which rule 14 has from time to time taken. Before, however, the rules can apply an action must have been brought and I have reached the conclusion that the key to the problem does not lie in the wording of the rules, but lies in the legal position when the widow as administratrix entered into the agreement with the defendants. I will first state my conclusion and then the ground for coming to that conclusion.

The conclusion to which I have come is that where the administrator enters into an agreement with the defendant to take a lump sum to cover all the dependants, that agreement is not a valid agreement unless (a) each of the dependants who is sui juris and desires to claim has approved thereof and (b) the court

1958

JEFFREY v. KENT COUNTY COUNCIL.

Paull J.

has sanctioned the agreement as being one for the benefit of each of the dependants who are infants. The court has no power to sanction an agreement unless (a) is fulfilled as well as (b).

Where, however, the administrator has with the approval of any dependant who is sui juris entered into an agreement with the defendant that the defendant should pay to that dependant (whom I shall call the settling dependant) a sum of money which is agreed to be sufficient as being proportionate to the injury suffered by the settling dependant, then the settling dependant is bound by the agreement as he would be if he personally entered into such agreement, but the claims of the other dependants still remain to be settled by the court and the court in judging what is the proper amount to be paid to each of the remaining dependants does not take the sum paid to the settling dependant into account unless the amount so paid affects the loss which has been suffered by any of the other dependants. For instance, if a widow agrees to take a sum of money (not as part of a general lump sum settlement, but individually) which the court considers is too small and which does not result in her having those resources behind her which she would otherwise have had for the bringing up of her infant children, the court in deciding the injury which has been suffered by the infant children by the loss of their father may give sums to such infants much larger than the sums which the court would have awarded had the widow received a proper capital sum. Clearly the ability of the widow to support the children in the future may be affected by the fact that she has too small a capital sum at her disposal and that would increase the loss suffered by the children by the death of their father.

My reasons for coming to this conclusion are as follows: That there are the two methods of settlement to which I have referred is plain although the first method (which may be called the lump sum method) is nowadays the usual, and indeed the almost invariable, practice. In *Bulmer* v. *Bulmer*[1] where a question arose as to the proper method of dividing a total sum awarded, Chitty J. said: "When the questions are before the jury, "undoubtedly the right way for the jury to proceed is either to "take the individual claims of the persons on whose behalf the "action is brought and to adjudicate on them separately or to "fix on an aggregate sum and then divide such sum among the "persons entitled. Both of these methods are adopted by juries." And in *Avery* v. *London & North Eastern Ry. Co.*[2] Lord Macmillan said[3]: "The damages which the jury are to give are "to be such as they may think proportioned to the injury "resulting from the death to the parties respectively and a jury "clearly cannot assess and apportion damages due to parties "who are not before them and whose claims have not been the "subject of evidence."

[1] (1884) 25 Ch.D. 409.
[2] [1938] A.C. 606; 54 T.L.R. 797; [1938] 2 All E.R. 592.
[3] [1938] A.C. 606, 618.

Avery's case was a case where four widows of four men who had been killed in the same accident brought proceedings under the Fatal Accidents Acts, 1846–1908, on behalf of themselves. Each widow did not include as dependants in her action her children, but as next friend elected on the children's behalf to accept compensation under the Workmen's Compensation Act, 1925, so far as they were concerned, thus in effect getting over the difficulty of having to opt whether to take workmen's compensation or claim damages. *Kinneil Cannel & Coking Coal Co.* v. *Waddell*[4] had decided that the option whether to take compensation or claim damages is one to be exercised by each individual claimant and had decided the widow's right to damages could not be defeated by the fact that a stepson had opted to take workmen's compensation. The question in *Avery's* case[5] was whether, where proceedings were brought under the Workmen's Compensation Act, 1925, by some dependants and under the Fatal Accidents Acts by other dependants, the amount recoverable under the Fatal Accidents Acts was affected by the fact that other dependants had received workmen's compensation. The House of Lords held it was not, since the amount claimed under the Fatal Accidents Acts is not group compensation, but individual compensation payable to each individual injured by the death.

It is well-settled law that the administrator in acting under the Fatal Accidents Acts, 1846–1908, is not acting in his normal capacity as administrator. He is not collecting assets to be distributed later. As long ago as 1863 in *Pym* v. *Great Northern Ry. Co.*[6] it was held that the remedy given by the statute is to individuals and not to a class and Erle C.J. in his judgment said[7]: "The principle which governs these cases appears to us "to be to consider whether there was evidence of a reasonable "probability of pecuniary benefit to the parties if the death of the "deceased had not occurred." Thus treating (as indeed did Lord Macmillan) the dependants in the action before the court (which was brought by the administratrix in each action) as the parties in whom the right against the defendants lay. Indeed this must be right. ". . . the damages," said Lord Atkin in *Avery's* case,[8] "constitute a legal debt due to each of the persons to whom the "jury have awarded damages. . . . The quantum of damages ". . . are not a proportion of a limited sum."

It was in *Avery's* case also that it was pointed out by Lord Atkin[9] that there was no need for all the dependants to join in the action and that if they did not the defendants could not pray in aid the absence of some of the dependants in order to reduce the sum payable to such of the dependants as had joined in the action. Lord Atkin made it clear that the claim was the claim of the dependants and not of the administrator and Lord Macmillan pointed out[10] that if for any reason any dependant did

[4] [1931] A.C. 575; 47 T.L.R. 386.
[5] [1938] A.C. 606.
[6] (1863) 4 B. & S. 396.
[7] Ibid.
[8] [1938] A.C. 613.
[9] Ibid.
[10] Ibid. 619.

1958

JEFFREY v. KENT COUNTY COUNCIL.

Paull J.

not join in or was not named in the action he had lost his right to share in the amount awarded, but could not bring a second action.

I apply these principles to a settlement made before any action is brought. If the claim is not the claim of the administrator, but the claim of each dependant separately, I do not see how the administrator has power to accept a sum of money in settlement of the whole of the defendants' liability unless each of those persons who has a claim has given him authority so to do. He is certainly not given any such power by the statute. In the case of an infant, of course, the infant cannot give any authority which is binding upon the infant, and apart from that it is to be remembered that the interest of the administrator may be in conflict with the interest of the infant if the administrator is a dependant.

Condliff v. *Condliff* [11] was cited to me as authority for the fact that an administrator can settle an action under the Fatal Accidents Acts. Indeed that case is sometimes quoted in the textbooks to establish that proposition. If, however, that case is looked at, it will be seen that the defendant in that action was being sued by one of the dependants for a share of the proceeds which the defendant had received as a result of two actions, in one of which he had sued as administrator under the Fatal Accidents Acts and in the other for personal injuries. In those actions the defendant in *Condliff* v. *Condliff* had in good faith and under a judge's order agreed to accept an amount to be paid by the defendants in the two actions in respect of both actions after there had been a judgment for damages in both actions. The defendant in *Condliff* v. *Condliff* had obtained an order of the court staying proceedings upon payment of the sum agreed. The administrator therefore had not acted without an order from the court authorizing him to take the course which he desired to take. I do not therefore look upon that case as being relevant to the problem which I am considering.

It follows from what I have said that in the present case the so-called agreement made by the defendants with the widow as administratrix bound nobody since it was a lump sum agreement to cover both her claim and the claim of the infants. The proportion which the widow agreed to take came into existence after the lump sum agreement had been made and the validity of that agreement was clearly a condition upon which the widow agreed to take and the defendants agreed to pay a certain proportion as her share. The whole agreement is therefore void.

I should add that there is nothing to prevent the plaintiff in the present case agreeing that she will take the sum of £3,650 to cover the injury suffered by herself by reason of the death of her husband, but the defendants must realize that such an agreement may result in the court giving considerably greater sums to the infants than those which were provisionally agreed if the court comes to the conclusion that the amount taken by the

[11] (1874) 29 L.T. 831.

widow is not as large as the court thinks proper and that, therefore, the children's chance of being adequately supported during childhood by the widow has been affected.

In view of the conclusions to which I have come it is unnecessary to refer in any detail to the Rules of the Supreme Court, but it is perhaps as well to point out that those rules as they now exist would appear to fall in with the view which I have taken. Once an action has been taken by the administrator the court has to see which of the dependants are claiming in that action that they have been injured. If the administratrix in her capacity as a dependant widow has agreed after the action has been brought to take a sum of money (not being part of a lump sum) to settle her injury then the court has jurisdiction under R.S.C., Ord. 22, r. 14 (9), to say whether that money should be paid to the widow in whole or in part or invested by the court. If, of course, the widow has settled her individual claim before the action has been brought she will not be a claimant in the action. If a sum of money has been paid into the court and the widow, with the consent of the defendants, has agreed to take a certain part of that sum as her proportion, the court is in no way bound, when deciding the proper sums to be paid to the remaining dependants, by the amount remaining in court. If, however, a total sum has been recovered in the action by judgment being given for a total sum, then of course the court has to apportion the share to each of the dependants claiming in the action. Ord. 22, r. 14 (1), merely applies the principle which I have stated to the case where a settlement has been arrived at after an action has been started, and makes it clear that the defendant cannot get rid of his liability except upon the principles which I have stated.

When this matter came before me in chambers, I did not hear any argument as to whether the amounts in this case were reasonable as it seemed to me that I could not do so properly until I had determined the principles of law to be applied. The amounts in this particular case are of no interest to anyone except the parties and I propose to return to chambers to decide that question.

Solicitors: *Hair & Co.; J. H. Williams, Dartford, Kent.*

J. D. P.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958
July 28.

Lord Goddard C.J., Donovan and Ashworth JJ.

* REGINA *v.* McCARTAN.

Criminal Law—Sentence—Irish, dealing with—Probation order—Recognizance—Citizen of Ireland—Power to make term of order that he should return to Ireland—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 3.

C. C. A.

1958

Regina
v.
McCartan.

A court has no power under section 3 of the Criminal Justice Act, 1948, to make it a term of a probation order that a citizen of Eire or Northern Ireland, who has committed an offence in this country, shall return to Ireland and remain there. The proper procedure is to bind him over and make it a condition of the recognizance that he return to Ireland and does not return to this country for such period as the court may think fit.

Reference by the Secretary of State under section 19 (*b*) of the Criminal Appeal Act, 1907.

The Secretary of State sought guidance as to the way in which the courts should deal with Irish offenders whom they considered should be made to return to Ireland instead of remaining in this country.

Lord Goddard C.J. In this matter the Secretary of State, under section 19 (*b*) of the Criminal Appeal Act, 1907, has referred a question to this court for their opinion. As a rule, when a reference under that paragraph is made, the court considers the matter in private and writes to the Home Secretary giving him their opinion, but in this matter, at the request of the Secretary of State, we are making public the advice we are giving the Home Secretary because it is a matter of some importance for the guidance of courts in the future.

There have been a considerable number of cases in the last year or two in which young men who are citizens of the Republic of Eire or of Northern Ireland have come over to this country and committed offences for which, if they were citizens of this country, they would be sent to Borstal. Not infrequently, courts here, instead of sending these young Irishmen to Borstal, have taken a course with the object of sending them back to Ireland and seeing that they stay there.

The particular question that has arisen in the case of one Stephen McCartan, who has petitioned the Home Secretary, is that the judge before whom he was brought made a probation order and made it a term of the probation that he should return to Ireland and stay there. He went to Ireland and then came back and was taken up by the police because he was found drunk and incapable in the street. Having been dealt with for that offence, he was then brought before a court of assize for a breach of the probation order and received a sentence of 12 months. The Secretary of State raised the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of the probation order that the probationer shall go to Ireland and stay there. In the opinion of the court such an order cannot be made because section 3 of the Act, which is the section which deals with probation orders, provides that a probation order can be made requiring the probationer the subject of the order "to be "under the supervision of a probation officer for a period to be "specified in the order of not less than one year nor more than "three years." Subsection (2) provides: "A probation order

"shall name the petty sessional division in which the offender "resides or will reside; and the offender shall (subject to the "provisions of the First Schedule to this Act relating to pro-"bationers who change their residence) be required to be under "the supervision of a probation officer appointed for or assigned "to that division."

If the attention of the court had been drawn to the provisions of that section, I think it would have been clear at once that it is not in the power of the courts of this country to make it a term of the probation order that the probationer shall go to Ireland and remain there because he could not be under the supervision of a probation officer, nor is there a petty sessional division in this country which can deal with him if he breaks the probation order. There is no petty sessional division which can be named so that he could be required to be under the supervision of a probation officer appointed for or assigned to that division. If the court has before it one of these young men whom the court thinks should be made to go back to Ireland instead of remaining in this country, and that this country should not be put to the expense of keeping him at Borstal, the way to do it is to bind him over and make it a condition of the recognizance that he returns to Ireland and does not return to this country for such period as the court may think fit. That was the order which this court made on June 23, 1958, in *Reg.* v. *Flaherty*,[1] in which I said: "This boy was convicted at Bow Street under the Vagrancy Act, "1898, as a person loitering with intent, and he was sent to "sessions for sentence with a view, I suppose, to his being sent "to Borstal, and that was where the learned deputy chairman "sent him. He is just over 19." I then went through his past history and continued: "He has some petty convictions against "him, but it seems to the court that there is really no reason why "British taxpayers should have to pay the considerable sum of "money it costs to keep boys in Borstal training, and the best "thing to do with him is to send him back to Eire." I then called upon the boy and said: "The court is going to bind you "over in your own recognizances in the sum of £10 that you "accompany an escort to the train, where you will be sent to "Eire tonight or as soon as arrangements can be made, and you "do not land again in this country for at least three years."

That is an order which, in the opinion of this court, can be made. It must be made in the form of a common law recognizance and not in the form of a probation order. We shall, therefore, inform the Secretary of State that in our opinion this probation order was one which the court had no power to make, and the order will have to be quashed. I should say, I think, that in this case of McCartan the man is a citizen of Northern Ireland, but it is just the same. The probation officers in this country have no duties or powers in Northern Ireland, though

[1] *The Times*, June 24, 1958.

C. C. A.
1958
REGINA
v.
McCARTAN.

they have in Scotland; that is dealt with in the Act, but it is these Irish cases we are now considering and, as I say, we shall advise the Home Secretary that the probation order is bad, and that will probably mean that the boy will be released. It is only fair to say that the offence was not serious; it was drunkenness, and it is also fair to say that he said that he came over here to get in touch with the probation officer, and there is reason to believe that is true. For that reason we shall advise the Home Secretary that the probation order cannot stand.

J. D. P.

[MANCHESTER ASSIZES.]

1958
April 29, 30;
May 1.
Paull J.

* NOLAN *v.* DENTAL MANUFACTURING CO. LTD.

[1957 N. No. 406.]

Factory—Eyes—Protection—Dry-grinding—Failure to provide goggles—Breach of duty not shown to be cause of accident—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 49—*Protection of Eyes Regulations,* 1938 (*S.R. & O.,* 1938, *No.* 654), *reg.* 1, *Sch.*

Negligence—Safe system of work—Goggles—Dry-grinding—Employers' statutory duty to provide goggles—Goggles not provided—Probability that goggles would not have been used except under compulsion—Common law duty to provide goggles and ensure their use.

The plaintiff, an experienced toolsetter, was sharpening a tool on a carborundum grinding wheel when a chip flew off and entered his left eye, which subsequently had to be removed. The plaintiff had been employed by the defendants as a toolsetter since 1948, and had been working in the machine-shop, where the accident happened, since 1951. In the course of his work the plaintiff spent short periods sharpening his tools on a grinder, usually two or three and not more than six times a day. Goggles were not provided for use by toolsetters on the grinders: nor were there adequate notices as to their availability. The plaintiff never wore goggles while using the grinders and saw no need to do so; he would not have drawn and used goggles without strict orders and supervision. The defendants' manager realized that there was a danger of an accident of the type which occurred, but thought it a very small one.

Held, (1) that although the defendants were in breach of section 49 of the Factories Act, 1937,[1] and the Protection of Eyes Regulations, 1938,[2] by their failure to provide goggles, the plaintiff had not shown that the probability was that he would have worn them,

---

[Reported by DONALD HART, Esq., Barrister-at-Law.]

[1] Factories Act, 1937, s. 49: "In "the case of any such process as may "be specified by regulations of the "Secretary of State, being a process "which involves a special risk of "injury to the eyes from particles or "fragments thrown off in the course "of the process, suitable goggles or "effective screens shall . . . be provided to protect the eyes of the "persons employed in the process."

[2] Protection of Eyes Regulations, 1938. By reg. 1, s. 49 shall apply to the processes specified in the Schedule. Sch.: "Dry grinding of "metals or articles of metal applied "by hand to a revolving wheel or "disc driven by mechanical power."

and consequently had not shown that the defendants' breach caused the accident.

Bonnington Castings v. *Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615 applied.

(2) That the defendant employers' duty at common law was to ensure not only that goggles were provided, but also that they were used, by strict orders followed by reasonable supervision.

Haynes v. *Qualcast (Wolverhampton) Ltd.* [1958] 1 W.L.R. 225; [1958] 1 All E.R. 441 applied.

ACTION.

The plaintiff, who was employed by the defendant company as a toolsetter in the machine-shop of their factory, was dry-grinding a tool upon a mechanically rotated carborundum stone when a particle from the operation flew out and entered his left eye, which subsequently had to be removed. The plaintiff claimed damages for this injury on the ground, inter alia, of the defendant company's breach of their duty to provide suitable goggles to protect his eyes under section 49 of the Factories Act, 1937.[1]

During the course of the trial the plaintiff added a further allegation of breach by the defendants of their common law duty to provide a safe system of work, by reason of their failure to take reasonable steps to promote the use of protective goggles by workmen engaged in dry-grinding of metals. The facts sufficiently appear from the judgment.

D. J. Brabin Q.C. and *R. Lambert* for the plaintiff.

Fenton Atkinson Q.C. and *C. M. W. Elliott* for the defendants.

The following cases in addition to those referred to in the judgment were cited in argument: *Roberts* v. *Dorman Long & Co. Ltd.*[3]; *Lee* v. *Nursery Furnishings Ltd.*[4]

Cur. adv. vult.

May 1. PAULL J. The plaintiff brings this action against his employers in respect of an accident which happened to him on December 5, 1956, while he was sharpening a tool on a carborundum wheel in the machine-shop at the defendants' factory; while so doing, a chip flew off the carborundum wheel and struck the plaintiff in the eye. By reason of the accident, the plaintiff has lost his left eye.

The facts in connexion with this accident, as I find them, are as follows. The plaintiff is an experienced toolsetter and has worked as such with the defendants since, at any rate, 1948, first in what is called the burr shop and, since 1951, in the machine-shop, where he was at the time of the accident. As a toolsetter he had from time to time to sharpen his tools on a small grinder.

[1] See note on previous page.

[3] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

[4] (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387.

1958

Nolan v. Dental Manufacturing Co. Ltd.

Paull J.

[His Lordship considered an allegation that the lighting provided was inadequate and continued:] He did not sharpen his tools on this wheel more often than six times a day at most, and usually only two or three times a day. The total time involved for this sharpening process during a day's work was not more than about half an hour in short, broken periods. At no time had he worn goggles during those periods and I am satisfied that the plaintiff never considered that there was any danger in using the carborundum wheel in this way. He, himself, said: "I never saw "any particular hazard in this job" and "I did not see any "need for goggles."

I am satisfied that no goggles were provided in any real sense of that word. An old pair of goggles was somewhere in the machine-shop, probably hanging by one particular grinder of a different type, which the foreman said he did consider dangerous. In addition, there was one pair of goggles in the stores, quite close to where the carborundum wheel was. As, however, there were at least three or four carborundum wheels of the same kind as the one on which the plaintiff was working at the time of the accident, all of which might be in operation at the same time, it cannot possibly be said that goggles were provided for use by toolsetters on these grinders.

Further, I am satisfied that there were no adequate notices as to goggles being available. There were no notices in the machine-shop at all. There was one notice on a partition outside the machine-shop, but I am not sure what were the terms of that notice and I am quite satisfied that neither the management nor the employees treated it as worthy of attention. I am also satisfied that if goggles had been provided in the sense of being made available and the plaintiff's attention had been merely drawn to this fact as opposed to his being required to use goggles, the plaintiff would not have used them. Unless compelled by order so to do, the plaintiff would never have gone to the stores, even though they were quite close to the machine, drawn a pair of goggles, used them and taken them back to the stores, each time he wanted to use the machine for a period which could be reckoned in minutes. It would have required strict orders and supervision to make the plaintiff do so. The attitude of experienced toolsetters towards goggles is well shown by evidence on behalf of the plaintiff that even now, in spite of the accident to the plaintiff and the questions by the foreman, he prefers not to use them. "I prefer," he told me, "to grind by natural vision," and that, in my judgment, was the attitude and is the attitude of these toolsetters. Although the plaintiff and the other toolsetters take up this attitude towards goggles, I am satisfied that the defendants' manager, Mr. Goldstone, realised that there was always a danger, although a very small one in his opinion, of this type of accident occurring. [His Lordship referred to the evidence and continued:] That being so, he must

have been aware that if such an accident did happen, the consequences might be very serious, possibly even amounting to total blindness, to the operator.

Those being the facts as I find them, I have now got to consider the claims made in the action and the defences thereto. The statement of claim claims damages both in respect of breach of statutory duty and also in respect of a breach of the defendants' common law duties. The first head of the claim is as follows: "The defendants, their servants or agents, failed to provide suitable goggles or effective screens to protect the eyes of the plaintiff, contrary to section 49 of the Act."

[His Lordship read the section and continued:] In pursuance of that section, the Protection of Eyes Regulations, 1938, were made, wherein the Secretary of State, in pursuance of the section, specifies processes to which the regulations shall apply, and the very first process set out in the Schedule is the dry-grinding of metals, and there is no doubt that this was a dry-grinding of metal. The Schedule specifies "applied by hand," and there is no doubt that this metal was applied by hand; "to a revolving wheel or disc driven by mechanical power," and that is this case. There has been a clear breach of this section by the defendants. Counsel for the defendants, however, while admitting this breach, contends that the plaintiff has not shown that the breach of this section resulted in the accident. Counsel submitted that the obligation is only to provide, not to take any steps towards ensuring that the plaintiff did wear goggles and that it is obvious that the plaintiff in fact would not have worn goggles merely because they were provided.

Until *Bonnington Castings Ltd.* v. *Wardlaw* [1] there were authorities which said in terms that it did not lie in the mouth of the defendants to say that even if they had not fulfilled their statutory obligation, it was for the plaintiff still to show that the breach caused the accident, but in the *Bonnington* case the House of Lords put the onus of showing that the accident resulted from the breach fairly and squarely on the plaintiff. Lord Reid said [2]: ". . . The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[2] [1956] A.C. 613, 620.

1958

Nolan v. Dental Manufacturing Co. Ltd.

Paull J.

I therefore ask myself the question: Has the plaintiff shown that if goggles had been provided in respect of this work, the probability is that he would have worn them? To that, on the facts as I have found them, I answer quite definitely, "No." In my judgment, the plaintiff fails on this head of his claim. [His Lordship rejected the plaintiff's claim based on inadequate lighting and continued:] It is further pleaded that the defendants failed, in the circumstances, to provide the plaintiff with reasonably safe and proper equipment for use in the course of his employment. That puts the duty no higher than the statutory duty and if that is the claim made by the plaintiff, then in my judgment that claim fails, as I have held that if goggles were merely provided, the plaintiff would not have used them. The other head to that claim is: ". . . or to have the said machine-shop as safe as reasonable care and skill would have permitted." That claim is merely as to the condition of the shop and has nothing to do with the provision of the goggles.

As the pleadings were drawn when this action came before me, those were the only heads under which the plaintiff claimed, but, during the argument before me, the case of *Haynes* v. *Qualcast (Wolverhampton), Ltd.*[3] was cited to me and in the closing speeches the arguments proceeded somewhat on the line whether there was liability at common law, on the assumption that the claim was a claim in respect of a failure to provide a proper system of work. Having looked carefully at the pleadings since the time when the arguments closed and found that such a plea was not in the statement of claim, I felt I ought to give an opportunity to the plaintiff to consider whether or not he desired to make any amendment to his pleading, and counsel for the plaintiff has applied to me this morning to amend his statement of claim. The amendment which he seeks to make and which counsel for the defendants does not oppose is as follows: "That the defendants failed to take reasonable steps to promote "the use of protective goggles by workmen engaged in dry-"grinding of metals and so to provide and impose a safe system "of work in their said machine-shop."

In my judgment, this case does come within that class of case where the employer must at common law go a very considerable length in ensuring not only that safety appliances are provided, but that they are used. In *Haynes* v. *Qualcast (Wolverhampton) Ltd.* Lord Evershed M.R. said,[4] in a case where molten metal dropped on the employee's foot, and if he had been wearing safety boots he would not have been injured, but no safety boots were being worn: "The test I take to be the "general one is that it is the duty of an employer in such a case "as this to take reasonable care for the safety of his workmen. "Mr. Thompson has pointed out that molten metal is of a

[3] [1958] 1 W.L.R. 225; [1958] 1 All E.R. 441.

[4] [1958] 1 W.L.R. 225, 229.

"temperature of something like thirteen hundred degrees centi-"grade. From that fact it is, of course, plain that if it gets on "the skin or the body it is likely to do serious and painful injury; "though it may not be (and was not in this case) of any lasting "effect. If, then, that is the nature of the hazard, I think "for my part that the obligation of the defendants extended "to more than merely having the spats available in case any "experienced moulder thought he would like to ask for them. I "do not think that it is necessary to attempt to define in this "case the extent of the duty to warn or advise. I am certainly "not prepared, for my part, to say that this is a case in the class "of those, for example, where the eye is at risk and where, having "regard to the nature of the hazard, there is a duty on the "employer to go to very considerable lengths to try to see that "his workmen take advantage of the protective equipment "supplied."

Thus Lord Evershed points out that where there is the danger of injury to eyes, where a man may be made blind either in one eye or in both, there is a duty upon the employer to take very considerable steps to see that the workmen in fact use the protective appliances provided, and, in my judgment, the mere fact that such an accident is not a very likely one does not affect the employer's duty as long as the risk is there.

In the same case, Parker L.J. said [5]: "The common law duty "is, in the words of Lord Herschell in *Smith* v. *Baker & Sons*,[6] ". . . to take reasonable steps . . . so to conduct opera-"tions that the men are not subjected to unnecessary risk. It "is quite clear that in an operation of this sort there is a risk "of serious injury—true, not injuries which are likely to be fatal "or to affect the eyes, but clearly such as are likely to produce "injury by burning; and it seems to me perfectly clear, in those "circumstances, that there is a duty on employers, not only to "have protective clothing available, but to inform anybody "coming into their employment that they have got that equip-"ment, and to take some steps to educate the man to wear the "equipment for his own safety. Exactly what those steps "should be, I find it unnecessary to determine. In some cases "the hazard may be so great and the injury if it occurs, so "serious, that it might be necessary to make the wearing of the "protective clothing a rule of the factory. Again, where the "matter is not so serious mere advice might be sufficient. But "at any rate, in this case, some steps, as it seems to me, had "to be taken to educate men for their own protection to wear "the protective clothing."

I have already stated that it would, in my judgment, have required a strict order and supervision to ensure that the plaintiff did use the goggles, if goggles were provided, but I hold that in this case there was a common law obligation on the part of the

[5] [1958] 1 W.L.R. 225, 229, 232.

[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

1958

NOLAN
v.
DENTAL
MANUFACTURING CO.
LTD.

Paull J.

defendants not only to provide goggles, but to give strict orders that they were to be used, and to supervise their workmen, at any rate to a reasonable extent, in order to ensure that their orders were obeyed. I hold that because, although the risk of accident was not a very great one, that risk was a very serious one, since, if an accident did happen, the consequences would in all probability be the loss of the sight of one eye and a possibility of the loss of the sight of both eyes. I hold that if that had been done, the probability is that the accident would not have happened, or rather that the injury would not have happened by reason of the accident. I do not think that the plaintiff was the type of man who, in spite of strict orders and supervision, would have tried to dodge them on every occasion. I think that if there had been the rule laid down in the factory that goggles were to be worn, and if on any occasion when it was seen by the foreman that goggles were not being worn the workmen had been pulled up by the foreman, in a very short time it would have been the custom in this factory automatically for the workmen to go to the stores and draw the goggles, to wear them during the process, and then to return them. I hold, therefore, that the plaintiff has proved liability under that head of claim and that head of claim only.

The question of contributory negligence has been raised but, in my judgment, contributory negligence does not arise in this action; no goggles having been provided, the plaintiff cannot be said to have been negligent in not using non-existent goggles. It follows that the plaintiff is entitled to damages. He has lost an eye and he is left with one eye, which is not a very good eye, in the sense that his distant vision cannot be brought up to normal, although he can read very small print. Shortly after the eye had been taken out, he met with another accident, due to his only having one eye and not being accustomed to avoid articles on his left as he passed them. The proper way of approaching that aspect of the case, however, is no longer in dispute, and it was agreed by counsel that the liability to meet with such accidents was a factor to be taken into consideration in judging the amount to be given to the man as a one-eyed man, and that no special damage can be claimed in respect of that particular accident. It now remains for me to assess his damages. On the whole, I think that the proper sum to award the plaintiff, in addition to the agreed special damage of £190 14s., is £2,250.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson; James Chapman & Co., Manchester.*

[CHANCERY DIVISION.]

* INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. *v.* INLAND REVENUE COMMISSIONERS.

1958
July 8, 15.

Wynn-Parry J.

Revenue—Stamp duty—Security—Agreement to provide broadcasting programmes — Fluctuating payments — Specified sums payable, variable on a contingency—Whether liable to ad valorem duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *First Schedule.*

By an agreement under seal dated May 23, 1955, made between Independent Television Authority ("I.T.A.") and Associated-Rediffusion Ltd. ("A.R."), A.R. agreed to provide programmes for broadcasting by I.T.A. pursuant to section 2 of the Television Act, 1954. The agreement was to come into operation between August 15, 1955, and November 15, 1955, and to continue in force until July 29, 1964. A.R. was to pay I.T.A. a fee at the rate of £495,600 a year for 2½ years and at a rate of £536,900 thereafter. The agreement further provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (therein defined), compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade).

The Inland Revenue Commissioners held that the agreement was liable to ad valorem stamp duty under the head of charge "Bond, "Covenant, or Instrument of any kind whatsoever (1) being the "only or principal or primary security for . . . any sum or sums of "money at stated periods" within the meaning of the First Schedule to the Stamp Act, 1891, and so assessed the duty on the sums payable annually of £495,600 and £536,900 respectively:—

Held, (1) that the agreement was a security within the meaning of the First Schedule, notwithstanding that it was for services, and that it was not collateral or ancillary to any other documents but itself created the obligation, and that it was executory at the time of its execution.

Jones v. *Inland Revenue Commissioners* [1895] 1 Q.B. 484; 11 T.L.R. 78 and *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [1899] 1 Q.B. 250; 15 T.L.R. 98 applied.

(2) That where it appeared on the face of a deed constituting a security within the meaning of the First Schedule that there was a specified sum payable, then, notwithstanding that such specified sum might on the happening of a contingency be increased or reduced in part or to nothing, the deed was liable to be charged to stamp duty, calculated on such specified sum; and, accordingly, the assessment to ad valorem duty was correct.

Underground Electric Railways Company, of London, Ltd. v. *Inland Revenue Commissioners* [1905] 1 K.B. 174; 21 T.L.R. 109; affirmed [1906] A.C. 21; 22 T.L.R. 160 and *Underground Electric Railways Company, of London, Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 210; affirmed [1916] 1 K.B. 306 applied.

CASE STATED.

The case stated so far as relevant provided: The decision of the court was desired on the amount of stamp duty chargeable on an instrument which had been presented to the Inland Revenue

1958

INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. v. INLAND REVENUE COMMISSIONERS.

Commissioners by or on behalf of the Independent Television Authority (hereinafter called "the authority") and Associated-Rediffusion Ltd. (hereinafter called "the contractor") under section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part.

The authority was established under the Television Act, 1954, to provide in accordance with the Act for the period of ten years from July 30, 1954, television broadcasting services additional to those of the British Broadcasting Corporation.

Section 2 of the Act provided that the programmes broadcast by the authority should so far as might be consistent with the observance of the requirements of the Act be provided, not by the authority, but by persons who under contracts with the authority had in consideration of payments to the authority and subject to the provisions of the Act the right and the duty to provide programmes or parts of programmes to be broadcast by the authority which might include advertisements. The agreement was such a contract.

Clause 4 (1) of the agreement provided that in consideration of the payments to the authority to be made by the contractor thereunder and upon the terms and subject to the conditions thereinafter contained and subject to the provisions of the Act the contractor should for the term mentioned in clause 10 of the agreement be a programme contractor and should have the right and be subject to the duty to provide programmes to be broadcast by the authority and that accordingly the contractor should provide and without prejudice to the exercise by the authority (subject as therein mentioned) of its powers under section 2 (2) (*a*) of the Act (being powers conferred on the authority to arrange for the provision of parts of programmes so as to include items of particular classes to secure a proper balance and which could not, or could not as suitably, be provided by programme contractors) the authority should broadcast programmes provided by the contractor from the station or stations and on the days and within the hours and otherwise in accordance with the terms and conditions set out in the First Schedule to the agreement (which set out particulars, inter alia, of the stations from which programmes were to be broadcast and the hours and times of broadcasting and laid down the period within which broadcasting was to commence as the period between August 15, 1955, and November 15, 1955) as from a date or dates (being a date or dates within the periods for commencement of broadcasting) to be determined by the authority by not less than 28 days' prior notice to the contractor. The said sub-clause contained a proviso for variation of programmes and substitution of

stations and a proviso for discontinuance of broadcasting in the circumstances respectively mentioned.

Under clause 9 of the agreement the contractor was bound to make payments to the authority as provided in the Third Schedule by which it was provided that the contractor should as from the date of commencement of broadcasting from the station being a date within the period between August 15, 1955, and November 15, 1955, pay to the authority a fee at the rate of £495,600 per annum until March 31, 1958, or the expiration of 2½ years from the commencement date (whichever is the later) and a fee at the rate of £536,900 thereafter. Paragraph 2 of the Third Schedule provided for an increase or decrease of such payments in the event of an increase or decrease of 5 per cent. or more in the half-yearly index figure (thereby defined) compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade for the months therein specified). Paragraph 3 of the Third Schedule gave the authority the right to increase fees after the expiration of 3½ years from the commencement date (subject to an upper limit) and paragraph 4 provided for review of fees by arbitration in certain circumstances.

Clause 10 of the agreement provided that the term for which the contractor should be a programme contractor should commence on the date thereof and should (subject to avoidance or determination as therein provided) continue in force until July 9, 1964. Clause 10 also contained power for (i) the authority and (ii) the contractor to determine the agreement in the events mentioned.

The commissioners were of opinion that the agreement was chargeable with ad valorem stamp duty under the head of charge "Bond, Covenant, or Instrument of any kind whatsoever (1) "being the only or principal or primary security for any annuity ". . . or for any sum or sums of money at stated periods . . ." in the First Schedule to the Stamp Act, 1891. They were further of opinion that the agreement was not (within the meaning of this head of charge) "for the term of life or any other indefinite "period" (which would entail a stamp duty of £5 per cent. of the sum periodically payable) but "for a definite and certain "period, so that the total amount to be ultimately payable can "be ascertained" and that in accordance with the terms of the said head of charge the agreement was chargeable with the "same ad valorem duty as a bond or covenant for such total "amount." The commissioners were of opinion that the "definite and certain period" within the meaning of this head of charge was under the agreement the period from November 15, 1955 (the last date at which broadcasting was to begin under the terms of the agreement), to July 29, 1964 (up to which date the agreement was to continue in force). On this basis they assessed the duty on the agreement pursuant to sections 1 and 4 of the Stamp Act, 1891, the said head of charge "Bond, Covenant,"

1958

Independent Television Authority and Associated-Rediffusion Ltd. v. Inland Revenue Commissioners.

etc., duty, the head of charge "Mortgage, Bond, Debenture, "Covenant," etc., in the First Schedule to the Stamp Act, 1891 (to which latter head securities for a definite and certain period chargeable under the head "Bond, Covenant," etc., were referred), and other relevant statutory provisions as follows: Ad valorem duty at the rate of 5s. for every £100 and also for any fractional part of £100—£11,430 10s. *and* under section 4 of the Stamp Act, 1891, a "deed" stamp of 10s. Total duty £11,431.

No objection was taken by the appellants to the fixed duty of 10s. but they contended—(1) that the agreement was not liable to ad valorem duty at all, as not being a "security" liable to ad valorem duty within the meaning of the head of charge "Bond, "Covenant," etc., duty in the First Schedule to the Stamp Act, 1891. (2) Alternatively that the agreement was not liable to such ad valorem duty at all as being a security for a definite period which was not certain. (3) That if, contrary to these first two contentions, the agreement was liable to such ad valorem duty as a security for a definite and certain period, it was chargeable only in respect of the fee payable during the period from November 15, 1955, until March 31, 1956, and not further or otherwise.

Geoffrey Cross Q.C. and *J. G. Monroe* for the appellants.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown.

Case cited in argument not referred to in the judgment: *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners.**

Cur. adv. vult.

July 15. Wynn-Parry J. read the following judgment: The first point in this case which Mr. Cross advanced on behalf of the appellants is that the agreement of May 23, 1955, to which I shall refer as "the agreement" was not a security within the meaning of that word as used in the First Schedule to the Stamp Act, 1891, under the heading "Bond, Covenant, or Instrument of any "kind whatsoever." It is clear from the authorities that a document can be a security under the above heading although it is not collateral or ancillary to any other document but itself creates the obligation: see *Jones* v. *Inland Revenue Commissioners.*[1]

Mr. Cross, however, contended that broadly speaking the agreement dealt with the provision of services for a consideration and that while an agreement involving the hire of chattels (see *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*[2]) or an agreement involving the sale of goods (see *County of*

* [1909] 1 K.B. 737; 25 T.L.R. 348.

[1] [1895] 1 Q.B. 484, 492, 495; 11 T.L.R. 78.

[2] [1899] 1 Q.B. 250; 15 T.L.R. 98.

Durham Electrical Power Distribution Co. v. *Inland Revenue Commissioners* [3]), in both of which instances property passed, could fall within the word "security" under the above heading in the First Schedule to the Stamp Act, 1891, an agreement involving the provision of services did not fall within that word "security."

In my view, having regard to the facts in *Jones* v. *Inland Revenue Commissioners*,[4] I am bound to reject this contention. In the statement of facts in that case it is stated [4]: "The "instrument chargeable with duty was an agreement under seal "for the supply of telephonic communication, dated July 1, 1894, "and made between the National Telephone Company, Limited, "of the one part, and the appellant, carrying on business as "Keith, Prowse & Co., of the other part. It contained recitals "that the appellant was desirous of establishing telephonic com-"munication from her head office, No. 48, Cheapside, to her "London branches and to various theatres, hotels, and other "places set out in the first schedule, such telephonic communica-"tion being by means of metallic circuits and including telephone "instruments at the head office, and that the company had "agreed to supply the means of such telephonic communication "and to maintain the same upon the terms and conditions pro-"vided by the agreement. By clause 1 the company undertook "to erect and maintain in good working order the telephonic lines "and apparatus."

Clearly, therefore, the consideration moving from the telephone company was the provision of services, yet the agreement in question was charged as a security. The next contention advanced by Mr. Cross was that as the agreement was executory at the time of its execution, it could not be a security within the above heading. It appears to me, however, that I am bound by the authorities to reject this contention also. In *British-Italian Corporation Ltd.* v. *Inland Revenue Commissioners*,[5] but at length in Sergeant on Stamp Duties, 3rd ed., p. 334, Rowlatt J. indicated clearly that he would have liked to accede to the argument that a wholly executory contract could not be regarded as a security, but held himself bound to do so by *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*.[6] In the Court of Appeal [6] both Lord Sterndale M.R. and Atkin L.J. treated the matter as settled by *Jones* v. *Inland Revenue Commissioners* [7] and *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners*,[8] pointing out that in each of those cases the instrument in question was executory at the time it was made. It appears to me, therefore, that certainly so far as this court is concerned and, I should have thought with respect, also so far as the Court of Appeal is concerned, this point is not open to the appellants.

[3] [1909] 2 K.B. 604; 25 T.L.R. 672.
[4] [1895] 1 Q.B. 484, 485.
[5] [1921] W.N. 220.
[6] [1899] 1 Q.B. 250.
[7] [1895] 1 Q.B. 484.
[8] [1899] 1 Q.B. 250.

1958

Independent Television Authority and Associated-Rediffusion Ltd. v. Inland Revenue Commissioners.

Wynn-Parry J.

It is true that *National Telephone Co. Ltd.* v. *Inland Revenue Commissioners* [8] was taken to the House of Lords,[9] but in the very short speech of Lord Halsbury L.C., this point was not expressly dealt with. Whether or not the point should be treated as covered by the decision of the House of Lords is, however, not one with which I am concerned. I therefore conclude that the agreement is a security within the above heading in the First Schedule to the Stamp Act, 1891.

The second main contention put forward by Mr. Cross was that, assuming that the agreement is a security, as I have held it to be, and admitting, as Mr. Cross does, that it is for a definite and certain period, it is chargeable only in respect of the fee payable during the period from November 15, 1955 (the latest date by which broadcasting was to begin), until March 31, 1956 (the first, though broken, half-yearly period contemplated under the agreement); in which case the duty would amount to approximately £500. Put shortly, Mr. Cross's contention is that on the true construction of the agreement it is impossible at the date of the agreement to predicate as regards the period after March 31, 1956, what sums will be payable, because of the presence of the provisions for increase or diminution of the sums specified in paragraph 1 of the Third Schedule to the agreement. On the authorities he accepts that if on the true construction of the agreement either a minimum sum or a maximum sum is discoverable, then the charge would operate on that minimum or maximum sum as the case might be: but, he contends that it is insufficient to find only a specified sum, which is neither a maximum nor a minimum sum, but which is only a line, so to speak, from which to measure the fluctuations permitted by the agreement. Mr. Pennycuick, on the other hand, contends that on the authorities it is sufficient, for the purpose of attracting the charge, that there should be a specified sum, and that it is immaterial whether that specified sum is liable to increase or diminution, or that it is impossible as at the date of the agreement to predicate the maximum on increase or the minimum on diminution.

The relevant words in the charge are "so that the total "amount to be ultimately payable can be ascertained." Were the matter res integra, then I should be inclined to say that the condition of liability to charge was that by an examination of the instrument the total amount payable under the instrument, that is, everything that is payable, must be ascertainable as at the date of the instrument, with the consequence that if the total were not so ascertainable then the charge would not operate. No doubt if this construction had found high judicial favour the Stamp Act, 1891, would have been altered, but it did not find such favour. In the agreement which fell to be considered in *County of Durham Electrical Power Distribution Company* v.

[8] [1899] 1 Q.B. 250. [9] [1900] A.C. 1.

Inland Revenue Commissioners [10] the consumers were to pay for all electric current supplied thereunder a fixed charge of £57 10s. per quarter and in addition 1d. per Board of Trade unit for all current supplied and consumed as indicated by the appellants' meters. It is clear, so far as regards the additional charge of 1d. per Board of Trade unit, that the amount which might become payable in respect of that liability could not be ascertained at the date of the execution of the agreement. The commissioners assessed the appellants' liability to stamp duty on the basis that duty was payable at the rate of 2s. 6d. per £100 on £57 10s. for seven years, the term of the agreement, and their assessment was upheld by the Court of Appeal. Thus the appellants were charged on a sum which was less than the total amount which would be ultimately payable. In other words, the court disregarded that part of the monetary consideration which could not be ascertained. Clearly, therefore, I cannot give the words in question the simple construction which otherwise I would have been inclined to give them.

I turn now to consider the conflicting contentions to which I have referred: on the one hand that a document properly describable as a security is not chargeable to stamp duty, unless it contains provision for the payment of a minimum or maximum sum; and on the other hand that such a document is chargeable if it contains provision for the payment of a specified sum, notwithstanding that such specified sum is liable to be increased or diminished on the happening of certain contingencies.

It is clearly established by the authorities that whether the sum required to attract the charge must be a maximum or minimum sum on the one hand or merely a specified sum on the other hand, the fact that such sum is payable on a contingency or a number of contingencies is immaterial: see *Underground Electric Railways Company, of London, Ltd.* v. *Inland Revenue Commissioners*,[11] affirmed by the House of Lords,[12] to which case I will refer as "the first *Underground Railways* case," and *Underground Electric Railways Company, of London, Ltd. and Glyn, Mills, Currie & Co.* v. *Inland Revenue Commissioners*,[13] affirmed in the Court of Appeal,[14] to which I will refer as "the "second *Underground Railways* case."

Before coming to an examination of these two cases I take note that, as was pointed out in argument, under the agreement which the court had to consider in *Durham Electrical Power Distribution Company* v. *Inland Revenue Commissioners* [15] not merely was there a liability on the consumer to pay for current consumed (a liability necessarily incapable of quantification at the date of the agreement) in addition to the fixed charge of £57 10s. per quarter, but that the fixed charge could in certain

[10] [1909] 2 K.B. 604.
[11] [1905] 1 K.B. 174; 21 T.L.R. 209.
[12] [1906] A.C. 21; 22 T.L.R. 160.
[13] [1914] 3 K.B. 210.
[14] [1916] 1 K.B. 306.
[15] [1909] 2 K.B. 604.

1958

INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. v. INLAND REVENUE COMMISSIONERS.

Wynn-Parry J.

circumstances be diminished to £50. Nevertheless, to my mind the principle which governs the present case is to be extracted from the two *Underground Railways* cases.[16] The agreement in the first *Underground Railways* case [17] was one which fell to be charged, if at all, under section 56 (2) of the Stamp Act, 1891, but for the purposes of this case that circumstance is immaterial. Clause 3, which was the relevant clause of the agreement, provided as follows [18]: "The profits of the new company available "for dividend in respect of each year shall be applied in the "following order and manner—that is to say: 'First. In pay- "'ment of a cumulative dividend at the rate of 5 per cent. per "'annum up to the end of such year on the amount for the "'time being paid up on any shares for the time being issued by "'the new company; and Secondly. In paying to the traction "'company or its assigns as a further part of the consideration "'for the said sale such a sum as shall be equal to a dividend "'of 3 per cent. for such year on the amount for the time being "'paid up on such of the original ordinary share capital of "'£5,000,000 in the new company as shall for the time being "'have been issued by the new company.'"

It is to be observed that under "First" the dividend payable on the shares of the new company was a cumulative dividend, whereas the sum payable under "Secondly" was in respect of a non-cumulative dividend, and was therefore payable exclusively out of the profits, if any, of the new company of the year in respect of which it was payable under the agreement. Thus the sum payable under "Secondly" might be reduced in part or even to nothing, a contingency which was recognized by Lord Lindley in his opinion in this case in the House of Lords. The approach to the matter which the commissioners made, as set out in the statement of facts, is not without interest [19]: "The "commissioners found that at the date of the agreement the "whole of the ordinary share capital of the new company to the "amount of £5,000,000 had been issued, and that the amount "paid up was £1,300,000, upon which sum a dividend of £3 per "cent. for a year would amount to £39,000. The commissioners "were of opinion that the sum contingently payable out of profits "in each year under clause 3, sub-clause 2, was part of the con- "sideration for the sale, and that, so far as such sum was "capable of ascertainment at the date of the agreement, it was "liable to ad valorem conveyance duty at the rate of 10s. per "cent." Collins M.R., in the course of his judgment, said [20]: "Another point was taken that, before the question of contin- "gency is reached, there must be an ascertained sum in respect "of which this duty can be levied, and it is said that, in this "case, there is absolute uncertainty about the sum upon which "the 3 per cent. dividend would be payable, because that sum

[16] [1906] A.C. 21; [1916] 1 K.B. 306.
[17] [1905] 1 K.B. 174.
[18] Ibid. 175.
[19] Ibid.
[20] Ibid. 180.

"is paid-up capital, and the agreement contemplates more capital "being paid up over and above the sum then paid up. Upon "that ground, it is said, that sum is too indefinite to be the "subject-matter of an ad valorem duty; and that a fixed factor "is not available in the calculation, inasmuch as the amount is "capable of being increased. That objection does not impress "me, because if I once find that there is a fixed minimum already "reached at the date of the agreement, it does not seem to me "that the fact that the minimum may be afterwards exceeded "alters the fixity of that which has already been ascertained, "namely, the sum below which the capital cannot fall, and the "sum, therefore, upon which the 3 per cent. dividend will have "to be paid if the other contingencies, which I will deal with in "a moment, arise. Therefore that factor of indefiniteness, so far "as it rests on the fact that the capital is capable of increase, "does not seem to introduce any such uncertainty into the "calculation as to prevent the incidence of the taxation."

Mr. Cross fastened on the words "if I once find that there is "a fixed minimum already reached at the date of the agreement," and he contended that this must be regarded as a case which was decided upon the basis that the agreement contained a fixed minimum. But I think that the sense in which the Master of the Rolls used the words "a fixed minimum" is to be discovered from a later passage in his judgment when he quoted the argument of the Attorney-General [21]: "He [the Attorney-General] "argued that the Crown is entitled to regard the sum ascertained "by the commissioners to have been paid up at the date of the "agreement as an absolutely fixed and permanent factor upon "which the sum of 3 per cent. will have to be paid, and with "this view I agree." As I understand that passage, its emphasis is upon liability as at the date of the agreement. The circumstance that by a calling up of uncalled capital the amount payable might be increased was not to be regarded as a circumstance, which in any way altered the character of the sum paid up at the date of the agreement, as being "an absolutely fixed and per-"manent factor." It follows, in my view, by parity of reasoning, that inability in any year on the part of the new company to pay the sum provided for under clause 3 "Secondly" of the agreement, would not affect that sum as being "an absolutely fixed "and permanent factor upon which the sum of 3 per cent. will "have to be paid." It would still remain, in the words of Collins M.R., "a fixed minimum" in the sense in which it is used by him [22] and as interpreted in the later passage of the report which I have quoted,[23] namely, a "fixed and permanent factor." In other words, on the one hand the sum payable might be increased upon the happening of a contingency which might never happen, namely, the calling up of uncalled capital; on the other hand the sum payable might in any year be reduced either in part or to

[21] [1905] 1 K.B. 181.
[22] Ibid. 180.
[23] Ibid. 181.

1958

Independent Television Authority and Associated-Rediffusion Ltd. v. Inland Revenue Commissioners.

Wynn-Parry J.

nothing by the happening of a contingency which might never happen, namely, insufficiency or total absence of profits. What was ascertainable at the date of the agreement was the liability to pay on the amount of capital of the new company called up at that date, and that was the "fixed and permanent factor."

In the House of Lords,[24] Lord Lindley delivered the only reasoned opinion. He uses the phrase "minimum sum." As I understand his opinion, he uses this phrase because, as he says,[25] "The amount payable in future was liable to be increased." Let me read the first paragraph of his speech[25]: "My Lords, when "the stamp duty payable on the conveyance in this case had to "be ascertained, part of the consideration for the sale was 3 per "cent. of the then paid up capital of the purchasing company. "This sum was a minimum sum and it was payable periodically "for an indefinite time. The amount payable in future was "liable to be increased, but not to be diminished, except in "certain events, to which I will now allude. One of these events, "and the only one in my opinion which creates any difficulty, "was the possible insufficiency of the profits of the company to "pay the amount referred to after paying a dividend of £5 per "cent. on the paid-up capital of the company. That dividend of "5 per cent. had to be paid out of the profits of the new company "to its shareholders before any further payment became payable "to the selling company. The minimum sum payable periodically "was so payable subject to a contingency, viz., the existence of a "sufficiency of profits to pay first a dividend of 5 per cent. and "then a further dividend of 3 per cent. We have therefore an "ascertained minimum amount payable periodically as part of "the consideration of the sale, but payable on a contingency."

As I understand that paragraph there was a fixed sum, which Lord Lindley calls a minimum sum, which was liable to increase. That fixed sum was liable to be increased on the happening of a contingency, namely, the calling up of further capital, but payment in respect of that fixed sum was also liable to be reduced on the happening of a contingency, namely, lack of profit in the hands of the new company. On that analysis, it would appear that the only reason for calling the fixed sum a minimum sum was because it was liable to increase; the liability of the new company thereafter being in respect of an increased sum, whereas an insufficiency of profits in the hands of the new company in any year would only reduce the actual liability of the new company to pay to the amount of the profits, if any, available, but would not reduce the measure of its liability which would continue, so that in any year in which sufficient profits were available it would have to pay the fixed or minimum sum. If I am correct in my analysis of the first *Underground Railways* case in the Court of Appeal[26] and in the House of Lords,[27] then I conclude that the real emphasis is on the discovery of a fixed or specified

[24] [1906] A.C. 21.
[25] Ibid. 22.
[26] [1905] 1 K.B. 174.
[27] [1906] A.C. 21.

sum ascertainable at the date of the agreement. For myself, I regard the use of the words "minimum sum" as equal to "ascertained" or "specified sum." I am fortified in this conclusion because in his judgment in the second *Underground Railways* case Scrutton J. said[28]: "It is said, however, that in all "these cases there was a specified sum or sums at the date of "the deed, and that if there is no sum specified at the date of "the deed, no stamp duty is payable. I do not think this is "true of the first *Underground Railways* case,[29] where any sum "up to 3 per cent. might be payable depending on amount of "profits, and the deed was assessed on the maximum payment "which might be required." That passage appears to me to rob the word "minimum" in the context of the first *Underground Railways* case of the magic with which Mr. Cross seeks to clothe it. It comes to this. It depends entirely on the point of view. If you look at the fixed or specified sum from the point of view of liability to increase, it can be regarded as a minimum sum. If, however, you regard it from the point of view of liability to reduction because of insufficiency of profits, then it can be regarded as a maximum sum. The common characteristic is that it is fixed or specified.

I now turn to consider shortly the second *Underground Railways* case.[30] This was a case under the heading "Bond, "Covenant, or Instrument of any kind whatsoever" in the First Schedule to the Stamp Act, 1891. The facts as set out in the headnote were as follows: "By a deed executed by them the "appellants agreed, provided a sufficient number of the holders "of ordinary stock of the Central London Railway Company "would take guaranteed stock in exchange for their ordinary "stock, to guarantee interest at 4 per cent. on such guaranteed "stock, payable half-yearly, if and to the extent that the profits "of the Central London Railway Company were not sufficient to "pay that amount of interest. At the date of the deed it was "not known whether a sufficient number of holders of ordinary "stock would accede to the arrangement or whether all would "so accede, but if they all acceded and if the Central London "Railway Company made no profits in any year, the appellants "would be liable to pay £120,000 in that year, being 4 per cent. "on £3,000,000 stock." It was "*Held*, that the deed was "chargeable with ad valorem stamp duty under the heading "'Bond, Covenant, or Instrument of any kind whatsoever, being "'the only or principal or primary security for any annuity . . . "'or for any sum or sums of money at stated periods . . . for ". . . [an] indefinite period,' on the maximum sum which "might become payable under the deed."

It will be observed that no fixed or specified sum could be ascertained as at the date of the deed, short of the maximum

[28] [1914] 3 K.B. 210, 220.
[29] [1905] 1 K.B. 174; [1906] A.C. 21.
[30] [1914] 3 K.B. 210.

1958

INDEPENDENT TELEVISION AUTHORITY AND ASSOCIATED-REDIFFUSION LTD. v. INLAND REVENUE COMMISSIONERS.

Wynn-Parry J.

amount which might possibly become payable. Scrutton J., treating the first *Underground Railways* case[31] as one in which the deed in question was assessed on the maximum payment which might be required, said later in his judgment[32]: "For "these reasons I am of opinion that under the heading 'Bond' "where the maximum sum which can be secured by the instru- "ment is ascertainable from the instrument itself, the ad valorem "stamp must be estimated with reference to that sum, though "it never may become payable, and it cannot be told at the date "of the instrument whether that sum, or any less sum, or any "sum at all will in fact be payable."

Here, clearly, the judge fastened on the maximum sum, because it was the only ascertainable sum. The only characteristic which the sum had to bear was that it should be ascertainable: the fact that it was the maximum amount which might possibly become payable was merely a result flowing from the language of the document. The decision of Scrutton J. was affirmed in the Court of Appeal.[33] I do not find it necessary to refer to the judgments except to point out that no distinction is drawn between "minimum" and "maximum."

Upon a consideration of the two *Underground Railways* cases, which, I think, contain all the necessary material, I extract the following propositions. In the case of a deed, being a security within the meaning of that word as used in the First Schedule to the Stamp Act, 1891, under the heading "Bond, Covenant or "Instrument of any kind whatsoever," where it appears on the face of the deed that there is a specified sum payable by one party to the deed to the other party, then, notwithstanding that such specified sum may (a) be increased on the happening of a contingency or (b) may be reduced in part or to nothing on the happening of a contingency, the deed is liable to be charged to stamp duty calculated on such specified sum. In my view, on its true construction, the deed in this case falls within that proposition and therefore the assessment appealed from was correct. The appeal will therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Overy; Solicitor, Inland Revenue.*

I. G. R. M.

[31] [1905] 1 K.B. 174.
[32] [1914] 3 K.B. 210, 221.
[33] [1916] 1 K.B. 306.

[COURT OF APPEAL.]

* WILSON BROTHERS LTD. *v.* EDWARDS (VALUATION OFFICER).

[L.V.C. 32/1956.]

* HUDSON'S BAY CO. *v.* THOMPSON (VALUATION OFFICER).

[L.V.C. 231/1956.]

C. A.

1958
June 24, 25, 26; *July* 25.

Jenkins, Parker and Pearce L.JJ.

Rates and Rating—Industrial hereditament—Adaption for sale—Greetings cards distributors' premises—Cards received in bulk lots of identical cards — Sorted into saleable mixed parcels — Whether "adapted for sale" — Fur sorting and auction premises — Mixed parcels of skins received from individual sellers—Sorted into auction lots of identical grade and species irrespective of ownership—Sold on commission on behalf of sellers — Whether "adapted for sale" — Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1)—*Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

In Wilson's case, the ratepayers were large dealers in greetings cards, with an annual turnover of some 88 million cards. The cards were received from the printers in large bulk lots of identical cards. To render them saleable to wholesalers, with whom the ratepayers dealt, the cards were rearranged or "collated" into a number of "series" of different cards, there being some 150 different varieties of such "series," before despatch. The ratepayers claimed that this operation constituted an "adapting for sale" of the cards, so that their premises constituted a "workshop" within the meaning of section 149 of the Factory and Workshop Act, 1901, with the consequence that they qualified as an "industrial hereditament" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.[1]

In the Hudson's Bay Co.'s case, the premises were used for the sorting and grading of skins, and their subsequent sale by auction to furriers. About 25 per cent. of the skins belonged to the company, the remainder being consigned by a number of different owners in the form of bales comprising a number of different species and

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament . . . occupied and used . . . "subject as hereinafter provided, as "a factory or workshop: Provided "that the expression industrial "hereditament does not include a "hereditament occupied and used as "a factory or workshop if it is "primarily occupied and used for the "following purposes or for any combination of such purposes, that is to "say— . . . (*c*) the purposes of distributive wholesale business; (*d*) the "purposes of storage; . . . (*f*) any "other purposes . . . which are not "those of a factory or workshop. "(2) . . . save as aforesaid, the "expressions 'factory' and 'work-"'shop' have respectively the same "meanings as in the Factory and "Workshop Acts, 1901 to 1920."

Factory and Workshop Act, 1901, s. 149: ". . . The expression 'work-"'shop' means . . . (*b*) any "premises, room, or place, not being "a factory, in which . . . any manual "labour is exercised by way of trade "or for purposes of gain in or incidental to any of the following purposes, namely . . . (ii) the altering, "repairing, ornamenting, or finishing "of any article; or (iii) the adapting "for sale of any article . . ."

C. A.

1958

Wilson Brothers Ltd. v. Edwards (Valuation Officer).

Hudson's Bay Co. v. Thompson (Valuation Officer).

qualities. Before sale the skins were sorted and graded into auction lots suitable for sale, each comprising a number of skins of the same species and quality, a process requiring great skill and experience. Each lot would contain skins which had been consigned by a number of different owners, and were identified throughout, the price bid being so much per skin, and the proceeds being credited to the respective owners. The company's contention was similar to the above.

In each case the Lands Tribunal held that the premises did not qualify as an industrial hereditament. On appeal:—

Held, (1) that the authorities established the following general propositions: (i) in order to amount to an adapting for sale of a given article the process to which it is subjected must work some change in the article itself which renders it saleable when unsaleable before, or more readily saleable than it was before; (ii) an article may be made saleable or more readily saleable by testing and certification, but this in itself is not adaptation for sale, since no change is brought about in the article as such; (iii) the sorting or separation of an article to be sold from a bulk may amount to an adapting of an article for sale where the article to be sold is a bulk, and considered as a bulk is substantially different from the original bulk although its constituent parts were included in the original bulk and have not in themselves been in any way changed.

Applying such principles:

(2) That in Wilson's case the work done on the cards amounted to rearranging them in the way demanded by the trade; the collated cards when despatched were not impressed with any special character by virtue of anything done to them on the hereditament; such a process was not an adapting for sale, but what Lord Dunedin in *Sedgwick* v. *Watney, Combe, Reid & Co.* [1931] A.C. 447 at p. 463; 47 T.L.R. 308 called a mere prelude to distribution; so that in the result, the hereditament must be held to be primarily used for the purpose of "distributive wholesale business," and thus excluded from the definition of the expression "industrial hereditament."

Fullers Ltd. v. *Squire* [1901] 2 K.B. 209; *Kaye* v. *Burrows* [1931] A.C. 446; 47 T.L.R. 308; and *Hines* v. *Eastern Counties Farmers' Co-operative Association Ltd.* (*ibid.*) distinguished.

(3) That the Hudson's Bay Co.'s case could not be treated as a "bulk" case, as the components of the lots sold never lost their individual identity as the property of individual vendors, and were sold as such to the buyers of the lots; and, under the circumstances, while the system of sorting and grading enabled each individual skin to be sold to the best advantage as part of a uniform lot, it could not be regarded as an adapting for sale.

Cases stated by the Lands Tribunal.

The following statements of fact are taken substantially from the judgment of the court.

The two matters before the court were (i) an appeal by Wilson Bros. Ltd., of 76, 78 and 80, Great Eastern Street, London, E.C.2, by way of case stated from a decision of the Lands Tribunal affirming a decision of the local valuation court for North-east London to the effect that their premises should be entered in Part I of the valuation list for rating purposes, the ground of appeal being that the premises should be transferred to Part II of the valuation list, with consequential reductions in their gross and rateable values, as an industrial hereditament

within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928; and (ii) an appeal by the Hudson's Bay Co. by way of case stated from a decision of the Lands Tribunal affirming a decision of the Central London local valuation court which had confirmed the assessment of the whole of the appellants' premises in the City of London shortly described as "Beaver Hall, Carpenter's Workshop and Beaver House" in Part I of the valuation list, the ground of appeal being that the carpenter's workshop and Beaver House, or, alternatively, the whole of the premises, ought to be entered in Part II of the valuation list as industrial hereditaments within the meaning of section 3 of the Act of 1928, with consequential reductions in their gross and rateable values.

Appeal of Wilson Brothers Ltd.

The decision of the Lands Tribunal annexed to the case stated (by the president, Sir William Fitzgerald, who heard both cases) read as follows: "The appellants, Messrs. Wilson Brothers "are engaged in what I may call 'the greeting card and Christ-"'mas card business.' The area of the premises is some 46,000 "sq. ft. They originally consisted of three separate four-storey "buildings; they are now interconnected on all floors with the "exception of the basements in No. 76 and 78. The operations "carried on by the appellants can be classified as follows: "(a) ornamenting and ribboning Christmas cards, (b) storage of "view cards, and (c) collating Christmas cards."

After a passage dealing with counsels' contention, the decision continued: "The ornamenting of cards covers only 19.5 "per cent. of the business. The collation of cards covers 65.5 "per cent. of the business, and cards not collated, that is, the "view cards, account for the other 15 per cent. of the business."

Further on the decision continued: "These cards are printed "outside the business and when they come from the printers "they are what is known as 'collated,' which is a type "of sorting. One hundred and thirteen women are engaged "in this sorting, which appears to require no particular "skill. There are 150 different series of cards and the "process of collating appears to be to make them up in "boxes—not all the same cards but each box contain-"ing a quantity of different cards. It is an incidence of the "Christmas card trade that the wholesalers will not buy cards "except they are collated. Mr. Rouse, the chief buyer of Wool-"worth's and Mr. Weissman, managing director of Post Card "Stores, confirmed in their evidence that they would only buy "cards from Wilson Bros. in a series; in other words, they would "only buy cards which had been collated. Collating was "described by Mr. Rees, a chartered surveyor called by the "appellants, as follows: 'It is a process done in this way. The "'operative sits at a bench with a number of piles of cards, each "'pile being of a particular design, and the process of collating

C. A.
1958

Wilson Brothers Ltd. v. Edwards (Valuation Officer).

Hudson's Bay Co. v. Thompson (Valuation Officer).

" ' consists of her taking one card off the first pile, one off the " ' second, one off the third, and so on, thus making up a dozen " ' cards which are all different. Having made up these cards " ' from the piles into a dozen different cards, the result is known " ' as a " series." ' "

In the case stated these further facts were set out: " In " addition to the facts proved or admitted which are set out in " my decision, a signed copy of which is annexed hereto and " forms part of this case, I find the following to be further facts " which were proved or admitted: (a) the total annual turnover " of cards of all descriptions dealt with by the appellants amounts " to 88,000,000; (b) of this total 75,000,000 cards consist of " greetings cards. This amounts to 85 per cent. of the total. " (c) Greetings cards consist of (1) Christmas cards; (2) Birthday " cards; (3) New Year cards; (4) Easter cards; (5) Valentine " cards; (6) Mother's Day cards; (7) Relation cards: 27 different " possible relationships being catered for. (d) Cards arrive at " the hereditament from the printers in packages, each generally " containing between 400 and 1,000 cards of the same design. " In the case of the greetings cards, these packages are opened " on the hereditament and the cards ' collated ' as described in " my decision. Cards are stored on the hereditament while " waiting ' collation ' and while awaiting sale or despatch to the " appellants' customers. Cards sold by the appellants are " packed, together with matching envelopes, on the hereditament, " and thereafter are dispatched to customers. (e) The appellants' " business is entirely wholesale, their customers consisting of " large retailers (multiple stores such as Woolworth's, Boots and " Timothy White's) and wholesalers. The appellants' customers " will only buy greetings cards from them in ' series ' form—that " is, in sets of (for example) a dozen cards, each card being of a " different design. The appellants make up and sell about 150 " different ' series ' of greetings cards, and only sell greetings " cards when they have been ' collated '—that is, arranged into " one of these 150 ' series '; all the cards referred to in sub- " paragraph (c) above are ' collated.' The appellants do not " sell greetings cards as single units."

Appeal of the Hudson's Bay Co.

The facts were set out in the decision of the tribunal annexed to the case stated and amplified in the latter. The decision read as follows: " The essential facts are these. Beaver House and " Beaver Hall were both built about 1925 to 1927 by the com- " pany: the workshop is considerably older. An agreed site " plan was tendered. On that site plan Beaver House is coloured " pink, Beaver Hall green, and the carpenter's workshop blue. " All these properties have common walls and common services, " but there is no actual intercommunication between them. " Since 1940 the company's headquarters were at Bishopsgate, " but in that year their headquarter administration moved into

"Beaver House: the object of the move being to get proper "accommodation in the heart of the fur trade area centred on "Garlick Hill. Beaver Hall is commonly known as the 'Fur "'Trade Sale Room.' The sales that are conducted in the "hall are run by a committee which is known as the Committee "of London Public Fur Sales. This committee operates under "an agreement of 1957 made between the Hudson's Bay Co. "and certain other companies and partnerships and it recites "that the objects of the committee are the holding of public "sales of furs upon the premises and their regulation, manage-"ment and control as between members of all such sales. The "enforcement and performance of rules are set out in the "second schedule. It provides that the committee shall in its "absolute and exclusive discretion manage and control all public "sales of furs held on the premises and shall permit sales of furs "by auction to be held on the premises on convenient days and "at convenient hours. The general effect of the agreement is "that the main function of Beaver Hall is concerned with the "holding of fur sales. Its control and management has been "given to this committee in which is vested entire management "of such sales, and which can decide when such sales are to take "place and how many there shall be, and although the Hudson's "Bay Co. remain the owners and normally the occupiers, the "committee is the de facto body in running the fur sales. There "is another agreement relating to Beaver Hall which concerns "a company known as the Little Ship Club. This provides that "the two rooms lying at the south end of the entrance hall, and "the two small store-rooms, shall be available for the club all "the year round. Another part of Beaver Hall is known as "the Strathcona Room, which is let for 'company, public and "'society meetings, trade exhibitions, dances, etc.'"

The decision went on to describe the use to which Beaver Hall was put, and by way of introduction stated the company's contention to be that Beaver House was primarily occupied and used by the company for the sorting and grading of furs; that by means of that sorting and grading bales of unsorted and ungraded skins sent in by trappers and breeders from various parts of the world were changed into saleable lots of assorted and graded skins.

The decision continued: "It may be said, therefore, that the "real issue upon which this case will depend is whether what is "done to those skins is or is not adapting for sale within the "meaning of the Factory Act. Mr. Rowe, with his usual candour, "has admitted that if it is not an adapting for sale then he "cannot see how he can win. The total area of Beaver House "amounts to some 114,000 sq. ft. in round figures. The "company's headquarter administrative offices occupy some "4,253 sq. ft. and the basement part of the premises, occupying "some 17,873 sq. ft., are used during the summer months for the "storage of furs for private owners. At this point it may be "convenient to describe in detail the various processes carried

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

"on at Beaver House from the arrival of the fur skins to their "disposal at the auction held in the auction room there. Bales "of skins are addressed from almost all parts of the world except "the Soviet Union. They arrive in lorries at the reception base-"ment. There they are unloaded on to lifts and conveyed to "the first floor where the bales are opened and are sorted "according to types—the bales consist of mixed skins of various "animals. The sorted bundles are then passed up to the next "floor; some of the skins which may be dusty or gritty are put "in drums with clean sawdust and whirled round. This "eliminates the dust and grit. This process is necessary only in "the case of very few, indeed almost a negligible quantity of the "skins that come in. Next comes the process on which the "appellants mainly rely to establish their contention that there "is an adaptation for sale. The skins are passed along in trolleys "to the sorters' counters. The counters extend along the room "which is specially lighted with artificial light and large windows. "The sorters are men who have been specially trained in the art "of sorting. It is said that it takes about 10 years to make a "man an entirely efficient sorter. The sorter takes the skin and "grades it either by its feel or visual appearance. Immediately "behind the sorter is a trolley with various shelves. Each shelf "represents the class which the sorter assigns to the skin. These "grades of skin are then conveyed to another sorting room where "there are sorters who can be described as final specialists. "These sorters examine the skins and either confirm the grading "or up- or down-grade the skins again. After this final grading "the skins are catalogued and passed down to the display room. "There they are displayed for some days and prospective buyers "come along to examine them and bid for them at the auctions "which are held about three times yearly. The skins are still in a "raw state in the sense that they could not be used as furs. They "have to undergo a highly technical process which converts them "from skins into saleable furs. This process is not undertaken "at Beaver House. It is carried out by the furriers who buy the "skins at the auction."

In the case stated with respect to the Hudson's Bay Co. the facts were thus amplified: "At the hearing before me the facts, "which were proved or admitted, and the contentions put for-"ward by the parties, are contained in my decision, a signed "copy of which is annexed hereto and forms part of this case, "save that the following further facts were admitted although "not referred to in my decision: (a) The carpenter's workshop "is used exclusively for purposes connected with Beaver House "and Beaver Hall, namely, the making and repairing of things "for use on those premises, and the storing of furniture surplus "to the current requirements of those premises; (b) very approxi-"mately 25 per cent. of the skins coming into Beaver House "are owned by the appellant company and 75 per cent. are owned "by other persons; but these are variable figures; (c) each skin

" (except musquash) is labelled on arrival in Beaver House with " the object of making that skin identifiable as the property of a " particular customer at all stages. Large numbers of musquash " are dealt with but their value is small, both individually and " collectively, in relation to the appellant company's turnover. " Usually one bale of musquash will provide one or two satis- " factory lots, and the identity of these lots can be preserved " without individual ticketing; (d) some furs are sold by private " treaty in Beaver House; nobody comes to buy furs at the " auctions except with a view to resale, and the Committee of " London Public Fur Sales does not regard a private individual " as an authorized trader."

Michael Rowe Q.C. and *Frederick Mattar* for Wilson Brothers Ltd.

Percy Lamb Q.C. and *Patrick Browne* for the respondent valuation officer.

Michael Rowe Q.C. and *William Roots* for Hudson's Bay Co.

J. P. Widgery Q.C. for the respondent valuation officer.

The following cases, which were cited in argument, are not referred to in the judgment: *Hoare* v. *Robert Green Ltd.*[2]; *Paterson* v. *Hunt*[3]; *Lejeune* v. *Tate & Lyle Ltd.*[4]; *Inland Revenue* v. *John Donaldson & Co.*[5]; *Lipton* v. *Burton.*[6]

Cur. adv. vult.

July 25. JENKINS L.J. The judgment I am about to read is the judgment of the court. [His Lordship, after stating the nature of the appeals, reading the relevant statutory provisions, and observing that no question of either premises being a " factory " could arise, as no mechanical power was used, continued:]

Both the present appellants found themselves on the contention that the activities carried on by them on the premises in question amount to the adapting of articles for sale within the meaning of the definition of " workshop " contained in section 149 of the Act of 1901.

The meaning of the words " the adapting for sale of any " article " in that definition has been considered in a large number of cases and in relation to a wide variety of processes or activities, the chief source of authority being the well-known group of cases decided in 1931.

In *Sedgwick* v. *Watney Combe, Reid & Co.*,[1] where the use to which the premises were put was the bottling of beer, Lord Dunedin said: " But without attempting any definition, which " would be useless, as one cannot have in one's mind all the

[2] [1907] 2 K.B. 315; 23 T.L.R. 483.
[3] (1909) 73 J.P. 496.
[4] 44 R. & I.T. 728.
[5] 1930 S.C. 348.
[6] [1932] 1 K.B. 204; 47 T.L.R. 565.
[1] [1931] A.C. 446, 463; 47 T.L.R. 308.

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

"instances which may arise, it is easy to conceive premises used "primarily for arranging for the process of distribution. Nor do "I doubt that, in the case of premises where nothing was done "except the mere bottling of a liquid, such premises might be "said to be of that character. An illustration of a case which "looks like that may be found in the case of *Law* v. *Graham*,[2] "although the actual question for decision was whether the "premises were a factory. But the point is whether the treat-"ment that the beer undergoes in these premises is a mere pre-"lude to distribution. I am clearly of opinion that it is not. The "finished article that is being prepared for distribution is bottled "beer. The beer does not enter the premises as bottled beer. "It undergoes treatment, a treatment which changes its quality "and makes it from an unpotable and unmarketable article into a "potable and marketable one. It is true the treatment requires "the use of a bottle, and that, when the treatment is finished, the "bottle and its contents are ready for distribution. But what is "really done on the premises is the turning of what I may call "an unfinished liquid into a finished one."

In *Grove* v. *Lloyds British Testing Co. Ltd.*[3] (where the premises were used for the testing of cables and anchors), Lord Dunedin said: "I think 'adapting for sale' points clearly to "something being done to the article in question which, in some "way, makes it in itself a little different from what it was before. "Now, testing does not in any way make the article different as "an article from what it was before. It only proclaims its "character."

In *Kaye* v. *Burrows*[4] (where the premises were used for sorting rags), and *Hines* v. *Eastern Counties Farmers' Co-operative Association Ltd.*[5] (where the premises were used for cleaning seeds), Lord Dunedin said: "In both of these cases I "agree with the Court of Appeal and approve the view of Lord "Sands in the passage quoted. The test is just as it was in the "bottled beer case. You must look at what is the finished article "to be turned out. If that finished article is only put into the "condition of a finished article by the processes to which it has "been subjected in the hereditament, then the processes will fall "within the expression 'alterating or adaptation for sale.'" And later he said[6]: "In both the cases of the rags and the seeds the "finished article is different from the article in bulk which enters "the hereditament, and that is, in my opinion, an adaptation for "sale. It is here that one gets the contrast with the cable testing "case, for there is no difference, in that case, between the article, "as an article, which enters and that which leaves the heredita-"ment." The passage from *Grove* v. *Lloyds British Testing Co. Ltd.*, cited above, was referred to in these terms by Lord

[2] [1901] 2 K.B. 327.
[3] [1931] A.C. 450, 467; 47 T.L.R. 308.
[4] [1931] A.C. 454, 484; 47 T.L.R. 308.
[5] Ibid.
[6] Ibid.

Evershed M.R. in *Cockram* v. *Tropical Preservation Co. Ltd.*[7]: "I respectfully accept that as being the test which we must apply "in this case. . . ."

In *Bailey* v. *Potteries Electric Traction Co. Ltd.*[8] Scrutton L.J. said this of the class of case in which the process claimed to amount to an adaptation for sale consists of the sorting or separation of the article to be sold from a bulk of which the rag-sorting and seed-cleaning cases referred to above were examples: "In "my view, the question whether sorting or separation of an "article to be sold from a bulk is an adapting for sale depends "on the facts of each particular case, and cannot be determined "simply by saying: 'no sorting is adaptation for sale.' The "original bulk may be such that it cannot be sold either legally, "as in mixed seeds, or commercially, because an unsorted bulk is "not wanted, and the process of sorting may be so complicated "and mechanical as to deserve the title of a manufacturing "process, i.e., of 'adapting for sale.' On the other hand, the "bulk and the article to be sold may be so similar and of such a "nature such as taking a quarter of a pound of bulls-eyes out of "a bulk in a bottle, that the separation or sorting may well be "regarded as an entirely minor incident of the sale or distribu-"tion. This view is indicated by Lord Sands in *Inland Revenue* "v. *Maclachlans Ltd.*[9]: 'Primo loco, in considering whether "'premises fall within the definition of a factory or workshop, "'we have no concern with the complexity or the simplicity of "'the operation carried on, so long as that operation falls within "'the definition of adapting goods for sale, or, as the case may "'be, under the statutory definition. The simplicity of the "'operation has no doubt been recognized as a factor where the "'question has arisen whether the operation is not just an "'incident in distributive wholesale business.' Where substan-"tial changes are made in the article, as in the seed-cleaning "case, I see no difficulty in holding the process to be adapting "for sale. But in view of the fact that 'adapting for sale' is "a separate head from altering, I see no reason for requiring "alteration of substance to make 'adapting for sale.' If this "were necessary, there would be no need to insert 'adapting "'for sale.' Where the process of separation or sorting is com-"plicated and substantial, again I think there is adapting for "sale. In many cases, it is a question of degree, which is, in "my view, fact and not law, and not properly the subject of a "special case. Further, the section in the Factory Act, 1901, "deals with an 'article,' which, I think, means an article to be "sold. A seed is never sold by itself commercially, and I think "the article to be altered or adapted for sale is the article to be "sold, i.e., a bulk, not an individual item which is never sold by "itself. The bulk bought at one price is altered or adapted for

[7] [1951] 2 K.B. 827, 833; [1951] 2 T.L.R. 814; [1951] 2 All E.R. 520.

[8] [1931] 1 K.B. 385, 494; 46 T.L.R. 601.

[9] 1930 S.C. 449, 452.

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

"sale into a bulk of small size and different character which can "be sold because of the alteration or adaptation at a much higher "price. It is this principle which I think should be applied "to the various cases involving sorting, which I consider "separately."

In *Kaye* v. *Burrows*[10] (the rag-sorting case) and *Hines* v. *Eastern Counties Farmers' Co-operative Association*[11] (the seed-cleaning case) Lord Dunedin quoted with approval the following passage from the dissenting judgment of Lord Sands in *Easson's* case,[12] which had also been quoted with approval by Greer L.J. in the Court of Appeal: "'On the counter emptied out of "'collecting carts there is a huge amorphous mass of waste "'paper, rags, etc., mixed with dirt and rubbish, which no paper "'manufacturer would look at. The workers produce a number "'of orderly bales in eighty different classes which the paper-"'makers readily buy for substantial sums. Can it reasonably "'be said that there has been no adaptation for sale of the mass "'of material which was emptied out of the carts, and which "'so far as not discarded as dirt or rubbish is now arranged in "'orderly merchantable bales? I understand the argument to "'be that, if you look at one particular rag or one particular "'scrap of paper, that rag or that scrap of paper has not been "'subjected to any treatment which alters it or adapts it for "'sale. As it appears to me, this is an altogether artificial and "'superficial argument. The papermaker is not buying one rag "'or one piece of waste paper; he is buying a bale. If what had "'happened was that the papermaker had come into the premises "'saying "I want a blue cotton rag" or "a piece of brown "'"paper," I could understand the argument that there had "'been no adaptation of the particular article for sale. All that "'had been done was to arrange the articles so as to avoid the "'trouble of having to rummage through the heap whenever a "'papermaker comes in and asks for something. But that is "'not the condition of the problem. If one regards the whole "'mixed mass that comes into the works, that mass has been "'adapted for sale, or made saleable, by laborious assortment.'"

We take these citations as sufficient authority for the following propositions: (i) In order to amount to an adapting for sale of a given article the process to which it is subjected must work some change in the article itself which renders it saleable when unsaleable before, or more readily saleable than it was before. (ii) An article may be made saleable, or more readily saleable, by testing and certification but this, in itself, is not adaptation for sale, since no change is brought about in the article as such. (iii) The sorting or separation of an article to be sold from a bulk may amount to an adapting of the article for sale where the article to be sold is a bulk, and considered as a bulk is substantially different from the original bulk, although its constituent parts

[10] [1931] A.C. 454, 481; 47 T.L.R. 314.
[11] [1931] A.C. 456; 47 T.L.R. 314.
[12] 1930 S.C. 480.

were included in the original bulk and have not in themselves been in any way changed.

But these are no more than broad general principles. Each case must depend on its own facts, which must be examined with some particularity. To this end we think it desirable to quote in extenso the findings of fact made by the tribunal in the present appeals rather than to attempt a summary or paraphrase of them.

[His Lordship read the cases stated as set out above, and continued:]

These being the facts of the two cases, we shall next consider on those facts whether the use to which the premises in question are put by the appellants are such as to make them "industrial hereditaments" within the meaning of section 3 (1) of the Act of 1928, as being premises occupied and used as a "workshop" as defined in section 149 (1) of the Act of 1901, on the ground that what is done there amounts to "the adapting "for sale of any article" within the meaning of that definition.

Appeal of Wilson Bros. Ltd.

First as to Wilson Bros. Ltd. It was common ground in this case that the ornamenting and ribboning of cards is an "adapting for sale." It follows that part of the premises is used as a workshop, and the question, therefore, is whether the premises are primarily so used. In view of the fact that 85 per cent. (if the cards ornamented and ribboned on the premises are included) of the total output of cards are subjected to the operation of collation, it seems clear that this must be taken as the purpose for which the premises are primarily used. Accordingly, as it seems to us, this appeal can only succeed if the operation of collating cards amounts to the adapting of them for sale within the meaning of the statutory provisions to which we have referred.

In his argument in support of the appeal, Mr. Rowe put this as a "bulk" case comparable to the rag-sorting and seed-cleaning cases cited above, and falling within the third of the general principles we have stated. He referred to several cases of the "bulk" type besides those already mentioned. He relied in particular on the old case of *Fullers Ltd.* v. *Squire*,[13] which concerned a conviction under the Factory and Workshop Act, 1878, in respect of the employment of a woman named Ada Simmonds after the legal period of employment. The work which the woman had been doing (from 1 p.m. on December 19, to 3 a.m. on December 20, 1900) is thus described in the report: "For the purposes of the last-mentioned employment Ada Sim-"monds was furnished by the appellants with an assortment of "bonbons and sweetmeats of various sizes and colours, also with "cardboard boxes, ornamental wicker hampers, ribbons of various "sizes and colours, and fancy lace paper necessary for her work "hereinafter described. From 1 p.m. on December 19 until

[13] [1901] 2 K.B. 209.

C. A.
1958
WILSON BROTHERS LTD. v. EDWARDS (VALUATION OFFICER).
HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER).

"3 a.m. on December 20, Ada Simmonds was chiefly engaged "in packing and arranging in layers in the cardboard boxes and "ornamental hampers an assortment of bonbons and sweetmeats "of different colours, shapes and sizes, in fancy patterns, placing "sheets of lace paper between each layer of sweetmeats or bon-"bons, tying up the hampers and boxes when so filled with the "fancy ribbons, and in arranging them with bows on the outside "of the boxes and hampers with a view to rendering them more "attractive to the purchasers than they would be if not so taste-"fully arranged, sorted and packed and bound up; and the "magistrate found as a fact that they were so rendered more "attractive by the work so expended upon them, and that the "work was work requiring skill and taste on the part of Ada "Simmonds."

The matter came before the Divisional Court by way of case stated by a metropolitan police magistrate, who, subject to the opinion of the court on the case stated, had convicted the employers. In his judgment, in which Lawrance J. concurred, Lord Alverstone C.J. said this[14]: "The only question we have "to decide is whether there was evidence on which the magistrate "could come to the conclusion that he did. I think there was. "What was being prepared for sale was boxes of sweetmeats, "and the operation of putting the sweetmeats in layers with "ornamental papers between them and ornamenting the boxes "afterwards was an adapting of them for sale within the meaning "of the section." The conviction of the employers was accordingly upheld.

Mr. Rowe also referred us to *Weatherhead* v. *Bradford Assessment Commtitee and Messrs. Laycock, Son & Co.*,[15] the wool-sorting case, in which Scrutton L.J. said this: "Apart from this, "it appears to me that the 'matching' which leaves the heredita-"ment is a substantially different article from the various fleeces "which entered it. Each hair is no doubt the same, but one does "not buy single hairs; one buys 'matchings,' which are made "out of, but different from, fleeces. That the process is for the "purpose of ultimate wholesale distribution appears to me for the "reasons already stated immaterial. The primary purpose of "the hereditament is the factory purpose of making 'matchings,' "a difference from the fleeces out of which 'matchings' are "made."

Mr. Rowe added, as a further example from the 1931 group of cases, *Pickin* v. *Langbaurgh Assessment Committee and Messrs. Robert Cheyne & Co. Ltd.*,[16] the scrap-metal case, where the breaking up into pieces of a suitable size of miscellaneous metal articles such as old machinery, boilers, ships' propellers and the like was held to be an adapting for sale. Nearer to the present case than the two last cited are the egg and

[14] [1901] 2 K.B. 211, 212.
[15] [1931] 1 K.B. 505, 506; 46 T.L.R. 601.
[16] [1931] 1 K.B. 507; 46 T.L.R. 601.

apple sorting cases to which Mr. Rowe also referred. The egg cases to which Mr. Rowe made reference were *A. Richardson & Son* v. *Middlesbrough Borough Assessment Committee and Another*,[17] and the Irish case of *Commissioner of Valuation* v. *McAllister*.[18] In the former case, Lord Goddard C.J. said this[19]: "I base my judgment on the ground "that there is a process of adapting for sale. These eggs have to "be cleaned and then sorted into various grades. They are "marked according to the grade. The result of these processes is "that the sorted results are sold, whereas the original bulk could "not be sold, because it would be illegal to sell the eggs until "these various processes, including that of grading, which was "done by machinery, had been carried out." Atkinson J. said[20]: "The article must not be regarded as an egg; what was "being dealt with were crates of eggs." And he went on to refer to *Hines* v. *Eastern Counties Farmers' Co-operative Association Ltd.*[21] (the seed-cleaning case).

In the Irish egg case,[22] on comparable though not identical facts, what was done was held by Lord MacDermott C.J. and Black L.J. to amount to adapting for sale, although looked upon by Lord MacDermott C.J. as a pure sorting case, "as the indi-"vidual eggs leave the ratepayers' premises in precisely the same "condition in which they enter them." In the apple case, *East Kent Packers Ltd.* v. *Buncombe*,[23] the operation of sorting and grading apples was likewise held by the Lands Tribunal (whose decision was not appealed from) to amount to an adapting for sale.

On the other hand, in *James A. Jobling & Co. Ltd.* v. *Sunderland County Borough Assessment Committee*,[24] where the primary purposes of a building occupied by glassware manufacturers were held to be storage and distribution as distinct from adapting for sale, Lord Greene M.R. said this: "An argument "was put forward that the process of storing, sorting, packing and "despatch of these finished products was a process of adapting "for sale so as to be in itself a process which would be sufficient "to bring the hereditaments within the meaning of factory or "workshop as defined in the Factory Acts. In my opinion, that "argument cannot bear examination for a moment. All that is "done is to sort, store and pack and despatch these articles. "Nothing is done to the articles themselves, and it is a complete "misuse of language to say that that amounts to adapting them "for sale. There is no adaptation whatsoever. The article "remains precisely the same article after it is sorted and packed "as it was before. That point, therefore, I can put aside." On the same side, there is *Davis Cohen & Sons Ltd.* v. *Hall*.[25] In

[17] [1947] K.B. 958; 63 T.L.R. 413; [1947] 1 All E.R. 884.
[18] (1954) 47 R. & I.T. 635.
[19] [1947] K.B. 958, 962.
[20] Ibid. 963.
[21] [1931] A.C. 456.
[22] 47 R. & I.T. 635.
[23] (1951) 45 R. & I.T. 151.
[24] [1944] W.N. 126; 60 T.L.R. 330; [1944] 1 All E.R. 500, 501.
[25] [1952] 1 All E.R. 157.

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

that case the facts and conclusions of the court are thus stated in the headnote: "The ratepayers occupied premises in which they "stored twenty-five thousand cases of government surplus stores, "the cases being there opened and their contents being identified "and arranged, but no other work was done on them. *Held*, in "the circumstances the premises were primarily occupied and "used for the purpose of a distributive wholesale business and "not for that of adapting an article for sale, and, therefore, they "were not an industrial hereditament within the Rating and "Valuation (Apportionment) Act, 1928, s. 3 (1)."

Evershed M.R. gave the example[26] of the purchase of 25,000 pairs of boots all mingled together, so that the operation had to be performed of sorting them out and finding the relative rights and lefts of each pair, so that eventually instead of a heap of unsorted boots, there was a number of pairs of boots, and said that he would certainly be prepared to hold that it would not amount to an adaptation for sale within the meaning of the Factory Act, 1901. As to the facts, we can quote this passage from the same judgment[27]: "These cases were placed in the "premises which are the subject of the present appeal, premises "which were specially acquired for the purpose. There, with "the assistance of eight unskilled men, the secrets of these boxes "were one by one unfolded. The ratepayers then proceeded so "to arrange the contents that, as from time to time occasion "made convenient, they were able to despatch for sale to their "London premises the articles which they had acquired. They "divided the goods into six general heads, including, for example, "clothing, textile goods, and wireless sets, and each of those "headings was itself subdivided according to the age and con-"dition of the particular article—used, damaged, good as new, "and so on. What I have so far described seems to me to be, "whatever may be the result of it under the Act, no more than "identification and arrangement."

Then, after referring to various special operations to which some of the goods were subjected, Evershed M.R. said this[28]: "I, therefore, proceed to consider my answer to the problem "posed on the footing that at most the operations conducted on "these premises were those of assembly to some extent and "substantially of identification and arrangement. I have said "enough to show that the operations so described were substan-"tial. Therefore, the case, at the very least, may be said to "come somewhere in the considerable region which lies between "my illustration of boots and the decided cases of seeds and "rags." Later he said this[29]: "In the present case, if it be "necessary, I would be prepared to hold on the facts as found "that there was here no adaptation for sale of the articles which "emerged. I again exclude from consideration those minor "activities relating to the anti-gas boots and so forth. Apart

[26] [1952] 1 All E.R. 157, 159.
[27] Ibid.
[28] Ibid. 160.
[29] Ibid. 161.

"from them there was nothing which could, in my judgment, be "fairly called any kind of industrial process with regard to these "goods. I do not wish by that phrase to suggest a necessary "test to be used in other cases, but it seems to me to be a brief "way of emphasizing, not inaccurately, the distinction that I "draw between this case and *Hines* (*Ipswich Revenue Officer*) v. "*Eastern Counties Farmers' Co-operative Association Ltd.*[30] and "*Kaye* (*Dewsbury Revenue Officer*) v. *Burrows and Dewsbury* "*Assessment Committee.*[31] I think counsel for the valuation "officer is entitled to say that in this case you start, not with an "amorphous mass, but with an unarranged and unidentified "aggregation of individual articles. At the end of the operations "you have found what they were, indentified them, and suitably "arranged them, but you have done nothing more to them." He expressed his conclusion thus[32]: "I think that the tribunal, "in deciding as it did, thought that what took place was but a "stage in the wholesale business of the ratepayers, and that, "therefore, the primary, principal, and substantial use of the "premises was that of wholesale distribution, and that the "tribunal inferentially negatived the argument that there was "here an adaptation for sale. I think it was legitimate for the "tribunal to find as a fact that there was in this particular case "a primary use for wholesale distribution without necessarily "finding that there was no adaptation for sale, and on that "ground I should myself support the decision. In so far as it "is necessary or appropriate in this case to express a view "thereon, I think on the facts of this case that there was no "adaptation for sale within the meaning of that phrase in section "149 (1) (*c*) (iii) of the Factory and Workshop Act, 1901. For "these reasons, therefore, I think that the ratepayers fail to "show that the tribunal came to a wrong decision, and that the "appeal should be dismissed."

In this state of the authorities, Mr. Rowe submitted that the appeal should succeed on the ground that the greetings cards coming in from the printers in packages each containing from 400 to 1,000 indentical cards and between them covering the entire range of greetings cards dealt with on the hereditament constitute a bulk comparable to (for example) the uncleaned seeds, unsorted rags, ungraded eggs, ungraded apples, and unboxed sweets, in the various decided cases. This bulk, he argued, is unsaleable in the form in which it comes in because the wholesale purchasers, who are the only customers with whom the company deals, are not interested in single cards or quantities of identical cards, and will only buy cards arranged and packed in series. Therefore, in his submission, the process of collation which produces the saleable articles in the shape of the packets of cards arranged in series from the unsaleable bulk in the shape of the printers' packages

[30] [1931] A.C. 456.
[31] Ibid. 454.
[32] [1952] 1 All E.R. 157, 162.

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

each containing a quantity of one type only of the various cards to be included in the series is an adaptation for sale. We find it impossible to accept this view. We do not think the packages of cards supplied by the printers are a bulk within the meaning attached to that expression in the cases. So far as we know, with the exception of the sweets case, and leaving on one side obvious cases of adaptation such as the scrap-metal and wool-sorting cases, every "bulk" case in which the ratepayer has succeeded has been concerned with a starting material in itself inherently unfit for sale in the state in which it comes to the hereditament. It may, for example, be an "amorphous mass" like the rags, or a quantity of a saleable commodity adulterated by unwanted or deleterious material, like the uncleaned seeds, or a consgnment of eggs or apples of all sizes and good, bad or indifferent in condition or quality. In such cases the process of sorting, selection and rejection to which the bulk is subjected can reasonably be regarded as an adapting of the bulk for sale by producing from it as the article to be sold a smaller bulk of a different character in that it has not merely been taken out of the original bulk as it stood, like the bull's-eyes in the example of Scrutton L.J., or produced by mere rearrangement of the original bulk, but has been changed in character as compared with the original bulk by the elimination of undesirable or inappropriate constituents.

Here the greetings cards come in from the printers arranged in orderly fashion in the packages of identical cards covering between them the entire range of cards dealt in. There is no amorphous mass. The contents of each package are known. All the cards in every package are in themselves saleable articles, and all are intended for sale. It is not suggested that the packages contain any waste material or faulty or damaged cards from which the saleable cards must be sorted out. The practice of the trade demands that the cards should be packed for sale in series, and they are arranged in series by the operation of collation. This appears to us to be nothing more than the method of sale demanded by the trade, which calls, no doubt, for the re-arrangement of the cards in the various packages covering a given series, by taking one card from each package and arranging the cards so taken in the appropriate order. We cannot regard this as an adaptation for sale of the greetings cards. We do not think it can reasonably be said on the facts of this case that the article to be sold is a series of cards produced by an adaptation for sale of a different article in the shape of the packages of cards from each of which one member of the series is taken. We think that the article to be sold in this case is a number of cards arranged in series and not a series of cards. If we are wrong, the result would be, as we think, to carry the "bulk" principle considerably further than has so far been done. For example, a dealer in table china might receive from manufacturers separate crates of cups, saucers, plates and teapots, and the demand from his wholesale

customers might be for tea-sets each comprising a teapot, a dozen cups each with a saucer and a dozen plates. To comply with the demand the dealer would have to take from the manufacturers' crates the items required to make up a set and pack them together for dispatch to the customer. If Mr. Rowe's submission in the present case were accepted, it would, so far as we can see, follow by parity of reasoning that in the imaginary case we have suggested the simple operation of arranging the china in sets would amount to an adapting of it for sale. We are not prepared to accept that view any more than Evershed M.R. was prepared to accept as an adapting for sale his example of sorting boots into pairs in *Davis Cohen & Sons, Ltd.* v. *Hall.*[33]

As to the sweets case, *Fullers Ltd.* v. *Squire,*[34] we have treated this as a "bulk" case, though it actually antedated by some thirty years the enunciation of the "bulk" principle in 1931. It did not concern "derating," which had not then been invented; but came before the Divisional Court on an appeal by way of case stated from the decision of a magistrate to the effect that a breach of the Factory and Workshop Act, 1878, had been committed. The woman had undoubtedly been employed for grossly excessive hours, whether an offence had been committed or not, and the case was thus one in which the court might well not be astute enough to find that she was outside the protection of the Act of 1878. Nevertheless, the relevant provisions in that Act were substantially in the same terms as the relevant provisions in the Act of 1901, and the case is accordingly well in point. The operations performed by the woman in the process of boxing the sweets came to a great deal more than the simple operation of "collation" performed in the present case. She had to select the sweets, arrange them in layers in the boxes with ornamental papers between them, and then fasten the boxes with fancy ribbons tied in bows on their outside. This, as it seems to us, sufficed to justify the Divisional Court in holding that there was evidence on which the magistrate could come to the conclusion he did, that, as Lord Alverstone C.J. observed, being the only question which the court had to decide. As to that observation we would say that in a case of this kind the question for the court on appeal by way of case stated is whether on the facts found by the tribunal of fact the tribunal could upon the true construction of the relevant statutory provisions, or, in other words, as a matter of law, properly come to the conclusion at which it arrived.

We cannot see that the lands tribunal on the facts of the present case could not as a matter of law properly come to the conclusion that it did. Mr. Rowe submitted that the President's decision here was vitiated by his view that in order to decide whether what is being done on the premises is adapting for sale he must follow the article in question into the hands of the

[33] [1952] 1 All E.R. 157. [34] [1901] 2 K.B. 209.

C. A.
1958
Wilson Brothers Ltd. v. Edwards (Valuation Officer).
Hudson's Bay Co. v. Thompson (Valuation Officer).

consumer. This, said Mr. Rowe, conflicts with the well-settled principle that what happens to the article on the hereditament is alone material, its subsequent history being wholly irrelevant. We do not think this criticism is sound. The President appears to us to be using the subsequent history of the article to test the true character of the process to which it is subjected on the hereditament. That is surely legitimate. The sorted bulk of the rags, the cleaned seeds, the graded eggs or apples go out into the world as articles of commerce impressed with a particular character attaching to them by virtue of the process to which they have been subjected on the hereditament. The collated cards go out into the world simply as boxes of cards arranged in series for convenience of disposal and not impressed with any special character by virtue of anything done to them on the hereditament. That seems to us to be a perfectly legitimate test.

In our view, the process here in question is not an adapting for sale, but what Lord Dunedin in *Sedgwick* v. *Watney Combe Reid & Co.*[35] called a mere prelude to distribution.

The result in our opinion is that the hereditament here in question must be held to be primarily used for the purpose of "distributive wholesale business" and thus excluded from the definition of the expression "industrial hereditament" contained in section 3 (1) of the Act of 1928 by the proviso to that sub-section.

Accordingly we cannot find that the lands tribunal fell into any error of law in reaching the conclusion that it did, with which conclusion we find ourselves in complete agreement.

We would therefore dismiss the appeal of Wilson Brothers Ltd.

Appeal of Hudson's Bay Co.

Secondly, as to the Hudson's Bay Co. In this case the activity relied on as constituting an adapting for sale consists in the sorting, grading and matching of furs, and their arrangement in matched lots of skins of uniform grade for sale at the company's fur auctions. Of the consignments of skins received from trappers and breeders, a small proportion requires cleaning and is subjected to a mechanical process to that end, but the proportion so treated is insignificant in comparison to the total of skins handled and can (it is agreed) be ignored for the present purpose, as also can the special treatment accorded to musquash.

For the rest, the skins brought into the hereditament are clean, but in unmatched, unsorted and ungraded parcels, and if sold in that state (if saleable at all) would command a very poor price, the demand being for matched and graded skins of uniform quality. Each parcel is accompanied by an invoice stating the number and types of skins it contains. On arriving at the hereditament the contents of each parcel are checked with the

[35] [1931] A.C. 447, 463.

invoice and each skin is marked so as to be identified as the property of the owner of that parcel and remains so identified throughout its subsequent history down to the time of sale. Having been thus marked, the skins received are mixed together regardless of ownership and subjected to a highly skilled process of sorting, grading and matching, and ultimately made up into lots of matched and graded skins of uniform quality which will include skins belonging to several different trappers or breeders. These lots are put up for sale at the company's periodical skin auctions, when they are bid for by dealers at so much per skin, the owner of each skin included in the lot receiving the appropriate price (less commission) for the skin or skins contributed by him as identified by the mark placed upon it or them on arrival at the hereditament. It is not in dispute that this method of disposal realizes a far better price than the owners could hope to realize by selling their skins by themselves. The facts are dealt with in considerable detail in the transcript of the evidence of the general manager of the company's fur sales organization, a copy of which is annexed to the stated case. We must not burden this judgment, already overlong, by repeating them in extenso. There is no doubt that the operations of sorting, matching and grading demand very great skill and experience. But it does not necessarily follow that these operations amount to an adapting for sale.

If on the facts the articles to be sold could properly be regarded as a bulk of sorted, matched and graded skins produced by these operations from an aggregate of unsorted, unmatched and ungraded skins, then there would be much to be said for the view that there was here an adapting of the skins for sale on the principle of the various "bulk" cases already quoted. But we cannot regard this as a "bulk" case. We think that the article to be sold must on the facts consist of each individual skin belonging to each intending vendor. Each parcel delivered at the hereditament for sale comprizes individual skins of the number and types particularized in the invoice, and each of those skins is marked as the property of the intending vendor and thenceforth dealt with as such. The auctioneer employed by the company when he sells each lot at so much per skin must be taken as selling each individual skin comprised in it as agent for and on behalf of the vendor to whom it belongs. We do not see how this can be treated as a "bulk" case consistently with the system of sale in fact adopted. It is of the essence of the "bulk" principle that the components of the bulk should lose their identity in the bulk, so that the bulk and not its individual components can properly be regarded as the article to be sold. That is plainly impossible here. The whole system of sale depends on the identity and ownership of individual skins being preserved. The elaborate system of sorting, matching and grading enables each individual skin to be sold to the best advantage as part of a uniform lot, but we cannot regard it as an adapting for sale.

C. A.
1958
WILSON BROTHERS LTD. v. EDWARDS (VALUATION OFFICER).
HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER).

The President's findings of fact were criticized by Mr. Rowe in various respects. There is to our minds no substance in those criticisms. Be that as it may, the facts on which we found ourselves are not in dispute, and appear to us to be fatal to the Hudson's Bay Co.'s claim.

Accordingly, we think that this appeal should also be dismissed.

Appeals dismissed.
Leave to appeal.

Solicitors: *Nicholson, Graham & Jones; Linklaters & Paines; Solicitor of Inland Revenue.*

F. R. D.

[CHANCERY DIVISION.]

1958
July 16, 17.
Harman J.

* *In re* RIDER'S WILL TRUSTS. NELSON *v.* RIDER.

[1958 R. 317.]

Will—Construction—Investment clause—Power to invest in stock of "any British colony or dependency . . . but not otherwise"—Meaning of "but not otherwise"—Whether investments authorized by law excluded—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 1 (1), 69 (2).

A testator, who died in 1909, by his will, made in 1908, directed his trustees to invest the trust moneys in stock "guaranteed by the "government of the United Kingdom or of any British colony or "dependency . . . or upon real securities in England but not "otherwise." The trust estate at the date of the summons included certain government stocks of Australia, New Zealand and Southern Rhodesia, which had become dominions since the testator's death, and Essex County stock.

Upon a summons taken out by the trustees to determine whether they could invest in securities authorized by law, and if not, whether they could invest in stocks of any British territory which was a colony or dependency at the date of the testator's death or at the date when the investment was made:—

Held, (1) that the words "but not otherwise" meant "not in "any other class or mode of investment" and not "not in any "other investment whatsoever," and to that extent excluded section 1 of the Trustee Act, 1925.

(2) The dominion stocks were authorized as they were of the same class of investment as stock of a "British colony or depen-"dency," but the Essex County stock was not authorized as it was not analogous to any of the stocks expressly sanctioned.

Dictum of Kennedy C.J. in *In re Westby* [1932] Ir.R. 444, 455 applied.

Semble, that if the language of the will had prohibited investments other than those actually named, government stocks of colonies and dependencies which had become dominions by virtue

[Reported by MARGARET THOMAS, Barrister-at-Law.]

of the Statute of Westminster, 1931, would have been within the investment clause before the passing of that Act; and it would be a strange result if the passing of the Act altered the status of an investment clause (except in exercise of a power to retain) in a will made and coming into effect long before; the facts in *In re Brassey's Settlement* [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577 being distinguishable as that settlement was made after the passing of the Act.

ADJOURNED SUMMONS.

By clause 10 of his will, which he made in 1908, the testator, Thomas Philip Rider, who died on March 14, 1909, directed: "I declare that all moneys liable to be invested under "this my will may be invested in or upon any stocks funds "or securities of or guaranteed by the government of the United "Kingdom or of any British colony or dependency or in the "stock of the Bank of England or the debentures or debenture "stock or guaranteed or preference stock or shares of any rail-"way or other company in England or India incorporated by "Act of Parliament or royal charter and paying a dividend "on its ordinary stock or shares or upon real securities in "England but not otherwise."

The affidavit of one of the trustees of the will showed that there were a number of investments standing in the trustees' names and representing the testator's estate. Category (A) of those investments represented securities undoubtedly authorized by his will. Category (B) likewise were authorized, because, although not of a class which would be authorized for investment, there was a power of retaining securities held by the testator at his death and those were such. Category (C) comprised investments in government stocks of Australia, New Zealand and Southern Rhodesia, while Category (D) represented one small investment, Essex County 5 per cent. redeemable stock, which was a trustee stock under the Trustee Act, 1925, and it was these two categories which raised the questions before the court. There were two small investments under category (E) which, on no view of the will, could be justified and had been made in breach of trust, although it appeared that no loss to the trust had resulted from the breach, because they were sound securities.

The testator by his will, which was in an odd form, gave a number of annuities, all of which had fallen in except two and the annuitants were the second and third defendants to the action. He then gave certain legacies and directed the application of the surplus income among certain charities, and declared that when all the annuities fell in those charities were to take the corpus. The fourth defendants were a representative charity.

The trustees took out a summons to determine whether, upon the true construction of the will, trust moneys could be invested in any of the investments authorized by section 1 of the Trustee Act, 1925, and, if not, whether they could be invested in the

1958

Rider's Will Trusts, *In re.*

stock of any British territory which was a colony or dependency at the date of the death of the testator or at the date of the making of the investment. It was uncertain whether the dominion government stocks could be called stocks of a "British "colony or dependency" and whether by using the words "but "not otherwise" the testator had shown an intention, within the meaning of section 69 (2) of the Trustee Act, 1925,* to exclude the operation of section 1 of the Act so that the Essex County stock would not be an authorized investment.

John L. Arnold, Q.C., for the plaintiffs.

John Waite for the second and third defendants.

C. J. Slade for the fourth defendants.

The first defendant (an annuitant) died after the issue of the summons and was not represented.

The cases cited in argument are referred to in the judgment.

Harman J. stated the facts and continued: The first question which arises is whether an investment clause in this form, which was much more ordinary in 1908, when it was penned, than it would be now, is sufficient to oust the provisions of the Trustee Act, 1925. At the date of the testator's death the relevant statute was the Trustee Act, 1893, by section 1 of which: "a "trustee may, unless expressly forbidden by the instrument . . . "creating the trust, invest any trust funds in his hands . . . in "manner following." Then are set out the manners in which he may invest, but he may not do so if expressly forbidden by the instrument. The question is whether the words "but not "otherwise" are an express prohibition in the instrument.

The words of section 1 (1) of the Act of 1925, which have been said in *In re Warren* [1] to have the same effect as those in section 1 of the Act of 1893, are slightly different. They are not so elegant; the words are: "A trustee may invest any trust funds in his "hands . . . in manner following." Then the authorized investments are set out; but when one looks at section 69 (2) one finds that "the powers conferred by this Act on trustees . . . apply if "and so far only as a contrary intention is not expressed in "the instrument." Therefore, I am to take it that "a con-"trary intention is expressed in the instrument" means that the instrument expressly forbids the investment in question.

There have been cases on the subject on both sides of the line. First, *In re Burke*,[2] where it was held that a direction to place the trust estate on deposit at a bank did not indicate

* Trustee Act, 1925, s. 69 (2): "The powers conferred by this Act "on trustees are in addition to the "powers conferred by the instrument, "if any, creating the trust, but those "powers, unless otherwise stated, "apply if and so far only as a con-"trary intention is not expressed in "the instrument, if any, creating the "trust, and have effect subject to "the terms of that instrument."

[1] [1939] Ch. 684; 55 T.L.R. 796; [1939] 2 All E.R. 599.

[2] [1908] 2 Ch. 248.

a contrary intention. That seems to me to be a clear case. It might be an implied prohibition, but was not an express one.

On the other side of the line is *In re Hill*,[3] where the words were, at the end of the list, "in no other investment whatso-"ever." Eve J. felt that he could not get round that, and one is not surprised. It is an express prohibition on investing in any other investment whatsoever.

Here we have something neither the one nor the other, and so one must choose on which side of the line to come down. One suggestion made to me is this, that the words "but not "otherwise" only refer to the last words of the clause, "upon "real securities in England," and I am invited to say that "but not otherwise" really means "but not elsewhere." Mr. Slade ingeniously pointed out that when one looks at subsection (*b*) of the then relevant Trustee Act, the Act of 1893, one has these words: "On real or heritable securities in Great Britain "or Ireland." He said that what the draftsman was minded to do was to confine the investment in real securities to England, cutting out those in Ireland (and also, I suppose, cutting out heritable securities in Scotland) and that that is all that he meant. That is a very attractive suggestion, but I do not feel able to accept it, because I do not think "otherwise" means "elsewhere"; nor do I think that the natural way to construe the clause is to confine the last three words to those immediately antecedent to it. But what does "not otherwise" mean? It means, in my judgment, "not in any other mode of invest-"ment"; that is to say, no other class of investment other than those already stated.

I have some authority for that way of looking at it in an Irish case, *In re Westby*,[4] where Kennedy C.J. was considering investment clauses in connexion with $3\frac{1}{2}$ per cent. War Loan and whether that was authorized according to the rules of the then Irish Free State. He says this in the course of his very careful reserved judgment[5]: "Even if I had come to the con-"clusion that the new War Loan, and, for the same reason, "Irish Free State National Loan, were not directly authorized "by the actual words I have been considering, I should have "come to the conclusion that they are not prohibited by the "proviso which reads, not (as in some of the precedents) 'in "'no other investment whatsoever'"—and those, it will be remembered, were the words in *In re Hill*,[6] to which his Lordship's attention had been directed—"but 'not in any other "'mode of investment,' a prohibition 'express' no doubt as "to the modes of investment forbidden, but which, having regard "to the generic terms of the investment clause itself, would "not in my opinion exclude the particular mode of investment "proposed."

[3] [1914] W.N. 132.
[4] [1932] Ir.R. 444.
[5] Ibid. 455.
[6] [1914] W.N. 132.

1958

Rider's Will Trusts, *In re.*

Harman J.

Therefore, I think that the testator was referring to investments generically; and, if one looks at the type of investments authorized, it seems to me that it is quite clear that investment in the stocks of a dominion are in the same mode as those expressly authorized and therefore not expressly forbidden by the clause. Therefore, I conclude that the prohibition (though it is an express prohibition) does not mean "not in any other "investment whatsoever," but "not in any other class or mode "of investment" and that the securities listed in category (C) are within the investment clause. On the other hand, I do not think that any investment (although it comes within the Trustee Act, 1925) which is not one of the modes that he suggests is authorized. In other words, the trustees have not got, on that view, the full trustee range. For instance, the Essex County 5 per cent. redeemable stock in category (D) does not seem to me to be analogous to any of those which he expressly sanctions.

That, I think, strictly makes it unnecessary for me to decide the other question, which is this: Suppose the words at the end do prohibit any investments other than those actually named, are stocks of dominions such as Canada and Australia authorized by the words "any British colony or dependency"? It is said that Danckwerts J. has decided this question in *In re Brassey's Settlement.*[7] That case related to a settlement made in 1936—after, that is to say, the passing of the Statute of Westminster, 1931, which made the great dominions independent of the British Parliament except by their consent. Therefore, it was almost inevitable, I think, that the judge should come to the conclusion that a draftsman who, five years after the Statute of Westminster, referred to a colony or dependency, must be taken to mean colonies or dependencies as they then were, and that those did not include the self-governing dominions which were not colonies or dependencies any more. I would not seek to throw any doubt on that decision; but, fo course, the position here is not the same; because in 1908, when this will was penned, and in 1909 when this testator died, Canada and Australia anyhow—as to the State of Rhodesia I am not sure—were colonies or dependencies of the British Crown. I think that Rhodesia must have been also; but until 1931 there is no doubt that investments in Canadian and Australian or New Zealand government stocks were undoubtedly within this investment clause, and it seems to me to be a strange result if a political event like the Statute of Westminster can have, by a side wind, the effect of altering the status of an investment clause (except in exercise of a power to retain, if there be one in the instrument) whereby authorized securities become unauthorized securities which must be realized and investments made in another form. It is also ridiculous to suppose that it was intended that because a dependency had the added

[7] [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577.

dignity given to it of becoming a dominion, its stocks should promptly become unauthorized stocks. I should like to be able to avoid that view and to say the time when one must look at the clause is the date when it comes into force, and if at that date the investment in question is within the authority, then it continues to be so, because that leaves out of the question the other view, namely, that stocks issued by such a colony or dependency afterwards becoming a dominion would not, although stocks issued before would, be authorized.

In *In re Maryon-Wilson*,[8] the Court of Appeal seems to have differed on that. Cozens-Hardy M.R. and Fletcher Moulton L.J. being of the opinion that if a stock had been issued by the province or dominion of Canada when it was a colony, it would not cease to be authorized because provinces were all merged in the dominion and that therefore one must look at the origin of the security. Farwell L.J. said that he thought one must look at the state of things at the time when the investment was made.

It is not necessary for me to decide between those two views. The Irish case to which I have already referred put forward a third view, which was that in some ways, anyhow, one might regard the description of something as a colony or dependency as merely geographical and that therefore "Great Britain," for instance, or "the United Kingdom of Great Britain" had the meaning which would ordinarily be given to it and that which was given to it under the Irish Free State treaty. I am not going to decide that either; but there is another possibility which I must say attracts me. Under the Colonial Stock Act, 1900, stocks of this type were for the first time brought within the trustee range, because the Trustee Act, 1893, says nothing about them. The Act provided that by taking certain steps the then colonies and dependencies could bring their stocks within the range allowed to trustees under the Act of 1893, and for that purpose, in order to guide trustees, the Treasury was to keep a list of colonial stocks. Among colonial stocks under that list, which is still maintained under the Act of 1925, there have always been the stocks of the self-governing dominions. Indeed, in the main Colonial Stock Act, that of 1877, when one looks at section 26, one sees "The word 'colony' means any "dominion." Therefore, I should have been disposed to say, had it been necessary, that for the purpose of an investment clause a dominion whose stocks rank in the list kept by the Treasury under the Colonial Stock Act could properly be described as a colony or dependency, although politically speaking no doubt it was nothing of the sort. But it is unnecessary for me to come to any conclusion on that part of the case; and I decide it on the view which I have expressed concerning the

[8] [1912] 1 Ch. 55; 28 T.L.R. 49.

1958

Rider's Will Trusts, *In re.*

meaning of the words "but not otherwise" at the end of the investment clause.

Order accordingly.

Solicitors: *Hancock & Willis; Church, Adams, Tatham & Co.*

[COURT OF APPEAL.]

C. A.

1958 *July* 9, 10.

Lord Evershed M.R., Romer and Ormerod L.JJ.

* BIRCH *v.* COUNTY MOTOR AND ENGINEERING CO. LTD. AND ANOTHER.

[Plaint No. O. 487.]

County Court—Transfer of proceedings to other county court—Proceedings "more conveniently or fairly tried in another court"—Second action arising out of same facts as first action—Application to transfer—Discretion of judge—Judge's duty on trying second action—County Court Rules, 1936, *Ord.* 16, *r.* 1 (1).

A Land Rover and a motor-bicycle carrying a pillion passenger were involved in a collision. The rider of the motor-bicycle was slightly hurt and his pillion passenger more seriously so. The motor-cyclist claimed damages against a company, the owners of the Land Rover, the action being heard by the county court judge at Shrewsbury. He held that both the motor-cyclist and the driver of the Land Rover had been negligent and he attributed the blame as to three-fourths to the motor-cyclist and as to one-fourth to the driver of the Land Rover. The damages he found as suffered by the motor-cyclist amounted to £50 and he accordingly awarded him £12 10s. The present action was brought by the pillion passenger claiming £400 damages as the result of his injuries, the defendants to the action being the company owners of the motor-vehicle and the driver, the motor-cyclist being joined as third party. The defendants applied under the County Court Rules, 1936, Ord. 16, r. 1,[1] to have the action transferred from the Shrewsbury County Court to another, on the ground that the judge, having made up his mind in the first case that the driver of the Land Rover was in some degree to blame, it was probable that the plaintiff would recover the full amount of the damages proved against the company. The county court judge refused the application:—

Held, that the Court of Appeal should be loth to assent to a transfer under the County Court Rules, 1936, Ord. 16, r. 1 (1), which the county court judge had rejected, unless there were good grounds for such a course and that, the judge having applied his mind to the rule and having come to the conclusion that he could fairly try the second action, the Court of Appeal should not interfere with the manner in which he had exercised his discretion, but that there must be a real trial of the second action.

Semble in a case where a judge had formed very unfavourable views of a witness or his credibility in one action he might find

[1] County Court Rules, 1936, Ord. 16, r. 1 (1): "If the judge of any "court is satisfied that any proceed- "ings in that court can be more con- "veniently or fairly tried in some "other court, he may order them to "be transferred to the other court."

himself embarrassed in trying a second action arising out of the same facts, when such second action should be transferred to another court.

APPEAL from Judge Evans sitting at Shrewsbury County Court.

The defendants, County Motor and Engineering Co. Ltd., and Herbert Oliver Farmer, had applied under the County Court Rules, 1936, Ord. 16, r. 1, to the judge of the Shrewsbury County Court to have the action transferred to the county court of Wolverhampton on the ground that the judge had already heard an action arising out of the same circumstances. The judge dismissed the application.

The defendants appealed.

The facts are fully stated in the judgment of Lord Evershed M.R.

Michael Hoare for the defendants.

R. Gavin Freeman and *N. B. Primost* for the plaintiff.

The following cases were referred to in argument which are not mentioned in the judgment: *Potter* v. *Great Western Colliery Co. Ltd.*[2]; *Price* v. *Price*.[3]

LORD EVERSHED M.R.: By Order 16, r. 1 (1), of the County Court Rules, 1936, it is provided: "If the judge of any court is "satisfied that any proceedings in that court can be more con-"veniently or fairly tried in some other court, he may order them "to be transferred to the other court."

In this action the defendants, County Motor and Engineering Co. Ltd., and Herbert Oliver Farmer, applied to the county court judge of Shrewsbury County Court for an order under that rule, transferring the case to another county court, Wolverhampton, which is admittedly the convenient and proper court if any transfer at all is to be ordered.

The case arises out of a road accident which occurred on April 27, 1957, near Shrewsbury, at 9.30 in the evening. The persons involved in the collision were three: two boys, one Michael Kenneth Shuker driving a motor-cycle, and Brian Birch, his pillion passenger, and thirdly, Herbert Oliver Farmer, who was driving a Land Rover motor-car.

The accident arose out of these circumstances: Farmer found that he had erred in his way and, coming to a roundabout, he made up his mind that, to gain his proper direction, he must completely encircle the roundabout and return for a short distance whence he had come. He appears to have changed down the gear of the Land Rover, which at that time was on a four-wheel drive, and thus the Land Rover was very abruptly reduced in speed.

Shuker and his passenger were very close behind on the

[2] (1894) 10 T.L.R. 380. [3] [1954] C.L.Y. 2245.

C. A.
1958
Birch
v.
County
Motor and
Engineering
Co. Ltd.
Lord Evershed
M.R.

motor-cycle and ran into the Land Rover. The accident was not serious; Farmer, the driver of the Land Rover, was not injured; Shuker was injured, but not severely; Birch, the pillion rider, sustained the most serious injuries.

There was an action then brought by Shuker against the County Motor and Engineering Co. Ltd., being Farmer's employers and the owners of the Land Rover, and that action, to which Birch was not a party, was tried by the county court judge at Shrewsbury. The result of that case was that the judge held both Shuker and Farmer to have been negligent, though he attributed the blame as to three-fourths to Shuker and one-fourth only to the County Motor and Engineering Co. Ltd. The damage proved or found in the Shuker action was £50 in all, so that, having regard to the apportionment, Shuker recovered £12 10s.

The present proceedings have been brought by Birch, the pillion rider, against the the County Motor and Engineering Co. Ltd., joining in this case Farmer, its driver, and Shuker has been joined as a third party.

The claim in the present action is for damages assessed at £400, greatly in excess of those recovered, or claimed, by Shuker. That is an important fact, because having regard to the amount of the claim, the case, on the face of it, is one from which, under the present rules, an appeal would lie to this court on fact, whereas, of course, no such appeal would lie in Shuker's action.

The defendants applied for a transfer from the Shrewsbury County Court, on the ground that the judge having made up his mind on the other case that the County Motor and Engineering Co. Ltd. was in some degree to blame, the result in practice would be, not improbably, that Birch would recover the full amount of any damages proved, from that company. He would not, of course, be affected by any apportionment between that company and Shuker, and Shuker may or may not be worth powder and shot, as the phrase goes.

When the matter came before the judge, he rejected the application, and there is before us a short note of what occurred. According to that note, the judge observed that he had never heard of an application like this before; he said: "You are "asking for a retrial? I am not a jury!"—that being an observation derived from a reference made in the notes to Order 14, r. 1, of the County Court Practice to *Clare Rural District Council* v. *Collen*,[1] which was a jury case, and where it was said that if a jury is likely to be biased, then the proper course is to ask for a transfer to another county court.

The judge went on to say: "I remember the facts and the "judgment I gave; my only doubt was whether I had under-"stated your client's"—that is, the defendant's—"negligence." Then later, at the end, there is a note added by the county court

[1] (1907) 72 J.P. 115.

judge, which reads as follows: "I agree that this was the gist "of what I said although I hope the application was not dealt "with as abruptly as would appear from this short note of the "proceedings. I also said that, in my opinion, this was an "ingenious attempt to obtain a new trial (in effect) when a "party was dissatisfied with a finding from which no appeal lay, "and that to grant such applications would lead to multiplicity "of actions."

Having regard to the wording of the rule and the use of the words "is satisfied," I would say that prima facie at any rate the success of an application made under that rule must be a matter for the discretion of the judge who hears it; but Mr. Hoare has pointed out that the observations attributed to, and added by, the judge seem to indicate that he had not really appreciated the basis of the application, and I must confess that on this record I think there is some cause for that criticism. After all, for reasons which are obvious—one of them being the ability of the dissatisfied party in this case to appeal on the facts—it would be quite wrong for the judge to say: "I am not going through "this again; I have tried it; I have found the answer, and this, "accordingly, is the result in the present case." That would be no trial at all, and if that happened, and if the defendants appealed, it would be at any rate not an extravagant probability that this court might order a new trial, which would then undoubtedly go to a new judge, and the result which the judge here sought to avoid would be achieved.

But, on the other hand, I should be loth to assent in this court to an application which a judge had rejected, unless I were satisfied that there were good grounds for such a course, more particularly since the result might be to establish a general rule of practice for cases where the same subject-matter gives rise to the possibility of several proceedings; which I am not satisfied would be right or desirable.

I think it right, therefore, to look a little more at what happened in the former case. I have said that Birch was not a party, but I gather from counsel, who have assisted us today, that the three persons involved in the accident were the three (and the only three) witnesses; I gather that no other witnesses could in fact assist. So Birch, Shuker and Farmer all gave evidence.

At this stage I will read a passage from the judgment in the Shuker case. The judge says: "I do not think that there can "be any doubt that he (Farmer) did slow down suddenly by "putting his vehicle into a lower gear. A director of the firm "said that it slows up quickly when a change is made with a "four-wheel drive. He"—that is, Farmer—"did this because "he was inexperienced. He did not know how to change the "four-wheel drive. I think, having heard his evidence, that "he did give a signal. I think he did put his arm out"—that is a reference to the fact that Farmer so swore, and Shuker, and I

C. A.
1958
Birch v. County Motor and Engineering Co. Ltd.
Lord Evershed M.R.

dare say Birch, said either that it was not so or that they had not seen it.

The judgment goes on: "Also at that time he"—that is, again, Farmer—"did not know whether there was anything "behind him. I am not satisfied that he turned suddenly. "When he came to this island, I think his mind was occupied "on his job. Having taken the wrong turning he said he knew "he would have to go round the island. He said: 'I did not "'know there was anything behind me.' In a statement which "he made to the police, however, he said that he had seen a light "behind him which probably was a vehicle. Today he said the "light had disappeared. In my view he was not applying his "mind to the matter that night and he ought to have known "that there was some vehicle about." Then the judge deals with Shuker.

That finding quite clearly is not a finding unfavourable to Farmer as a witness. On the one apparent controversial matter, namely, "Did he give a signal?" the judge found in Farmer's favour.

From that it would appear clear enough to me that the real question was: What inference ought the judge to draw as to negligence from facts which in the end were not substantially in dispute? And, more important still, this is not a case in which the judge formed a very unfavourable view of a witness or his credibility. I think when that is so, a judge who then finds that he has to try another action involving the same point, or the same subject-matter, and who has formed a very strong view about a witness, might well feel embarrassed in trying again the same issues; but I do not think that this is such a case. In those circumstances, therefore, I feel that, notwithstanding the reasons which the judge appeared to give and which were not, on the face of them, if I may say so, entirely satisfactory, the judge was entitled to reach the conclusion he did, and that conclusion does not involve any injustice or unfairness to the defendants, or indeed (as I think) a result that, although justice were done, it might not to the defendants at any rate appear to have been done.

It is plain, of course, that the judge must retry the matter, and counsel before us say that they certainly would make that quite clear. On the other hand, of course, it may mean that the trial may be shorter because some matters will no doubt really be no longer much in dispute. Subject to that, the judge must hear the witnesses. And it may indeed be that under new cross-examination or new argument he will change or modify his mind about some points.

I think the judge had in mind that, as a responsible judge, he ought to be relied upon to be able to do that, and I so read his reference to the jury. "I am not," says he, "a jury"; and no one, I think, would assert that an experienced judge

would be liable to be so prejudiced by some view he had formed on a previous occasion as not to be able to reopen his mind.

I think that is all I need, and should, say, because after all we are not trying this action. But I have come to the conclusion that we ought not on this occasion to interfere with the conclusion reached by the judge, although I repeat that for my part I think the grounds he stated, as recorded, are not entirely satisfactory. But I am quite sure he will appreciate that he must try this case.

Subject to that, I dismiss this appeal.

Romer L.J. I agree. I confess that I should not have been altogether surprised myself if the county court judge had acceded to this application, but it is quite clear that he had the relevant rule, Order 16, r. 1 (1), in the County Court Rules, 1936, in mind, because he refers to it in his note, and it is a legitimate assumption, therefore, that he applied his mind to the terms of the rule; that he considered the matter and came to the conclusion that he could fairly try this action unprejudiced by the result at which he had arrived in the previous proceedings.

As my Lord has said, it will have to be a real trial, and having regard to the amount which is being claimed in this present action, an appeal will lie on questions of fact, and the judge no doubt will bear that in mind, listen to the evidence and take a note of it.

But it seems to me that it is impossible for this court really to say that the judge exercised his discretion on a wrong principle or in a way which cannot be upheld. It is possible, though improbable, that further evidence may be called in this action which was not called at the original trial, as indeed it is also possible that the result of the evidence, by reason of a different form of cross-examination or further questions put, might throw a different light on the evidence of the witnesses from that which emerged at the last hearing.

But I am satisfied that there is no tangible risk of injustice to the defendants in having this case tried by the same judge as tried the last one, and I would agree, therefore, with the Master of the Rolls in dismissing the appeal.

Ormerod L.J. I agree. It is clear from the rule that the question here is entirely a matter for the discretion of the county court judge, and it does not appear that he has taken into account matters which were not relevant to the proper exercise of his discretion.

It may well be, of course, that other judges in similar circumstances might have come to a different conclusion and exercised

C. A.
1958
Birch v. County Motor and Engineering Co. Ltd.

their discretion in a different way, but that is no ground for allowing this appeal.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. C. H. Bowdler & Sons, Shrewsbury; B. D. J. Hayes & Sons, Shrewsbury.*

B. A. B.

[YORK ASSIZES.]

1958
June 17, 18, 19; *July* 2.

Edmund Davies J.

* BRAITHWAITE *v.* SOUTH DURHAM STEEL CO. LTD. AND ANOTHER.

Licensor and Licensee — Licensee or trespasser — Railway — Licensee involuntarily a few inches outside area of licence—Licensor's duty of care—Whether licensee constituted a trespasser.

Trespass—Involuntary—Licensee—Foot over railway sleeper.

The plaintiff was employed by the defendant company as a slinger or crane driver's mate and in semi-darkness at 6.30 p.m. on February 24, 1956, in the course of his employment he was preceding a mobile crane which ran along a railway line in the occupation of his employers In accordance with the proper and settled practice he was walking along a walkway between the company's track and a railway track in the occupation of the second defendants, the British Transport Commission. The clear space between the sleepers of the two sets of lines at the point where he was walking was only about two feet six inches. The parts of the walkway in the occupation of the respective defendants were not defined, but it was the practice of the company's servants to use the part of the walkway between the sleepers belonging to the commission and the plaintiff had an implied licence to do so. The company had given no cautionary advice nor taken any practical steps to warn their employees of the danger from trains travelling on the commission's line. A guard's van was leading a tender and engine travelling silently in reverse along the commission's line in the same direction as that in which the plaintiff was walking. The guard did not see the plaintiff but the driver of the crane shouted to him to warn him of the approaching danger. The plaintiff turned to ascertain the reason for the shout and in so doing inadvertently put his foot or body a few inches on or over the sleepers to which the commission's implied licence did not extend and he was struck by the van and injured. In an action by the plaintiff against both the company and the commission:—

Held, (1) that the company were liable in negligence to the plaintiff by failing to provide him with a safe place of work.

(2) That the commission were also liable as the guard had failed to keep a proper look-out; and the virtually unheralded approach of the van, tender and engine and the striking of the plaintiff at a time when, in proper exercise of his implied licence

---

[Reported by G. M. Smailes, Esq., Barrister-at-Law.]

to use the walkway, he was in close proximity to the commission's sleepers constituted a breach of their duty of care in relation to their licensee; and that his involuntary encroachment outside the licensed area caused by their negligence did not constitute him a trespasser.

ACTION.

On February 24, 1956, the plaintiff, then a man of 52, was employed by the first defendants, South Durham Steel Co. Ltd., as a slinger or crane driver's mate. He had worked for some five years as slinger to one Salvin, the driver of a mobile crane run on lines of rails to and from the company's Cargo Fleet Works. As a slinger the plaintiff would assist Salvin to cope with any derailments or other lifting jobs near the rails and, in order to see that the road ahead was clear and the points properly set, his settled and proper practice was to precede the crane by some twenty or thirty yards walking ahead on the left or nearside if the crane was travelling forward and on the crane's right or outside if it was proceeding in reverse. At the time of the plaintiff's accident Salvin was proceeding in reverse and the plaintiff was accordingly walking properly ahead and to the right of the following crane. Owing to frequent obstructions between the rails he had no alternative but to walk along the space of ground called the "walkway" between the lines occupied by the company on which the crane was proceeding and the set of lines belonging to the British Transport Commission, the second defendants, immediately adjacent on its offside. The parts of the walkway in the occupation of the company were not defined. The width of the walkway between the tracks varied and at the point the plaintiff was injured, roughly some hundred feet short of a signal gantry, it measured approximately six feet three inches but the actual clear space between the sleepers was only about two feet six inches, sloping slightly upwards from the left to the right as the plaintiff proceeded, the difference in levels varying between three and nine inches.

The accident occurred about 6.30 p.m. It had been snowing and there was slush and some snow underfoot and the lighting at the spot where the plaintiff was struck was not good though it was sufficient for him to be seen by anyone keeping a proper look-out. The plaintiff and Salvin had been directed to a derailment job and were proceeding along the company's line when the accident occurred, the plaintiff walking ahead in the manner described while Salvin, driving his crane at about walking pace in reverse, kept his look-out by glancing backwards over his left shoulder.

As the plaintiff was walking towards the signals Salvin, facing in the opposite direction and therefore having seen the traffic on the commission's line for some time, realised that a dangerous situation was or might be developing. This apprehension arose from the fact that Salvin could see upon the commission's line

1958

Braithwaite v. South Durham Steel Co., Ltd. and Another.

some traffic moving in reverse towards the signal gantry consisting of a guard's van leading a tender and engine belonging to the commission and being driven by their servant. Salvin could also see that the plaintiff, picking his way in the semi-darkness along the muddy and slushy walkway approximately two and a half feet in width, was getting very near the sleepers of the commission's line. As these sleepers were only at the most about one feet eleven inches from the outside or nearer edge of the nearer rail and as the guard's van overhung that line by about one foot eight inches, it was obvious that a very slight deviation or even a leaning over to the right by the plaintiff as he proceeded in the walkway could imperil him. Salvin accordingly blew his crane whistle but it was defective and ineffective. He thereupon shouted warnings to the plaintiff but the crane was noisy and only by his third shout did he make himself heard. Meanwhile the commission's van, tender and engine had coasted in silence down the gradient. Upon hearing Salvin's third shout the plaintiff turned to his right to ascertain the reason for the shout. In so doing he inadvertently brought his left side nearer the rails of the second defendants and was struck by the van which fractured his ribs on the left side.

At the time of the accident the traffic on the commission's line was travelling at about five to eight miles an hour and two white pilot lights were showing on the guard's van. A green light showed on the commission's signal gantry to indicate to those whom the signals concerned that up traffic on the commission's line was free to proceed. The plaintiff knew that the commission's line to his right was one carrying traffic which ran in the same direction as that in which he was walking. Until the moment of Salvin's shout he was wholly unaware of any approaching traffic and the fact that the green light was showing on the gantry was not a matter which would necessarily make any impression on his mind at all.

In this action the plaintiff sought to recover damages against both the company and the commission alleging that each caused or contributed to his injuries by their negligence. He further alleged that the company were in breach of their statutory duty under section 26 (1) of the Factories Act, 1937, but the company denied that the Act was applicable; and as this point was not the subject of argument at the hearing no conclusion on it was expressed in the judgment having regard to the conclusions arrived at regarding the allegations of negligence.

Judgment was delivered at Sheffield Assizes.

H. C. Scott for the plaintiff.
L. B. Stephen for the first defendants.
Alan Goss for the second defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 2. EDMUND DAVIES J. read the following judgment in which he stated the facts, made the findings summarised above and continued: The plaintiff alleges that the company were in breach of their common law duty of reasonable care as his employers. Although expressed in a variety of ways in the statement of claim, the gravamen of the plaintiff's complaint is that the first defendants failed to provide him "with a safe place of "work in that there was very little available room between the "two sets of lines and that it was known to the defendants that "engines or trains came along the lines occupied by the British "Transport Commission without warning and at a time when "the plaintiff's attention would be occupied in keeping a look-out "for obstructions or points." In my judgment, this complaint of a breach of the company's common law duty as his employers is established. In coming to that conclusion I have not been unmindful of the fact that for many years these two tracks had run alongside and that there had apparently been no previous similar accident. However, Mr. Stirzaker, the company's safety officer, told me that owing to the debris it would have been stupid for the plaintiff to have walked between the company's lines. In the result, therefore, he would have to walk, as I find, between the company's and the commission's sets of lines.

Mr. Stirzaker further agreed with plaintiff's counsel that the company's employees might easily and inadvertently walk too near the commission's line and would thereby be in danger of being struck by any traffic travelling thereon, that this danger was naturally greater in the case of men intent on a job as they walked along, and that although the company had this danger in mind for some time, no cautionary advice had been given and no practical steps by fencing, notices or otherwise had been taken. Mr. Morgan, the company's works engineer candidly admitted that there would be a tendency to walk nearer to the commission's line inasmuch as the company's line was then a secondary or dead-end track and waterlogged and requiring the re-laying which it received soon after the plaintiff's accident. He agreed that a slight deviation from the centre of the walkway might cause trouble, that such a shoulder as was created between the two sets of lines shortly after the accident would have provided a practical warning of danger, and that without it a man might walk wholly unconsciously into the danger area of the commission's lines and the traffic proceeding thereon. There was no practical reason why, assuming that the resiting of the company's line was impossible, such a shoulder or break should not have been made long before it was. In fact, the company, although alive to the danger inherent in their layout, did nothing until it was too late. In these circumstances, I have come to the conclusion that the company were in breach of their common law duty of reasonable care to provide a safe place of work and that this breach played a substantial part in the accident which befell the plaintiff.

1958

Braithwaite v. South Durham Steel Co., Ltd. and Another.

Edmund Davies J.

I turn to the claim against the commission, which is framed wholly in negligence. There is ample and convincing evidence that if, in the course of treading in the walkway, the plaintiff overstepped into that part of the walkway which belonged to the commission, he did so by their implied licence. The company's employees had used the walkway for years, by day and by night, without demur of any sort and regardless of whether they kept strictly within the company's completely undefined part of the walkway. If, accordingly, injury had befallen the plaintiff while wholly on the walkway as the result of anything done by the commission's servants, their liability would turn upon whether or not they had failed in their duty as a licensor to "act with reasonable "diligence to prevent his premises from misleading or entrapping a "licensee": per Lord Sumner in *Mersey Docks & Harbour Board* v. *Procter*.[1] But it is urged on behalf of the commission that, on the proved dimensions of rails, sleepers and guard's van, the plaintiff must have had some portion of his body projecting over the commission's sleepers and that probably at least one of his feet was actually upon the sleepers. From this it was argued: (i) that, there being no evidence of a licence to encroach over or to be upon such sleepers, the plaintiff must have been trespassing at the moment of his accident; and further (ii) that (a) as the duty owed even to trespassers whose presence is actually known is merely that of not doing an act "with the deliberate intention "of doing harm to the trespasser, or at least some act done with "reckless disregard of the presence of the trespasser": *R. Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, *per* Lord Hailsham,[2] and (b) since no one suggests that the commission's servants acted either with such deliberate intention or reckless disregard, they were not in breach of any duty owed to the trespassing plaintiff. For the purposes of this judgment, I am prepared to find, and do find, (i) that at the moment of his accident the plaintiff, in all probability, had his left foot actually upon the commission's sleepers, and (ii) that the implied licence of the commission to the company's employees to use such part of the walkway as was the commission's property did not extend to their sleepers. Even so, the submissions of learned counsel for the commission appear to me to be unrealistic when sought to be applied to the facts of this case, namely, that (a) the plaintiff was a licensee in the walkway, and (b) his encroachment of a few inches over or upon the sleepers of the commission's line was wholly inadvertent and involuntary and the result of his startled turnabout as a result of the warning shout of Salvin, the crane driver.

In my judgment, the quiet coasting and virtually unheralded approach in the darkness of the commission's van, tender and engine and the striking of the plaintiff at a time when, in the proper exercise of the implied licence enjoyed by the company's employees

[1] [1923] A.C. 253, 274; 39 T.L.R. 275.

[2] [1929] A.C. 358, 365; 45 T.L.R. 267.

to use the walkway, he was in close proximity to the commission's sleepers, arose from and constituted a breach of the latter's duty of care in relation to their licensees, limited though that duty was. It affronts common sense that licensors, having by their negligence caused a licensee to take a startled and unpremeditated step of a few inches outside the licensed area, should thereafter be entitled to say that if any portion of the plaintiff's anatomy was outside the licensed area he must be regarded as a trespasser to whom no duty was owed other than that of refraining from harming deliberately or recklessly. None of the cases cited to me warrant what in my judgment would be a wholly artificial approach to the facts of this case as I find them and, were authority to the contrary needed, in my view the ratio decidendi of *Pearson* v. *Coleman Bros.*,[3] albeit a case involving an invitee, affords some support to a certain degree.

In my judgment, accordingly, the commission were in breach of their duty as licensors in running the plaintiff down, as I hold they did, and it is nihil ad rem that at the moment of the collision the plaintiff, consequent upon that negligence, was, as on the balance of probabilities I find to be the case, unwittingly encroaching upon the commission's land to the extent of a few inches in instinctive response to the warning shout from his crane driver. Furthermore, having regard to the known practice of the company's employees to use the walkway at all times of the day and night, in my judgment the commission were in serious breach of their duty as licensors. My attention has been drawn to *Trznadel* v. *British Transport Commission*,[4] and it has been urged upon me that in the light of that case I ought to hold that, assuming the commission owed a duty of care towards the plaintiff, no breach thereof had here been proved. But each case turns upon its own facts, and in my judgment there is here evidence of a compulsive nature that the commission were in breach of their clear duty of keeping a proper look-out.

That the lighting was far from good is established. That the practice of the company's employees to use the walkway at all times was well known to the commission is equally clear, and Mr. Watson, their Permanent Ways Inspector, acknowledged that the guard should keep a look-out for such employees. Be the engine's speed five miles or eight miles an hour, the guard Hudson was quite clear (a) that he could see forty yards ahead, and (b) that the engine's speed was such as to enable it to be halted within twenty yards. Nevertheless, at no time did he ever see the plaintiff, and indeed he had no idea as to why the engine stopped until after the accident had actually occurred. From this evidence, combined with that of Salvin that, when the engine overtook him, the plaintiff was then so visible to him and his increasingly imperilled position was so obvious that warning

[3] [1948] 2 K.B. 359; [1948] 2 All E.R. 274.

[4] [1957] 1 W.L.R. 1002; [1957] 3 All E.R. 196n.

1958

BRAITHWAITE v. SOUTH DURHAM STEEL CO., LTD. AND ANOTHER.

Edmund Davies J.

shouts and whistles became clearly necessary, it is solidly established that the commission's guard was gravely lacking in his duty of keeping a proper look-out. His employers must accordingly be held substantially to blame for the accident which in fact occurred.

For these reasons, both defendants have, in my judgment, been proved to have contributed to the plaintiff's accident by their negligence. The apportionment of responsibility between them is not easy, but, after giving the matter the best consideration that I have been able to, and particularly bearing in mind the higher duty, as I regard it, owed by an employer to his employee than that owed by a licensor to a mere licensee, in my judgment the company must bear sixty per cent. of the blame as opposed to the commission's forty per cent.

This still leaves to be determined the question of whether the plaintiff himself must be held in some degree to blame by reason of his contributory negligence. The complaint that he was negligent in not carrying a lamp is, in my judgment, not substantiated. The only one provided was a Tilley "Inspection" Lamp—and I stress the adjective "Inspection"—a cumbersome object weighing 7½ pounds without the necessary fuel oil. No practice of carrying such a lamp between jobs was established and, in the circumstances of the case, the defendants, upon whom, of course, the burden of establishing contributory negligence rests, did not satisfy me that any failure by the plaintiff in this respect could properly be regarded as blameworthy. I have carefully and, I hope, adequately considered all the other matters pleaded in paragraph 5 of the first defence and in paragraph 4 of the second defence as constituting contributory negligence by the plaintiff. In my judgment, none of these complaints is established, and it is not enough to demonstrate that the plaintiff fell short of the higher standards of caution which would be attained by the ultra-prudent. On the contrary, the plaintiff, like the defendants, must be measured by the yardstick of ordinary prudence in the working conditions shown to have been in existence at the material time. Applying this measure, it has not been shown to my satisfaction that the plaintiff fell short of it, and he is, accordingly, in my judgment, entitled to be awarded damages unabated by reason of any blameworthy neglect on his own part.

I turn finally to the assessment of damages. The accident might have had extremely ugly results. Fortunately, the injuries sustained were comparatively slight. The plaintiff, a solid, decent type of workman, was away from work for some twenty-one weeks and thereafter resumed his pre-accident work, but he claims that he is not as adept at it as he formerly was. I have, however, had presented to me and, of course, abide by two agreed medical reports, the first dated some four months after the accident, the second just under two years after its occurrence. I refrain from quoting from them, but I have sought to bear their contents fully in mind. Doing so and taking into account

the agreed special damages of £200 3s. 9d., the total amount to which, in my judgment, the plaintiff is entitled is the sum of £750. There will accordingly be judgment against both defendants for £750. In the light of their respective responsibility for the accident, as between the two defendants, I apportion that sum as to £450 in respect of the first defendants and £300 against the second defendants.

Judgment for the plaintiff against both defendants.

Solicitors: *Samuel Doberman & Richardson, Middlesbrough; Cohen, Jackson & Scott, Stockton-on-Tees; M. H. B. Gilmour.*

[QUEEN'S BENCH DIVISION.]

* BAKER AND ANOTHER v. T. E. HOPKINS & SON LTD.

1958
July 14, 15, 16, 17, 18, 21.

Barry J.

[1956 B. No. 1948.]

Negligence—Duty of care—Extent—Rescuer—Employees overcome by fumes in well—Dangerous system of work—Employees ordered not to go down well—Whether orders sufficiently precise and urgent to absolve employers from blame—Attempt by doctor to rescue employees—Death of doctor—Whether right of action in injured rescuer when peril caused by negligent act arising out of relationship of master and servant.

Fatal Accidents Acts—Damages—Insurance—Estate duty—Half of estate left by deceased made up of payments under insurance policies—Whether estate duty on whole of estate to be deducted from benefit accruing to widow from the death—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

The defendants, a small firm of contractors, were engaged in cleaning a well 50 feet deep and six feet wide, in which there was about 12 feet of water. The defendants' managing director, H., decided to use a petrol-driven pump to clear the water out of the well and a small platform, reached by two ladders, was constructed inside the well 29 feet below the ground on to which the pump was lowered. The pump's tank held enough fuel to work the pump for about six hours which H. thought would be a sufficient period to empty the well. On the afternoon of Tuesday, August 16, 1955, he and two of the defendants' employees, W. and Y., went to the farm where the well was. W. and H. went down the well and W. started the engine of the pump. Having come to the surface again W. said: "By gum, you couldn't stay down there long; the fumes "would kill you," and H. replied, "That's how they commit "suicide in motor-cars." Up to that time H., who was ignorant of the problems which the use of a petrol-driven pump in a well might involve, had not directed his mind to the possibility that difficulty or danger might arise; but after the engine had been running for about a quarter of an hour, he began to realise that a dangerous situation might be building up and before leaving the farm said to W. "Don't go down the well tomorrow until the "fumes have cleared." W. replied, "All right." Just before W.

1958

Baker
v.
T. E. Hopkins & Son
Ltd.

and Y. left the farm the engine, which had then been running for one and a half hours, stopped. That period of time was sufficient for the fumes to produce a lethal concentration of carbon monoxide in the lower part of the well, which would not disperse for several days. H. became worried about the situation during the night and on the next morning, when giving instructions to the workmen in the defendants' yard, he told W. and Y. that the lorry would take them to the farm and said: "Don't go down that bloody well till I get "there." He then left the yard intending to join the two men at the farm after he had kept a business appointment elsewhere. When W. and Y. arrived at the farm W. went down the well. Y. saw that he was ill, and, after someone from the farm had gone for help, went down the well too. Y., also, became overcome by the fumes and fell on to the platform. Shortly after a doctor, who had been summoned to the scene, arrived, and was told by persons gathered at the surface that it was feared that the two men had been overcome by poisonous gas in the well. The doctor was told that the engine had been running on the previous evening and emitting fumes, and was urged not to go down and that the fire brigade was coming. He replied "There "are two men down there. I must see what I can do for them," and having tied a rope round his waist and asked the persons at the well to hold one end of the rope and pull him up if he felt ill, descended the well. He was heard to call up that there was nothing he could do for the men, and had started to climb up when he collapsed and his full weight came on the rope. Those on top started to haul him to the surface, but the rope became inextricably caught in a pipe or cross-member of the well and they were unable to raise him any further. Soon afterwards a fire brigade arrived and the doctor was brought to the surface, but he was then unconscious and died before reaching hospital. The other two men were dead when they were brought up. In an action by the executors of the doctor claiming damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants in respect of his death:—

Held, (1) that the defendants in adopting a highly dangerous system of work in the well were in breach of the duty which they owed as employers to their employees W. and Y., and that it was that negligence and not the disregard by W. and Y. of the orders given to them not to go down the well which was the cause of the accident, because those orders, on their wording and in the light of the circumstances in which they were given, were insufficiently precise and urgent to absolve the defendants from blame.

(2) That the doctor was within the class of persons to whom the defendants owed a duty of care for he was a person whom they might reasonably have anticipated would attempt to rescue their employees whose lives had been imperilled by their negligence and, therefore, it was immaterial that the peril was caused by an act of negligence arising out of the relationship of master and servant. The doctor's executors, accordingly, were entitled to recover from the defendants.

Haynes v. *Harwood* [1935] 1 K.B. 146; 51 T.L.R. 100 applied.

Per Barry J. Although no one owes a duty to anyone else to preserve his own safety, if a man by his own carelessness puts himself into a position of peril of a kind to invite rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid.

By section 1 of the Fatal Accidents (Damages) Act, 1908 "In "assessing damages in any action . . . under the Fatal Accidents

"Act, 1846, . . . there shall not be taken into account any sum "paid or payable on the death of the deceased under any contract "of assurance or insurance."

Nearly half of the gross personal estate left by the doctor, £36,827 in all, was made up of payments under insurance policies taken out by him during his life. Estate duty on the whole of the estate amounted to £8,897 and on the question whether, in estimating the benefit accruing to the widow from his death, the whole of the £8,897 estate duty should be deducted from the amount of the estate or only that sum which would have been payable as duty had the estate not included the insurance moneys:

Held, that estate duty was a debt against the estate as a whole and that, to subdivide it and treat some part of it as attributable to and payable out of the insurance moneys, and the balance as attributable to and payable out of the remainder of the estate, would be contrary to the provisions of the Act of 1908.

Passage in Kemp and Kemp on the Quantum of Damages (1950), Vol. 2, p. 17 approved.

ACTION.

The plaintiffs, Dr. Ailsa Battie Baker, the widow of Dr. Mark Gregory Baker [Dr. Baker], and Geoffrey Murkett, the executors of Dr. Baker, who died on August 17, 1955, in attempting to rescue from a well two workmen, Ward and Wileman, who had been overcome by fumes, claimed damages in respect of his death under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants, T. E. Hopkins and Sons Ltd., the employers of the workmen.

The following account of the circumstances in which the three men died is a summary of the facts stated by Barry J.

The defendants, a small firm of builders and contractors, carrying on business at Ashby-de-la-Zouch, were engaged in cleaning out a well on Tadser Farm, Derbyshire, a few miles from Ashby-de-la-Zouch. The well was 50 feet deep and approximately six feet in diameter; it was normally covered by a manhole cover the aperture of which was considerably smaller than that of the well itself. At the material time there was about twelve feet of water in the well and in order to clean the well it was first necessary to empty it.

The managing director of the defendant company, Thomas Hopkins, had done some bricklaying work in the interior of wells but his experience of work below ground of that kind was very limited. A hand pump installed at the top of the well was of insufficient capacity to lower the level of the water to any extent and Hopkins conceived the idea of using a "Pegson" pump, a petrol-driven pump in the possession of the defendants, to empty the well. He had never used the pump for that purpose before and was wholly ignorant of the problems which its use might involve, nor did he direct his mind to the possibility that difficulty or danger might arise from its use in the well.

Before descending the well Hopkins tested the atmosphere in it by lowering a lighted candle in a bucket to the bottom. Such

1958

Baker
v.
T. E. Hopkins & Son
Ltd.

a test is effective and satisfactory for detecting the presence of black damp or other natural gases, for if the percentage of oxygen in the lower half of the well is less than 17 per cent. the candle will go out, but it is virtually useless for the detection of carbon monoxide as a fatal concentration, half of one per cent., of carbon monoxide may exist while the oxygen content of the air remains at over 17 per cent. and in such conditions the candle will continue to burn. Hopkins, however, did not know that, and, the candle being still alight when brought to the surface, he descended the well and inspected the walls and timbers. After that he, with the employees Ward and Wileman, constructed a platform in the well about nine feet above the surface of the water and some 29 feet below ground, on to which the petrol-driven pump was lowered. Access to the platform was gained by two ladders, the lower one resting on the platform with its top against the side of the well and the other, placed at an angle to the lower ladder, and supported by a wooden cross-member, leading to the top of the well.

On the afternoon of Tuesday, August 16, Hopkins, Ward and Wileman went to the well at Tadser Farm, and Ward went down the ladder to start the engine of the pump. The petrol tank of the engine held enough fuel to run the pump for about six hours, a period which Hopkins thought would be sufficient to enable the pump to clear the well. Hopkins followed Ward down the well and was about halfway down the second ladder when the engine started. The engine spluttered and ran badly for a short time, but after it was firing regularly both men came to the surface and a casual conversation took place between them as to the conditions below ground; Ward said to Hopkins words to this effect: "By gum, you couldn't stay down there long; the fumes would "kill you," and Hopkins replied, "That's how they commit "suicide in motor-cars." Hopkins still failed to appreciate the danger of running a petrol-driven motor below ground in the well and the possibility of danger only began to dawn upon him after the pump had been working for about a quarter of an hour. About then a further candle test was conducted and this time the candle, which was suspended on a rope and not in a bucket, went out. A little later, but after he had begun to realise the dangerous situation which might be building up, Hopkins left the farm. Before going he said to Ward, "Don't go down the "well tomorrow until the fumes have cleared," and Ward replied "All right." Ward and Wileman remained at the farm for some time after Hopkins left and just as they were about to leave the engine stopped. It had then been running for about one and a half hours and almost certainly it stopped because its own exhaust gases had so reduced the amount of oxygen near the bottom of the well that combustion was no longer possible. Ward and Wileman knew that the engine had stopped.

Unknown to Ward and Wileman, Hopkins, who was worried about the situation, returned to Tadser Farm later that evening.

He found that the engine had stopped and that the well was filled with a blue haze and emitted a smell of fumes. He decided that it was too dangerous to go down and left the manhole cover off and placed a short ladder over the aperture. During the night he decided to tell Ward and Wileman not to go down the well the next morning until he himself had arrived, but he still intended that he and his men should go to the farm to "get on with the job," —to restart the engine and clear the well—and had he arrived there at the same time as Ward and Wileman he would have gone down the well himself, certainly if a candle test had proved satisfactory. As it was Hopkins had a business appointment on the next morning and intended to meet Ward and Wileman at Tadser Farm after his business had been concluded. Accordingly, when, at about 7.30 a.m. on Wednesday, August 17, Hopkins met all the defendants' workmen in their yard at Ashby-de-la-Zouch he said to Ward and Wileman that the lorry driver would take them to Tadser Farm, and "don't go down that bloody well till I get "there." He then left the yard, and, had no disaster occurred, would not have arrived at Tadser Farm until after 10 a.m., so that the two men would have been waiting there for over one and three-quarter hours before his arrival.

Ward and Wileman arrived at the farm at about quarter past eight and they, or one or other of them, were heard to test the depth of water in the well. A few minutes later Wileman called out, "Bill, are you all right?" One, Taylor, went out from the farm and Wileman told him that his mate, whom he thought was ill, was down the well. Taylor said that he would go for help and told Wileman not to go down after his mate. A few minutes later two other persons from the farm went out to the well and, on seeing neither of the two men, looked down and discovered that Wileman was also down the well and had fallen down the ladder on to the platform below. At about a quarter to nine Dr. Baker, who had been summoned to the scene either by the police or by a neighbour, arrived and was told that it was feared that the two men had been overcome by poisonous gas in the depths of the well. He looked at a rope which was lying on the ground but rejected it and fetched a new clean rope from his car which he tied round his waist and then joined to the rope on the ground. He was told that the engine of the pump had been running on the previous evening and emitting fumes and was asked not to go down because the fire brigade was coming. He replied, "There are two men down there. I must see what I can do for "them." He was again urged not to go down, being told that if he did he would only make a third, but he said that he would be all right and asked the persons at the top of the well to hold on to the rope, indicating that if he did not feel well he could tell them and they could pull him up. He then climbed down into the well. Just before he reached the platform he was heard to call up "There is nothing I can do for these men; all right," or "O.K., pull me up," and he started to climb up, those on the

1958

Baker
v.
T. E. Hopkins & Son
Ltd.

surface taking up the slack of the rope. As he was moving from the lower to the upper ladder he collapsed and his full weight came upon the rope. Those on the surface pulled on the rope and managed to raise him several feet when by an unfortunate mischance the rope became inextricably caught, either in a pipe running down the side of the well or one of the cross-members, so that they could move it no further and all efforts made to pull Dr. Baker up were unsuccessful. At about 9.20 a.m. a fire brigade arrived; a fireman wearing breathing apparatus went down the well and released Dr. Baker from the rope but he was unconscious when brought to the surface and died before reaching hospital. The other two men were dead when they were brought to the surface. Hopkins, who had been eventually traced, arrived at the farm shortly after all the bodies had been recovered.

The facts relevant to the assessment of damages are fully stated in the judgment of Barry J.

The plaintiffs alleged, inter alia, that it was by reason of the defendants' negligence and breaches of duty towards their employees, or of negligence and breaches of duty by their employees Ward and Wileman, that Ward and Wileman were in the imminent danger of death or injury from which Dr. Baker had attempted to rescue them and that his death was due to such negligence and breach of duty, or, alternatively, that it was due to the breach by the defendants of their duty to anticipate or contemplate that by reason of failure to fulfil their duties to their employees Dr. Baker might attempt to rescue them; in the further alternative they alleged that the acts and death of Dr. Baker were the natural and probable consequence of, and such as they might reasonably have anticipated as likely to follow from, the defendants' or their employees' negligence or breaches of duty and that by reason thereof the defendants were guilty of a breach of their duty to him whereby he died.

The defendants contended that in descending the well neither Ward nor Wileman were acting in the course of their employment, and they denied negligence and breach of duty. They alleged, inter alia, that, if they had been guilty of any negligence or breach of duty, that was not the cause of the death of any of the three men and that Ward and Wileman were overcome by fumes owing to their own negligence in descending the well knowing that it was unsafe to do so and contrary to specific oral instructions. They further alleged that Dr. Baker descended into the well knowing that two men had been overcome by gas or fumes and voluntarily undertook and consented to the risks involved in doing so and they relied upon the doctrine of volenti non fit injuria. They also alleged that the death of Dr. Baker was caused solely, or contributed to, by his own negligence.

An action in which Florence Mary Ward, the administratrix of William Ewart Ward, who died in the well, claimed damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants in respect

of the death of Ward was heard at the same time as the action by the executors of Dr. Baker.

F. W. Beney Q.C. and *Douglas Lowe* for the plaintiffs.
Marven Everett Q.C. and *H. Tudor Evans* for the defendants.
M. K. Harrison-Hall for the plaintiff, Florence Mary Ward.

The following cases were cited in argument: *Haynes* v. *Harwood*[1]; *Wagner* v. *International Railway Co.*[2]; *Dupuis* v. *New Regina Trading Co. Ltd.*[3]; *Donoghue* v. *Stevenson*[4]; *Staveley Iron and Chemical Co. Ltd.* v. *Jones*[5]; *Staveley Iron and Chemical Co. Ltd.* v. *Jones*[6]; *Hyett* v. *Great Western Railway Co.*[7]; *Eckert* v. *Long Island Railroad Co.*[8]; *Stevens* v. *Woodward*[9]; *Canadian Pacific Railway Co.* v. *Lockhart*[10]; *Century Insurance Company Ltd.* v. *Northern Ireland Road Transport Board*[11]; *Twine* v. *Bean's Express Ltd.*[12]; *McKean* v. *Raynor Brothers Ltd.*[13]; *Conway* v. *George Wimpey & Co. Ltd.*[14]; *London County Council* v. *Cattermoles (Garages) Ltd.*[15]; *Lloyd* v. *Grace, Smith & Co.*[16]; *Bowskill* v. *Dawson (No. 2)*[17]; *O'Neil* v. *S. J. Smith & Co. (Bidford) Ltd.*[18]; *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[19]; *Heatley* v. *Steel Company of Wales Ltd.*[20]; *Roughead* v. *Railway Executive*[21]; *Zinovieff* v. *British Transport Commission*[22]; *Burgess* v. *Florence Nightingale Hospital for Gentlewomen.*[23]

BARRY J. Mrs. Ailsa Baker is the widow of the late Dr. Mark Gregory Baker. She and her co-executor, Geoffrey Murkett, now claim damages for the death of her late husband on behalf of herself and her family, and for the benefit of her late husband's estate under the provisions of the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934.

The tragic events which give rise to this claim occurred within the space of less than an hour on the morning of Wednesday, August 17, 1955. During that short period of time three men, one of them being Dr. Baker, met their deaths at or near the

[1] [1935] 1 K.B. 146; 51 T.L.R. 100 (sub nom. *Haynes* v. *G. Harwood & Son*).
[2] (1921) 232 N.Y. 176.
[3] [1943] 4 Dom.L.R. 275.
[4] [1932] A.C. 562; 48 T.L.R. 494.
[5] [1955] 1 Q.B. 474; [1955] 2 W.L.R. 69; [1955] 1 All E.R. 6.
[6] [1956] A.C. 627; [1956] 2 W.L.R. 479; [1956] 1 All E.R. 403.
[7] [1948] 1 K.B. 345; 63 T.L.R. 411; [1947] 2 All E.R. 264.
[8] (1871) 43 N.Y. 502; 3 Am.Rep. 721.
[9] (1881) 6 Q.B.D. 318.
[10] [1942] A.C. 591; [1942] 2 All E.R. 464.
[11] [1942] A.C. 509; [1942] 1 All E.R. 491.
[12] (1946) 62 T.L.R. 458; [1942] 2 All E.R. 650.
[13] [1942] 2 All E.R. 650.
[14] [1951] 2 K.B. 266; [1951] 1 T.L.R. 587; [1951] 1 All E.R. 56.
[15] [1953] 1 W.L.R. 997; [1953] 2 All E.R. 582.
[16] [1912] A.C. 716; 28 T.L.R. 547.
[17] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.
[18] [1957] 1 W.L.R. 1204; [1957] 3 All E.R. 255.
[19] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.
[20] [1953] 1 W.L.R. 405; [1953] 1 All E.R. 489.
[21] (1949) 65 T.L.R. 435.
[22] (1954) *The Times*, April 1, 1954.
[23] [1955] 1 Q.B. 349; [1955] 2 W.L.R. 533; [1955] 1 All E.R. 511.

1958

Baker
v.
T. E. Hopkins & Son Ltd.

Barry J.

bottom of a well situated at Tadser Farm, Ticknell, in the County of Derby. [His Lordship stated the facts summarized above and continued:] Mr. Beney contends that the plaintiffs are entitled to recover damages from the defendant company for the loss sustained as a result of Dr. Baker's death. Shortly stated, he based his claim upon the following grounds: he submitted first that Mr. Hopkins, and through him the defendant company, was guilty of negligence towards his two work people, Ward and Wileman, and, secondly, that under the principles enunciated by the Court of Appeal in the very well-known case of *Haynes* v. *Harwood*,[1] the defendants also owed a duty of care to Dr. Baker as a person who went to the rescue of the two men who had been placed by the defendants' negligence in a position of imminent peril and whose lives were obviously in danger.

As an alternative method of establishing the liability of the defendants, Mr. Beney submitted that even if no personal negligence on the part of Hopkins or his company were established by the evidence, the defendants are none the less liable because on this assumption Ward, or Ward and Wileman, had placed themselves, owing to breach of the instructions given to them, in a position of imminent danger, and would themselves have been liable to anyone, including Dr. Baker, who came to their rescue. As Ward, or Ward and Wileman, committed this negligent act in the course of their employment, as Mr. Beney submits, he contends that the defendants are vicariously responsible for its consequences.

Apart from the two warnings, or orders not to go down the well, which were undoubtedly given by Hopkins to his two work people, there can I think be no doubt of any kind that the defendants were guilty of almost every possible breach of the duties which as employers they owed to their servants. These duties are really so well known that I do not think that I need refer to them in detail.

On the undisputed evidence of Professor Statham—and indeed by every normal standard of common-sense, the system of work adopted by the defendants was highly dangerous to their employees—and, in fairness, let it be said to Hopkins himself. Even a small 98 c.c. petrol motor, working some 29 feet down this well, would very soon poison the air, and after running for as long as one and a half hours would produce what Professor Statham described as "a very powerful lethal mixture" containing a high proportion of carbon monoxide in the lower parts of the well. This fact is so obvious that it is unnecessary for me to refer in detail to the technical evidence. Moreover, for the reasons explained by Professor Statham, this lethal mixture would not be dispersed for many days—or may be weeks. Owing to the low temperature and complete lack of turbulence in the lower levels of the well, there would be no tendency for the

[1] [1935] 1 K.B. 146; 51 T.L.R. 100 (sub nom. *Haynes* v. *G. Harwood & Son*).

poisonous gases to rise, and the opportunity for their diffusion was extremely limited.

Hopkins was ignorant of these facts, nor did he seek information or advice before he installed the engine on its platform and instructed Ward to start it. In the nature of things, if the well was not completely emptied by the use of the one gallon which its tank contained, someone would have to go down the well to refill and restart the engine. Alternatively, someone might have had to go down to stop it when the well was empty or to adjust it while it was running. Moreover, when the water had been cleared, someone had to go down to the bottom of the well to clean it, and whoever had done any of these things would almost inevitably have met his death. Hopkins was not aware of—nor did he seek advice as to—the well-known tests for the presence of carbon monoxide, and he embarked upon the whole enterprise with almost complete disregard to its danger. Clearly a petrol engine should never have been used nearly 30 feet down this well, except perhaps with an elaborate system of ventilation.

The law exacts from employers a high standard of care; ignorance and inexperience which result in the creation of unnecessary risk, cannot, in law, provide an excuse for departure from that standard. The defendants failed to comply with their duty to their two employees, Ward and Wileman, and unless it can be said that the sole cause of this accident was the disregard by these two men of the orders given to them not to go down the well, the defendants' liability to them is not in doubt.

Mr. Marven Everett's case was that, whatever his earlier mistakes, Hopkins saw the light in time and effectively put matters right by the instructions which he gave to Ward on the Tuesday evening and to both the two men early on Wednesday morning, and that after these instructions had been given, Ward and Wileman were solely responsible for the disaster which overtook them; Mr. Everett asked the rhetorical question: "What more could Hopkins do than to tell them not to go down "the well?"

Attractive though this argument may sound, I think that it requires somewhat careful examination. It is necessary to look at the wording of the orders, and the circumstances under which they were given. What was said to Ward on Tuesday night, clearly—to my mind—implied that there was at least a good chance that the fumes would have cleared by the following morning, if not when Ward arrived, at least shortly afterwards. Why, otherwise, should the two men be sent to the farm? The only possible object in sending them there was either to restart the engine if it had stopped or to clean the bottom of the well if all the water had been cleared. Again, one is bound to ask: how were they to tell whether or not the fumes had in fact cleared—and above all how were they to tell whether a rapidly fatal concentration of carbon monoxide did or did not remain in

1958

Baker
v.
T. E. Hopkins & Son Ltd.

Barry J.

the lower portion of the well? Although he did not mention it to the coroner, Hopkins, somewhat as an afterthought, told me that he had already told one of them to make the candle test before they ever went down the well. If such an instruction was ever given, which I am bound to say I doubt, it was not repeated on Tuesday evening, when Hopkins was already beginning to apprehend the danger. Even if it had been repeated, the candle test might well have been useless. Then on Wednesday morning Hopkins said: "Don't go down the bloody well until I "get there." As the only reason why they were being sent to the farm was to work in the well, an instruction of that kind surely implied that after Hopkins' arrival they were at least likely to be able to go down.

As to the circumstances under which the order was given on the Wednesday morning, I was much impressed by Mr. Harrison-Hall's argument on behalf of the widow of Ward as to the very considerable likelihood of misunderstanding. Neither Ward nor Wileman were aware that Hopkins had visited the farm after they had left on the previous evening. For all they knew he might have thought that the pump had run for the full six hours and had emptied the well. No one seems to have ascertained what was in the mind of these two unfortunate men, but they may well have thought that his order "not to go down" related to the clearing of the bottom of the well, which he may have wished to supervise. If that was their state of mind they may well have thought that, without disobeying the spirit of the orders given to them, they would be doing a service to their employers by restarting the engine and emptying the well before Hopkins arrived. Indeed, for all we know, Ward may have gone down the well to see if the "fumes had cleared," so as to be able to report to Hopkins on his arrival rather than wait for an indefinite period wasting his employers' time.

Taking all these factors into account, I am quite satisfied that the orders given by Hopkins to Ward and Wileman were insufficiently precise and urgent to absolve the defendants from blame. If, for example, a farmer brings into a shed in his yard a man-eating tiger or a bull which is so savage that it attacks every human creature that approaches it, it is surely insufficient for him to say to his men: "Don't go into the shed unless it "looks friendly," which was in effect the real result of Hopkins' instruction to Ward on the Tuesday evening, or "Don't go in "until I come." Both of these orders imply that when the animal looks quiet or when the farmer is present it is safe to go in. In my view the appropriate order, in such circumstances, must be: "Don't go into that shed because if you, or I, or "anyone else does so it means certain death." For these reasons I am satisfied that the defendants were negligent towards their two employees.

As an alternative line of defence Mr. Everett sought to persuade me that the duty owed by an employer to his workmen.

being personal to them, left no room for the "rescuer," and that the *Haynes* v. *Harwood*[2] doctrine had no application when the act of negligence which caused the peril arose out of the relationship of master and servant. No authority could be cited in support of this proposition and I am satisfied that it is unsound.

The original premise is no doubt correct. On a similar principle, the motorist driving along the highway does not owe a duty of care to the world at large, but only to those whom he might reasonably contemplate would be affected by his negligence. The essence of the *Haynes* v. *Harwood*[2] doctrine, as I understand it, is that among the persons who fall within that class are those who might attempt to rescue the man or woman placed in acute peril by the negligent act complained of. Whether that act of negligence arises out of the relationship between master and servant, or any other relationship which involves a duty of care, seems to me to be quite immaterial.

While paying very proper and very generous tribute to the bravery of Dr. Baker, Mr. Everett, as it was his duty to do, also challenged the reasonableness of his conduct. Indeed, as I ventured to put it during the course of the argument, he suggested that he was "unreasonably brave" and that his conduct broke the chain of causation by amounting to a novus actus interveniens—or at least that the defendants can escape liability under the maxim volenti non fit injuria or in other words that he voluntarily accepted the risk.

It was not disputed that a doctor summoned to the scene of a disaster such as this one, would in normal circumstances qualify as a "rescuer."

In my judgment neither of these submissions can succeed, having regard to the evidence in the present case. It is beyond question that Dr. Baker acted as he did in an urgent and passionate desire to do everything that he could, even at great risk to himself, to preserve human life. It would be an insult to the profession to which he belonged if I were to hold that such conduct, on the part of a brave and humane doctor, could not be reasonably anticipated by those whose negligent acts created the peril which he sought to avert. It is clear that Dr. Baker was fully alive to the risks, but I can find no evidence to suggest that he voluntarily undertook to accept all the consequences of the defendants' negligence; nor do I think that he acted in a foolhardy or unreasonable way. Despite the emergency, he arranged for himself to be roped, and, had it not been for the quite unforeseeable mischance of the rope becoming caught in the down pipe or cross-members of the well, he might easily have been hauled to the surface and his life saved. The defendants, whose negligence brought about the danger, must, however, accept the risk of mischances of this kind.

On these findings the plaintiffs are entitled to recover and it

[2] [1935] 1 K.B. 146.

1958

Baker
v.
T. E. Hopkins & Son Ltd.

Barry J.

is unnecessary for me to deal at any length with the very difficult legal problems which arise under Mr. Beney's alternative submission based on the assumption that Ward or Wileman or both were wholly to blame. To succeed on this ground the plaintiffs would have to show that Ward, or Ward and Wileman, or one or other of them in going down the well, were acting in the course of their employment, although contrary to express instructions, and that in consequence the defendants were responsible for any tortious act which they might commit. Secondly, it would be necessary for them to establish that one or other or both of them owed a duty to their rescuer, Dr. Baker, for the neglect of which they would have been liable to him in damages. I have little doubt that the two men were acting within the scope and in the course of their employment. They were sent to the farm to work in the well and the orders which they received regulated only the manner and time in and at which they should carry out this work. The second element involves a difficult and fundamental problem which, in this country at least, is devoid of authority, namely whether a right of action arises at the suit of the "rescuer" when the negligent act is committed by the person whom he attempts to rescue. Were I called upon to decide it, I should, with some hesitation and doubt have taken this view:—Although no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid.

In expressing this opinion I am aware that it is contrary to the view taken by the Canadian court in *Dupuis* v. *New Regina Trading Co. Ltd.*[3] On reading the judgment in that case I am not wholly satisfied that the point was presented to the court in quite the same way as it was presented to me by Mr. Beney. Be that as it may, that Canadian decision, although of course entitled to the greatest respect, is in no sense binding upon the courts of this country.

I must now turn to the last but not the least difficult problem which this case presents, namely, the damages which ought to be awarded to the widow and the family of the deceased.

[His Lordship referred to Dr. Baker's practice and his widow's financial position and continued:] Under the Fatal Accidents Act the real question for determination is the amount which the widow and her family had lost financially by reason of the death of Dr. Baker, against which must, of course, be set off the true value of any financial gains accruing to them for the same reason, that is to say on account of Dr. Baker's premature death. So many imponderable factors arise that any detailed analysis of the figures would, I think, be of very little value either to the parties or to anyone else. It is sufficient for me to say that having considered

[3] [1943] 4 Dom.L.R. 275.

the whole of the evidence, I am satisfied that the net annual gain accruing to the family from Dr. Baker's earnings was not less than, and probably somewhat more than £1,000 per year. Having regard to Dr. Baker's age and the age of his widow, and having regard to the nature of his profession, which in the normal course of things is not a perilous one, this annual sum must, it is clear, I think, be capitalized at a very substantial number of years' purchase, even after making all due allowance for the normal vicissitudes of life, including of course, even though the chance may be remote, the possibility of the widow's remarriage.

Against this capital sum arrived at by multiplying the annual net gain accruing to the family from Dr. Baker's earnings by a suitable multiplier, which as I have said in this case must be a large one, credit must be given for the true value of any financial gains which resulted to the family from Dr. Baker's death.

Dr. Baker left a very substantial personal estate, amounting, at gross value, to £36,827. From this total certain deductions must clearly be made. Out of the total, the amount of the insurance payments arising from policies which had been taken out by Dr. Baker during the course of his life amounted to no less a sum than £15,370. Under the terms of the 1908 Act, that sum must be disregarded in assessing any substantial benefits accruing to the widow and family. Moreover, the State demanded its share and some £8,897 have been paid by way of estate duty. Clearly the widow and her family have received no benefit from that sum.

An interesting argument was addressed to me by Mr. Marven Everett in relation to the insurance moneys and their effect upon the total estate duty payable to the Revenue. The effect of this submission was that the widow should be regarded as benefiting by the amount of the estate less the insurance moneys and less only such portion of the total estate duty as was attributable to that part of the estate other than the £15,378 received under the insurance policies. This somewhat interesting point was discussed at length in Kemp and Kemp on the Quantum of Damages (1956), Vol. 2, pp. 15–17, and I do not think that at this stage it would be helpful for me to deal with it in any detail. It is sufficient for me to say that I agree with the views expressed on page 17 of that work, and I think that it would be infringing the real meaning of the provisions of the Act of 1908 if I were to deal with death duties or estate duties in that way. The estate duty is a debt; and it is a debt against the estate as a whole. I do not think that it is possible, as I say, without infringing the provisions of the Act of 1908 to subdivide it and treat some part of that sum of £8,897 as being attributable and payable out of the insurance moneys and the balance as being attributable to and being payable out of the remainder of the estate.

[His Lordship then considered other factors relevant to the assessment of damages, which do not call for report, awarded the plaintiffs the sum of £12,000, and concluded.] Before I

1958

Baker v. T. E. Hopkins & Son Ltd.

Barry J.

leave this case, it is right for me to say this. I have indicated that in my judgment the defendant company is in law clearly to blame for the death of these three men, and that it is to blame because ignorance, lack of thought and lack of experience do not provide employers with an excuse for subjecting their men to unnecessary risks. That is the law, and this court is concerned only with the law. Very different considerations apply in relation to moral responsibility. I am satisfied that Hopkins is a very decent and a very truthful man; I am quite satisfied that this disaster occurred wholly through his lack of experience and ignorance. Many better men than he have tried to undertake tasks which were beyond them, and I think that it would be wrong for him to go through his life weighed down by the thought that he was under a moral responsibility, as opposed to a clear legal responsibility, for the death of these three people.

With regard to the case brought by Mrs. Ward, the damages are agreed and have already been approved by me. The one question which I have to consider is whether, and if so at what step, the negligence of Ward himself contributed to this accident. I have already indicated my views as to the nature of the instructions which were given, the circumstances under which they were given and the possibility of a misunderstanding, certainly as to their spirit if not as to their letter.

I have hesitated for some time before reaching a conclusion that any blame should properly be attributed to Ward, but looking at the evidence as a whole I feel bound to think that a small —indeed a very small—part of the blame must rest upon his shoulders, and I think that his share of the blame can be assessed at the very low figure of 10 per cent.

Judgment for the plaintiffs.

Solicitors: *Gregory Rowcliffe & Co. for Fishers, Ashby-de-la-Zouch; Hempsons; George Thatcher & Sons for A. W. & H. W. Timms, Burton-on-Trent.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1958
July 23.

Lord Evershed M.R., and Ormerod L.J.

* FICK & FICK LTD. *v.* ASSIMAKIS.

[1958 F. No. 252.]

Practice and Procedure—Writ—Specially endorsed writ—Statement of claim—No signature shown on copy writ served on defendant—Appearance entered—Whether writ duly served—R.S.C., Ord. 3, *r.* 6; *Ord.* 14, *r.* 1; *Ord.* 19, *r.* 4.

The defendant, a married woman, agreed to purchase goods of the plaintiffs. At the time of the purchase the plaintiffs were aware that she was a married woman, but not that she was

purporting to contract as agent of her husband. The goods were delivered but the defendant failed to pay. The plaintiffs issued a specially endorsed writ to recover the purchase money. The writ was duly endorsed with a statement of claim in accordance with the requirements of R.S.C., Ord. 3, r. 6, and Ord. 19, r. 4, which was signed. A copy of that writ was served on the defendant, but the copy did not show that the statement of claim was duly signed. The defendant having failed to enter an appearance, the plaintiffs obtained judgment in default of appearance and defence. That judgment was set aside on the defendant's application on April 9, 1958, and the defendant was taken to have entered appearance to the writ on that date. The plaintiffs then applied for summary judgment under Ord. 14, r. 6, and it was ordered that the plaintiffs should be entitled to recover judgment, unless the defendant paid the sum of £112 8s. into court, being the whole sum claimed. The defendant appealed against that order on the ground first, that the copy writ served on her contained an unsigned statement of claim and the plaintiffs were accordingly precluded from proceeding under Ord. 14 and secondly, on the ground that she had a good defence since the goods were purchased by her as agent of her husband.

Held, (1) that the defendant could not be heard to say that she had not been properly served because she had entered an appearance and that her appearance had been to the writ itself which admittedly was in all respects adequate.

Cassidy & Co. Ltd. v. *M'Aloon* (1893) L.R.Ir. 32 Q.B. & Ex. 368 distinguished.

(2) That it was not sufficiently established that the wife was acting as agent for her husband to justify the court in interfering with the discretion of the judge, in giving leave to defend subject to payment into court of the sum claimed.

Decision of Glyn-Jones J. affirmed.

APPEAL from a decision of Glyn-Jones J.

The plaintiffs, Fick & Fick Ltd., by specially endorsed writ claimed to recover from the defendant Mrs. Assimakis the sum of £112 8s. in respect of two armchairs and a stool which they had sold and delivered to her. The plaintiffs applied under R.S.C., Ord. 14, r. 6, for leave to sign final judgment against the defendant. Master Jacob gave leave to sign final judgment. Glyn-Jones J. varied that order and ordered that, unless the defendant paid £112 8s. into court within seven days, the plaintiffs might sign final judgment against the defendant for the amount claimed and costs.

The defendant appealed against that order.

The facts and contentions of the defendant are fully stated in the judgment of Lord Evershed M.R.

Mark Littman for the defendant.
Harry Lester for the plaintiffs.

The following cases were referred to in argument which are not mentioned in the judgments: *Anlaby* v. *Praetorius* [1]; *Paquin Ltd.* v. *Beauclerk*.[2]

[1] (1888) 20 Q.B.D. 764. [2] [1906] A.C. 148.

C. A.
1958
Fick & Fick Ltd.
v.
Assimakis.

Lord Evershed M.R. The first point taken by the appellant is unusual, but it is, of course, a point which she is perfectly entitled to take. The action is one brought to recover a sum of money—not very great—£112 8s.—for two articles of furniture. As I have understood from Mr. Littman, the original writ, bearing the number and figures: 1958 F. No. 252, was issued by the plaintiffs by way of a specially endorsed writ and complied with all the requirements of such a writ. Particularly, it bore upon the back of it the legend "Statement of Claim," followed by "Particulars," and it was signed by the solicitor for the plaintiffs. The writ was served upon the defendant, in the ordinary way by handing to her a duplicate or copy, or what purported to be a duplicate or copy, of the writ. I dare say that the original writ was in the possession of whoever served her and available for her to see if she wanted to see it. The defendant ignored the proceedings at first, and the plaintiffs obtained a judgment in default of appearance and defence. At that stage the defendant wisely took expert advice and consulted a solicitor. The judgment was set aside; but it was obvious that she was in considerable difficulty in applying to have the judgment set aside, unless she was prepared to say she was appearing to the writ. So the order made by the master on April 9 was in this form: "It is ordered that the judgment entered in this action and "obtained in default of appearance on "—the date stated—" and "all subsequent proceedings in this action "—which included, I think I am right in saying, proceedings by way of execution—"be set aside." Then there follows: "Appearance to stand as "of today's date." An appeal from that order was unsuccessful. It therefore is plain that from April 9, 1958, the defendant must be taken to have duly appeared to the writ, which was issued bearing the date, number and letters: 1958 F. No. 252. The plaintiffs, having been somewhat checked upon their first advance, then proceeded by way of application for summary judgment under Order 14 and the result of that proceeding has been the order now under appeal by Glyn-Jones J. dated May 15 of this year. That order provides that the plaintiffs should be entitled to recover judgment unless the defendant pays the whole sum stated on the writ, £112 8s. into court within seven days. In that event, the action will be transferred to a county court for trial.

The first point which Mr. Littman has argued for the defendant is this—and if it is unusual and purely technical, it loses none of its interest for that: he has drawn attention to the rule, particularly the opening language of Order 14: "Where the "defendant appears to a writ of summons specially endorsed with "or accompanied by a statement of claim under Order 3, rule 6"; and he says that in order to sustain Glyn-Jones J.'s order the plaintiffs must show that the defendant has appeared to a writ specially endorsed with a statement of claim. That carries you back to the other relevant Orders: Order 3, r. 6; particularly

Order 19, r. 4; and Order 2, r. 1. If an endorsement is to be a statement of claim, then it must possess certain characteristics. One is that there should be at the head of the particulars or statement the words "Statement of Claim"; and there is no doubt that those words appear in the copy which we have, and which corresponds to the copy given to the defendant. But in addition, by virtue of Order 19, r. 4, it is requisite that the statement of claim on the endorsement should be signed—actually signed. It is at this point that the defendant has discerned what might be for her a tabula in naufragio, because she says: "The thing with which "I was served, the copy which I was given, omitted to have upon "it any signature. Therefore it was not a statement of claim; "the endorsement was not a statement of claim, and therefore "I have not appeared to a writ endorsed with a statement of "claim; and you, the plaintiffs, are shut out from any proceeding "under Order 14, r. 1."

If that is right, then she is entitled to prevail: although it is to be observed, as Mr. Littman conceded, that if his client is right, there is no possible means by which the plaintiffs, by amendment or otherwise, can rectify the situation. Notwithstanding the attraction of the argument, I cannot accept it. I think the answer is really quite short: what has been issued here is the writ—the original writ—bearing the title: 1958 F. No. 252, the plaintiffs and defendant, and so on, issued out of the Central Office; and it is not in doubt that that writ was a specially endorsed writ in every technical sense, having on the endorsement both the legend "Statement of Claim," and the signature of the solicitor. The only error which has been made is that whoever made the copy, which was handed to the defendant, was not sufficiently assiduous in his copying work and omitted to copy the solicitor's name in the space provided by the word "Signa-"ture." To that extent, therefore, the defendant might say that she was never properly served, because the thing she was given was not a true copy or duplicate of the actual writ. But in my judgment she cannot be heard to say that now because she has appeared. She has had to do that for reasons already stated, and therefore, having appeared, she must now be taken to have appeared not to a duplicate writ or somebody's copy of the writ but to the writ itself, which is admitted in all respects to be adequate and sufficient. On those grounds I think this case cannot be treated as governed by the case of *Cassidy & Co. Ltd.* v. *M'Aloon*,[1] where, though this particular point is not precisely stated, it seems to be assumed that the writ, whatever that may mean, was never in truth signed at all.

On those grounds, therefore, I reject the first ground of Mr. Littman's appeal.

There remains the second ground, which he has described, perhaps, if he will allow me to say so, slightly euphemistically,

[1] (1893) L.R.Ir. 32 Q.B. & Ex. 368.

C. A.
1958
Fick & Fick Ltd.
v.
Assimakis.
Lord Evershed M.R.

as based upon merits. The facts in regard to this ground may be quite briefly stated. According to the evidence, the defendant went, as many wives do, and ordered the furniture in question. She says in her first affidavit, sworn on April 25, that before going—again as many wives, at any rate, if prudent, do—she consulted her husband and had his support in her excursion. She then went to the premises of the plaintiffs and ordered these articles. She has intimated that the credit, in her view, was given to her husband and not to her, and that she entered into the transaction not as a principal but as agent for her husband.

The director of the plaintiff company, one Fick, has produced certain correspondence, and says that he was never told that she was acting on behalf of her husband and he had no reason to believe that she was. It is true that the letter which is exhibited is, according to the copy, addressed to "Mrs. Assimakis" and begins "Dear Madam." To that extent it must be assumed that the plaintiffs knew that the defendant was or had been married, though it does not show that they knew anything more than that about her domestic affairs. Two other affidavits have been sworn, both bearing the same date, so that the one cannot be by way of answer to the other. It is made quite plain by the plaintiffs' representative that he treated his customer as being the defendant, Mrs. Assimakis. He wrote to her sending her the account and frequently communicated with her. Subsequently, having been told in January of this year, as he says, for the first time, that her husband would be responsible, he then proceeded to write, with equal lack of response, to the defendant's husband. On the other side, all that the defendant has said—and no doubt she has avoided saying that which is not true—is that she did consult her husband, and at the end of the affidavit she suggests that the plaintiffs should have realised that the real customer was the husband, though she never states that she so informed the plaintiffs.

Mr. Littman has drawn attention to what is stated in Halsbury's Laws of England, 3rd ed., Vol. 19, p. 855, and has suggested that, notwithstanding the terms of the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, and section 1 of that Act in particular, it is still true to say that a person who deals with somebody to his knowledge being a married woman, may find that he has no recourse against her if it turns out that in fact she was purporting to act as her husband's agent. The passage in Halsbury is subject to the qualification "unless the "tradesman has treated her as his debtor," which I think plainly on this evidence appears to have been the attitude of the plaintiffs.

I do not want to prejudge this matter, because it may be that in the end this will indeed be the only possible refuge for the defendant. I confine myself, accordingly, to saying that if there is here to be found some defence, it seems to me on the evidence as it at present stands to be of a somewhat unsubstantial

character. At any rate, I am clear in my own mind that it is not sufficiently established to justify this court in interfering with a view taken in his discretion by the judge below, that the right order here to make was that if she should have leave to defend, it must be upon terms that this relatively small sum of money should be in its entirety paid into court.

For those reasons, therefore, I would dismiss the appeal.

ORMEROD L.J. I agree and there is nothing I wish to add.

Appeal dismissed.

Solicitors: *Lucien Fior; Hall Brydon.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

* WOODLEY *v.* TERSONS LTD.

1958
July 24.
Devlin J.

[1957 W. No. 386.]

Fatal Accidents Acts—Damages—Administration—Administration by trustees instead of court—R.S.C., Ord. 22, *r.* 14 (1) (9).

Where money is recovered by a widow under the Fatal Accidents Acts, 1846–1908, the court may, in certain circumstances, agree to the money being paid to trustees by means of a trust deed for them to administer for the benefit of the widow instead of the money being administered by the court.

APPLICATION.

On June 27, 1958,[1] the plaintiff was awarded £4,000 in an action under the Fatal Accidents Acts, 1846–1908 and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband while in the employment of the defendants. The sum of £300 was paid to her under the Act of 1934, but she wished that the sum of £3,700 under the Fatal Accidents Acts, instead of being administered by the court, should be paid to trustees by means of a trust deed with wider powers of investment. Accordingly a draft trust deed was drawn up for the approval of the court.

The deed was stated to be made between the plaintiff (hereafter called the settlor) of the one part and Hoares Trustees (hereafter called the company) of the other part. The deed provided: 1. that the company should stand possessed of the sum of £3,700 (the trust fund) and accrued interest thereon on the following trusts. (*a*) The sum of £500 to be appropriated out of the trust fund and invested by the company for the benefit of the settlor's daughter and to be paid to the daughter on her

[1] *The Times*, June 28, 1958.

1958

Woodley v. Tersons Ltd.

attaining the age of 21. Notwithstanding this direction the company was to have power in its absolute discretion to release the whole or any part of the capital if required for the benefit of the daughter during her minority. The company was to pay the income on the £500 to the daughter during minority and in the event of her dying before the age of 21 that sum was to revert to the trust. (*b*) The company was to pay the income of the remainder of the trust fund to the settlor during her life by monthly instalments. (*c*) After the death of the settlor the company would hold the capital and income of the remainder of the trust fund on such trusts or for the benefit of such persons as the settlor should by deed or will appoint and in default of appointment, in trust for the daughter absolutely.

2. The company should in its absolute discretion have power at any time to pay or apply any part or the whole of the capital of the trust fund for the benefit of the settlor for any purpose during her life.

3. The company might in its absolute discretion apply capital money for the purchase of an annuity for the benefit of the settlor on her attaining 65.

4. Trust moneys requiring investment might be invested in such stocks, funds, shares, securities, mortgages, loans or other investments whether of a kind authorized for the investment of trust moneys or not as the company should in its absolute discretion approve in all respects as if the company were absolutely entitled thereto and such moneys might be applied in the purchase of life insurance policies or in the purchase of land.

5. The company might as trustee act by its proper officers and might employ a solicitor, banker, broker or other agent to transact any business required to be done in relation to the trust. In addition to all charges and expenses incurred in connexion with the employment of such agent, the company should be entitled to retain out of the trust fund or the income thereof the charges made by the company for acting as trustee on the appropriate scale.

6. In no event should the company be liable for the manner in which any discretion vested in it was exercised or for any loss or damage accruing to the trust fund other than loss due to wilful wrongdoing.

J. Sofer for the plaintiff.

P. H. Ripman for the defendants.

Sofer. The plaintiff is minded, subject to the court's consent, to have the money paid out to Hoares Bank Trustee Department. The advantage of a bank trustee department handling the money would be that they would have very wide powers of investment; and there has been prepared for the court's consideration a trust deed which gives the bank these wide powers of investment, both in gilt-edged and equities and investment trusts. The court

is invited to make an order that the £3,700 be paid to Hoares Bank Trustee Department to be administered on the trusts set out in the instrument.

1958

WOODLEY v. TERSONS LTD.

DEVLIN J. The trust deed seems to be perfectly simple in form, and the real object of it is to give a wider latitude in investment than the court has at present. The plaintiff should understand that in exchange for the wide latitude in investment, which she may well consider under present conditions to be of benefit, she is not getting the free administration which the court could provide. So long as she realises that, and you are satisfied that that is what she desires, I am perfectly satisfied and will sanction payment-out in the way you desire.

Order accordingly.

Solicitors: *Matthew Morris; Mackrell & Co.*

J. D. P.

[PROBATE, ETC., DIVISION.]
[BIRMINGHAM DISTRICT REGISTRY.]

* WIGGINS *v.* WIGGINS (ORSE. BROOKS) AND INGRAM.

1958
June 9.

Mr. Commissioner Carr.

[1957 D. No. 916.]

Husband and Wife—Nullity—Remarriage—Remarriage before decree made absolute—Whether second marriage bigamous.

The respondent wife in the present suit had previously gone through a ceremony of marriage with B. against whom she obtained a decree nisi of nullity on the ground of incapacity on October 4, 1954. On October 16, 1954, before the decree had been made absolute she went through another ceremony of marriage with the petitioner:—

Held, that although the first marriage was later declared null and void, and for some purpose such a declaration was retrospective, it did not have the effect of making the second marriage valid, and it was accordingly bigamous.

Inverclyde (orse. Tripp) v. *Inverclyde* [1931] P. 29; 47 T.L.R. 140, and *De Reneville* v. *De Reneville* [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56 applied.

PETITION by a husband for a decree of nullity of marriage on the ground of bigamy, alternatively for a decree of dissolution on the ground of adultery.

The respondent, Thelma Marketa Wiggins, was married on August 23, 1952, to one Brooks. On October 4, 1954, she obtained a decree nisi of nullity against him on the ground

---

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

1958

Wiggins v. Wiggins (orse. Brooks) and Ingram.

of his incapacity. On October 16, 1954, before that decree had been made absolute she went through a ceremony of marriage with the petitioner, Edward Wiggins. The petitioner sought a decree of nullity on the ground that the marriage was bigamous; alternatively he asked for a decree of divorce on the ground of adultery.

D. T. Hallchurch for the husband.

The wife did not appear and was not represented.

Mr. Commissioner Carr. This is an interesting case which raises a somewhat difficult point. The facts are that the respondent, Thelma Marketa Wiggins, was married to a man named Brooks on August 23, 1952. On October 4, 1954, she obtained a decree nisi of nullity against that man on the ground of his incapacity. Twelve days afterwards, on October 16, 1954, before the decree was made absolute, she went through a form of marriage with the present petitioner.

Since then I am satisfied that she has committed adultery with the co-respondent, Leonard Roy Ingram, and, in those circumstances, the petitioner brings these proceedings, and prays, first, that the marriage shall be declared null and void on the ground that it was a bigamous marriage in that the respondent was at the time of the marriage married to her first husband. In the alternative the petitioner prays for the dissolution of this marriage on the ground of adultery with the co-respondent.

In the absence of authority I should have held without any question that at the time of this marriage the respondent's first marriage was subsisting, and, therefore, the second marriage was bigamous, but Mr. Hallchurch has referred me to all the authorities on the matter, and particularly to a decision of the Irish Court of Appeal in *Mason* v. *Mason* (*orse. Pennington*),[1] in which Andrews C.J. found, in effect, that when a decree is made absolute for nullity it is retrospective to the time of the purported marriage for all purposes, and, therefore, although that marriage which is afterwards nullified was apparently subsisting when the second marriage was entered into, it was not really subsisting because it had never existed. It would, therefore, follow in the present case that the petitioner's marriage would not be bigamous, and the appropriate relief today would not be a decree of nullity, but a decree of dissolution on the ground of adultery.

But Mr. Hallchurch has also referred me to a case in the English Court of Appeal of *De Reneville* v. *De Reneville*,[2] which was heard after *Mason* v. *Mason*, in which Lord Greene M.R. and Bucknell L.J. dealt with this point.[3] It had already been dealt with by Bateson J. in *Inverclyde* (*orse. Tripp*) v. *Inverclyde*.[4] I think the effect of those judgments of Bateson J. and

[1] [1944] N.I. 134.

[2] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[3] [1948] P. 100, 110, 120.

[4] [1931] P. 29; 47 T.L.R. 140.

of the Court of Appeal in *De Reneville* v. *De Reneville* is that although for certain purposes, indeed for most purposes, a decree absolute of nullity acts retrospectively to the date of the purported marriage, nevertheless, one must look at the existing facts at the time of an alleged bigamous marriage and must not be deceived—if that is the right word—by the terms of the decree absolute. Applying that principle, as I think I must, it follows, in my view, that at the time when this petitioner entered into his marriage which he now seeks to dissolve or to have declared null and void his wife was married. It is true that her first marriage was later on declared null and void and that for some purposes was retrospective, but I do not think that that has the effect of making the present marriage a good marriage.

Let it be said that I am not attaching any blame to the parties in this case for that marriage which I hold to be bigamous. They may well have been, and probably were, perfectly innocent in entering into this marriage, and nobody should think that they were to blame without any further evidence, but I am afraid they entered into a marriage which, in law, they were not entitled to do because, in my view, the respondent was at the time of this marriage a married woman, and in those circumstances I think the appropriate remedy is that I should declare this present marriage null and void.

Decree nisi.

Solicitors: *Bickley & Co., Birmingham.*

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (INSANITY: APPOINTMENT OF GUARDIAN).

1958
August 6.

Husband and Wife—Divorce—Insanity—Incurable unsoundness of mind—Appointment of guardian—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 66 (9).

The extension by the Divorce (Insanity and Desertion) Act, 1958, of the definition of care and treatment for the purposes of section 1 of the Matrimonial Causes Act, 1950, has created a class of case in which a petition for divorce can be founded on incurable unsoundness of mind, but the Official Solicitor is not automatically the guardian of the respondent under Matrimonial Causes Rules, 1957, r. 66 (8).

In such cases an application under rule 66 (9) for the appointment of the Official Solicitor as guardian may, on his written consent, be made ex parte to the registrar for the day.

B. LONG,
Senior Registrar.

August 6, 1958.

[QUEEN'S BENCH DIVISION.]

1958
July 28, 29.

Lord Goddard C.J., Donovan and Ashworth JJ.

* WHITTINGHAM *v.* NATTRASS.

PRACTICE NOTE.

Justices—Case stated—Limitation—Extending time for stating or lodging case—No power to extend time by consent—Application to court—Magistrates' Courts Rules, 1952 (*S.I.* 1952, *No.* 2190), *r.* 63—*R.S.C., Ord.* 59, *r.* 33.

Where it is desired to have a case stated by magistrates or a case lodged in the Crown Office out of time, application to extend the time must be made to the Divisional Court. There is no power to extend the time by consent.

Statement to the contrary effect in the Annual Practice, 1958, vol. I, at p. 1749 disapproved.

CASE STATED by Leicester Justices.

The defendant, Alexander Robert Whittingham, was charged by an information preferred by William Henry Nattrass, on November 28, 1957, with having committed four offences against the Road Traffic Act, 1930, and the Road Traffic Act, 1934. The information was heard by the Leicester justices on January 22, 1958, and on January 27, 1958, when they found the charges proved and convicted the defendant and sentenced him to a term of imprisonment. On the defendant applying to them to state a case pursuant to section 87 of the Magistrates' Courts Act, 1952,[1] they granted him bail pending the determination of his appeal.

The justices signed the case on May 8, 1958, and it was lodged in the Crown Office by the defendant's solicitors on July 9, 1958. The prosecutor's solicitors consented to the lodging of the case stated out of time by letter dated July 7, 1958. The notice of appeal was dated July 22, 1958, lodged in the Crown Office on the same day, and made returnable on July 30, 1958.

The Divisional Court took the preliminary objection that the case was stated and lodged out of time, so that there had been non-compliance with the Magistrates' Courts Rules, 1952,[2] and

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Magistrates' Courts Act, 1952, s. 87: "(1) Any person who was a "party to any proceeding before a "magistrates' court or is aggrieved "by the conviction, order, determina-"tion or other proceeding of the court "may question the proceeding on the "ground that it is wrong in law or "is in excess of jurisdiction by "applying to the justices composing "the court to state a case for the "opinion of the High Court on the "question of law or jurisdiction in-"volved. . . . (2) Any application "under the preceding subsection shall "be made within fourteen days after "the day on which the decision of the "magistrates' court was given."

[2] Magistrates' Court Rules, 1952 (S.I. 1952, No. 2190), r. 63: "The "time within which justices shall "state a case shall be three months "after the application for the case to "be stated."

R.S.C., Ord. 59, r. 33.[3] It was contended for the defendant that the non-compliance had been remedied by the prosecutor's consent, but that, if it was not, the court should grant the defendant an extension of time. The case is only reported on this preliminary point.

Raphael Tuck for the defendant.
R. C. B. Parnall for the prosecutor.

The following case was cited in argument in addition to the case referred to in the judgment: *Moore* v. *Hewitt*.[4]

LORD GODDARD C.J. If magistrates do not state a case within the statutory time, that is to say, three months, the court has power to extend the time, but an application to extend the time must be made to it and reasons must be shown as to why the court should extend the time, because if the failure of the magistrates is due to the fault of the applicant, the court will not as a rule extend the time. No application was made in this case to extend the time. That is the first blunder made here.

The second is, perhaps, rather more excusable. The rules provide that the case shall be lodged in the Crown Office in ten days and within fourteen days after receiving the case, a notice of appeal is to be served. Those dates were ignored. There seems to have entered into the Annual Practice [1] a statement that that can be remedied by a consent being filed in the Crown Office. That statement was probably based on Mr. Griffits' book, Guide to Crown Office Practice, 1947, p. 66, but there is no authority for it. Consents cannot be filed to set aside the Rules of Court in that way. The court has power to extend the time, if proper grounds are shown, but an application must be made to the court for that purpose. It cannot be done by consents filed in the Crown Office. The court can extend the time for stating the case and no objection has been taken by the other side to our doing that. We can also extend the time for lodging

[3] R.S.C., Ord. 59, r. 33: "Where "a case has been stated by justices "under section 87 of the Magistrates' "Courts Act, 1952, the appellant "shall—(*a*) within ten days after "receiving the case lodge it in the "Crown Office and Associates Department; or in the Principal Probate "Registry if the appeal falls to be "heard by a Divisional Court of the "Probate, Divorce and Admiralty "Division; and (*b*) within fourteen "days after receiving the case serve "on the respondent a notice in "writing of the appeal together with "a copy of the case, and there shall "be at least eight clear days between "the service of the notice and the "day named therein for the hearing."

Ord. 64, r. 7: "A court or a "judge shall have power to enlarge "or abridge the time appointed by "these rules, or fixed by an order "enlarging time, for doing any act "or taking any proceeding, upon "such terms (if any) as the justice of "the case may require, and any such "enlargement may be ordered "although the application for the "same is not made until after the "expiration of the time appointed or "allowed."

[4] [1947] K.B. 831; [1947] 2 All E.R. 270; 63 T.L.R. 476.

[1] Annual Practice, 1958, vol. I, p. 1749.

1958

WHITTINGHAM v. NATTRASS.

Lord Goddard C.J.

the case. An affidavit ought to have been filed explaining the delay and asking the court to exercise its power; we will do that, but I hope in future it will be understood that consents cannot be filed to set aside the Rules of Court. It is most important that these cases from magistrates for the reasons given in *Rippington* v. *Hicks & Son (Oxford) Ltd.*[2] should come on promptly and not be delayed in this way. It is to be understood that, if extension of time is desired, application should be made to the court, and it cannot be done by consent.

Solicitors: *Lincoln & Lincoln; James & Charles Dodd for Josiah Hincks Son & Bullough, Leicester.*

Application to extend the time granted.

[2] [1949] 1 All E.R. 239; 65 T.L.R. 243.

[LEEDS ASSIZES.]

1958 *July* 8, 9, 10, 11, 23.

Salmon J.

* WOODS *v.* MARTINS BANK LTD AND ANOTHER.

Banking—Duty to customer—Advice on investment—Liability to customer.

Practice and Procedure—Discovery—Affidavit of documents—Duty of solicitor.

Solicitor—Office of court—Duty as—Discovery.

At the beginning of May, 1950, J., who was manager of a branch of a bank, in reply to a request by the plaintiff (who had no real business experience) to be his financial adviser, said that the bank would be only too pleased to take care of the plaintiff's financial affairs. On May 9, 1950, the plaintiff was induced to invest £5,000 in preference shares of B. R. Ltd., in consequence of advice previously given by J., but implicitly repeated on that day, that B. R. Ltd., who were customers of the bank, were financially sound and that the investment was a wise one to make. The plaintiff on that date, in a letter dictated by J., authorized the proceeds of certain investments to be paid to the bank so that they might pay for the shares out of the proceeds and retain the balance to his order. The balance, after the bank had paid for the shares, was put by them to the plaintiff's credit in a suspense account.

On June 1, 1950, the bank opened a current account for the plaintiff. Relying on further advice by J., the plaintiff subsequently invested a further £6,800 in shares in B. R. Ltd., and made a loan of £3,000 to the company in the form of an unregistered bill of sale. In February, 1952, the plaintiff signed a guarantee of the overdraft of F. A. Ltd. with the bank, relying on advice by J. that F. A. Ltd. were sound financially.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

There were no grounds on which J. could reasonably have advised that B. R. Ltd. was in a sound or strong financial position, and still less could the investment in the shares be reasonably recommended as a wise one. Unknown to the plaintiff, B. R. Ltd. had with the bank a considerable overdraft, of which at all material times the district head office of the bank were pressing J. to procure a reduction. Nor was there any reasonable ground for giving the advice in relation to F. A. Ltd.

The plaintiff lost the sum of £14,800 invested in B. R. Ltd., and was called upon to pay £990 3s. under his guarantee for F. A. Ltd., and claimed these sums from the bank and J. A claim based on fraud failed as it was found that J. honestly believed in the advice which he gave, but as to a claim in negligence:—

Held, (1) The limits of a banker's business could not be laid down as a matter of law; the nature of such a business must in each case be a matter of fact, and on the facts it was within the scope of the bank's business to advise on all financial matters, and they owed a duty to the plaintiff to advise him with reasonable care and skill in the transactions referred to.

Banbury v. *Bank of Montreal* [1918] A.C. 626; 34 T.L.R. 518 distinguished.

(2) That from May 9, 1950, when the bank accepted the plaintiff's instructions the relationship of banker and customer existed between them.

(3) That even if the plaintiff did not become a customer until later, the defendants would still have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction on May 9.

(4) That J. ought never to have advised the plaintiff without making a full disclosure to him of the conflicting interests between the plaintiff and the bank and the bank's other customers concerned.

(5) That as none of the advice was reasonably careful or skilful, and but for it the plaintiff would never have made any of the investments or given the guarantee, he had made out his case in negligence against both defendants.

Certain material documents were not disclosed in the defendant's affidavit of documents, and it should at all times have been obvious to the defendants and their solicitors that such documents existed.

Held, that the solicitors' duty did not stop at explaining to their clients that they must disclose all relevant documents which were or had been in their possession; solicitors owed a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents had been omitted from their clients' affidavit.

ACTION.

The plaintiff claimed damages against the defendants, Martins Bank Ltd. and Joseph Johnson, the manager of their branch at 15, Lombard Street, Quayside, Newcastle-upon-Tyne, for fraudulent representations made by the second defendant, alternatively for negligence or alternatively for breach of an agreement to act as his financial advisers. The facts are fully set out in the judgment.

P. Stanley Price Q.C. and *J. A. Baldwin* for the plaintiff.

G. S. Waller Q.C. and *J. F. S. Cobb* for both defendants.

1958

Woods
v.
Martins
Bank Ltd.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 23. Salmon J. read the following judgment: The plaintiff's father died in August, 1948. Approximately one year before he died he gave the plaintiff about £26,000 in cash, the bulk of which was invested by the plaintiff, under his father's guidance, in building societies. At about the same time the father established a fund of between £20,000 and £30,000 to provide an income for the plaintiff's step-mother for her life. When the plaintiff's father died death duties became payable on both sums to which I have referred. The plaintiff voluntarily contributed a large sum of money to his step-mother's fund so that she would not suffer any serious diminution in income by reason of the payment of death duties. Thereafter, the plaintiff had about £17,000 of free money, and, subject to his step-mother's life interest, he was entitled to a further sum of more than £20,000. The plaintiff had not long since left the services, and after a short time as a salesman in a retail store he had entered under his father's auspices a small motor business near the parental home. This was Connaught Motors Ltd. One Darling, in whom the plaintiff's father had had confidence, was the principal director. The plaintiff's investment in this company was £200. The name of this company was subsequently altered to True Shapes Ltd. when it changed its business to sheet metal working, and it will be necessary for me to refer to it again presently. At this time the plaintiff was a young man about 30 years old with no real business experience or knowledge of affairs. In my judgment, the plaintiff is a pleasant and honest young man but rather stupid and extremely gullible. These attributes can have been no less pronounced or obvious eight years ago than they are today. He was, in fact, the very prototype of the lamb waiting to be shorn. And he did not have long to wait.

At about the month of April, 1950, he met one Brock who was the moving spirit in a company called Brocks Refrigeration Ltd. This was a company which had then been in existence only a few months and whose business was to sell, instal and service refrigerators manufactured by J. & E. Hall Ltd. Between May, 1950, and October, 1951, the plaintiff sank £14,800 in this company, every penny of which he has lost. The plaintiff claims that he invested this money as a result of the advice given to him by the defendant bank through the defendant Johnson who was the manager of the defendant bank's Quayside branch at Newcastle-upon-Tyne. The plaintiff claims that this advice was given negligently or fraudulently.

The writ in this action was not issued until April, 1956. It is therefore apparent that the claim is a stale claim. The plaintiff gives as his principal reason for the delay in issuing the writ that he and his company True Shapes Ltd. became heavily involved

with the bank and he postponed bringing this claim until he was no longer in the hands of the bank. However this may be, it is obvious that such a stale claim must be scrutinized very closely. It would be easy for a young man who had improvidently lost a large amount of money, many years later to persuade himself that he had received bad advice from his bank manager, and that it was as a result of this advice that his money had been lost. If the defendant Johnson had been able categorically to deny the plaintiff's story, if he had said that the plaintiff never came to him for advice, and that he never did and never could have advised the plaintiff that Brocks Refrigeration Ltd. was in a sound financial position, or that it was wise for the plaintiff to make the investments in that company that he in fact made, then, in spite of the fact that the plaintiff impressed me as a most candid witness I might have found it difficult to accept his evidence. It seems to me strange that anyone with the slightest knowledge of financial matters could have considered the finances of Brocks Refrigeration Ltd. as sound in 1950 or 1951, or that the investments which the plaintiff made in that company were other than ludicrously imprudent. But the defendant Johnson, however, admits in effect that the plaintiff did come to him for advice, and does not strongly challenge the fact that he may well have advised the plaintiff that the investments the plaintiff proposed making were wise and prudent investments. At any rate, the defendant Johnson admits that he certainly told the plaintiff that if he, the defendant Johnson, had been able to make the same investments with his own moneys he would have done so. I am quite satisfied that the plaintiff received the advice from the defendant Johnson that the plaintiffs says he received. I am bound to say that until I saw the defendant Johnson in the witness-box it seemed to me incredible that any bank manager could be sufficiently ingenuous or ignorant honestly to have believed in such advice. Having seen the defendant Johnson in the witness-box, however, I think that he did, in his muddle-headed way, honestly believe in the advice which he gave the plaintiff.

During the course of this judgment I shall have to refer to the memoranda passing between the defendant Johnson and the defendant bank's district head office. Most regrettably, these documents were not disclosed in the defendants' affidavit of documents although they are of the greatest materiality. It should at all times have been obvious to the defendants and their solicitors that such memoranda existed. Indeed, they are expressly referred to in some of the documents which were disclosed. I am certain that these documents were not purposely suppressed. Nevertheless, the defendants were grossly negligent in omitting these documents from their affidavit of documents. It was not until the trial was well advanced that these documents were produced on my direction. They were then found within a a very short space of time, and it was conceded that there was no excuse for their non-disclosure. No doubt the defendants'

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

solicitors explained to their clients that they must disclose all relevant documents which were or had been in their possession. The solicitors' duty, however, does not stop there. It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit. In this case I am regretfully driven to the conclusion that this duty was not performed by the defendants' solicitors.

I find the following facts: In April, 1950, True Shapes Ltd. were interested in the project of manufacturing a product known as the Bolden Steriliser. The plaintiff and Darling were directors of this company. Its accountant and secretary was one Gordon Barr. At Barr's suggestion a meeting took place in the office between, amongst others, the plaintiff, Darling, Brock and the defendant Johnson in order to consider the proposal of Brocks Refrigeration Ltd. becoming the distributors of the Bolden Steriliser. It appears that this proposal was carried at the meeting. In point of fact Brocks Refrigeration Ltd. had never sold a single Bolden Steriliser, for no commercial Bolden Steriliser has ever been produced by True Shapes Ltd. At the meeting to which I have referred the defendant Johnson was introduced to the plaintiff as Brock's bank manager and financial adviser. Between the date of that meeting and May 9, 1950, the plaintiff met the defendant Johnson on three or four occasions. At this time the defendant Johnson had learned from Darling that the plaintiff was a man of considerable means. The defendant Johnson then set out to acquire and succeeded in acquiring for the defendant bank the custom of the plaintiff, True Shapes Ltd., and an associated company named Bolden Sterilisers Ltd. The defendant Johnson, as manager of the Quayside branch of the defendant bank, perfectly properly considered it part of his duty to attract such customers as he could for his employers. The defendant Johnson impressed upon the plaintiff that the Quayside branch of the defendant bank was a commercial branch and that he, as the manager of that branch, was at the very hub of financial business in the city of Newcastle-upon-Tyne and in a position to offer the plaintiff much better service than the manager of the suburban branch of the rival bank at which the plaintiff and True Shapes Ltd. were then customers.

By the beginning of May 1950 the plaintiff was convinced of the defendant Johnson's financial experience and acumen and had complete confidence in the defendant Johnson's supposed knowledge and skill in financial affairs. The plaintiff asked the defendant Johnson if he would be his financial adviser, to which the defendant Johnson replied that the defendant bank would be only too pleased to take care of the plaintiff's financial affairs. Thereafter the defendant Johnson told the plaintiff that he might be able to get some preference shares for the plaintiff in Brocks Refrigeration Ltd. At this time, and indeed at all

times, Brock was urgently in need of money for his company. Brock, who had then known the plaintiff only for a few weeks or months, was quite cunning enough to realise that the proposition to invest money in his company was more likely to attract the plaintiff if it came to him from a bank manager in whom he had confidence rather than from Brock, who would necessarily be an interested party. I have no doubt that the plaintiff asked the defendant Johnson whether Brocks Refrigeration Ltd. was financially sound and whether it would be wise for him, the plaintiff, to invest £5,000 in that company's preference shares. Brock and his company were, to the plaintiff's knowledge, customers of the defendants' Quayside branch. Accordingly the plaintiff rightly supposed that the defendant Johnson, in whose ability he reposed great confidence, had special knowledge of Brocks Refrigeration Ltd.'s financial affairs. It is to be observed that the defendant Johnson, as bank manager to the company, would be doing them a service by helping to introduce further capital, and he would also thereby be helping to reduce the company's overdraft, which, even as early as May 9, 1950, the district head office was suggesting, in the memoranda to which I have referred, ought to be reduced. He was in an invidious position in suggesting the investment to the plaintiff and in a still more invidious position when he was asked by the plaintiff for his advice. The defendant Johnson did, however, advise the plaintiff that Brocks Refrigeration Ltd. was financially sound and, if he were able to do so with his own money or if he were in the plaintiff's place, he would invest £5,000 in the company's 6 per cent. cumulative preference shares. This advice meant that the proposed investment was a wise and sound one for the plaintiff to make.

The plaintiff then had a conversation with one Sowerby, the manager of the Gosforth branch of Barclays Bank Ltd. with whom the plaintiff had banked for some time and from whom he had then almost been weaned by the defendant Johnson. As a result Sowerby accompanied the plaintiff to another interview with the defendant Johnson, and the defendant Johnson repeated before Sowerby the advice which he had previously given to the plaintiff. Sowerby has not been called as a witness by either side. I draw no inference from his absence from the witness-box except that it would have been difficult for him to give evidence against a former customer and equally difficult for him to give evidence against a rival bank. It seems to me that there were no grounds upon which the defendant Johnson could reasonably have advised that Brocks Refrigeration Ltd. was in a sound or strong financial position. No audited accounts existed. Such figures as the defendant Johnson had did not support the view that the company's finances were sound or strong. Their liquid assets were not sufficient to meet their current liabilities, even leaving out of account their not inconsiderable overdraft. Still less, in my view, could the investment

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

by the plaintiff of £5,000 in preference shares in that company be reasonably recommended as a wise investment. The daunting risks of investing in a company of mushroom growth such as this, and, moreover, a company which was so clearly overtrading, should have been palpable even to the veriest tyro in financial affairs. The plaintiff had never in his life before this occasion bought a share. His inexperience and ignorance and dire need of advice should have been obvious, as I believe they were, to the defendant Johnson. I have no doubt that, but for the defendant Johnson's advice, the plaintiff would not have made the investment in Brocks Refrigeration Ltd. which he in fact made in May of 1950.

On May 9, 1950, the defendant Johnson dictated a letter for the plaintiff to sign. It is addressed to the defendant bank and it is in these terms: "I hand you herewith Alliance Building "Society passbook registered No. A.18370 showing investments "for £5,000 together with my letter of authority to that society "requesting them to pay to you the proceeds of that investment "against your discharge. On receipt of such proceeds please "pay the sum of £5,000 to the above mentioned company against "their acknowledgment and undertaking to issue to me 5,000 "6 per cent. preference shares of £1 each and retain to my order "the balance of the proceeds." The balance referred to in this letter amounted to between £40 and £50 and this sum was put to the plaintiff's credit in a suspense account opened for him by the defendant bank. In my view the defendant bank accepted the instructions contained in this letter as the plaintiff's bankers, and at any rate from that date the relationship of banker and customer existed between them. It is true that the express advice was in the first place given before the 9th May, but it was implicitly repeated on that day. On June 1, 1950, the defendant bank opened a current account for the plaintiff, and it is conceded that from this date the relationship of banker and customer existed between them.

At the beginning of October, 1950, the defendant Johnson told the plaintiff that he could acquire a further 2,500 preference shares in Brocks Refrigeration Ltd. He then told the plaintiff that this company was very strong financially and advised the plaintiff that it would be wise for him to subscribe for the shares. At this stage he knew that the plaintiff's disposable capital was about £17,000, £5,000 of which was already invested in the company's preference shares. The defendant Johnson had then no more reason than he had had in May for advising that the company was strong financially or that the investment was a wise one for the plaintiff to make. The plaintiff, relying on the defendant Johnson's advice, decided to make the investment and the defendant Johnson made out the cheque for £2,500 for the plaintiff to sign. The plaintiff signed it. The communications between the defendant Johnson and the district head office make it plain that prior to this transaction the company's overdraft had

been allowed by the defendant Johnson considerably to exceed the permitted limit, and the district head office had been pressing the defendant Johnson to procure a reduction of the overdraft. The defendant Johnson in effect assured the district head office that the overdraft position would be eased by the additional capital, which he stated was £2,750. These facts were not disclosed by the defendant Johnson to the plaintiff.

In November, 1950, as appears from the defendants' internal memoranda, the defendant bank's district head office was again urging the defendant Johnson to procure a reduction of the company's overdraft. The defendant Johnson assured the district head office that this would be accomplished by the company unloading unwanted stock to the value of £3,000 upon factors. To the defendant Johnson's knowledge, as he admitted, the company tried unsuccessfully during November to unload £3,000-worth of stock upon factors and upon J. & E. Hall Ltd.

At the beginning of December, 1950, a meeting took place between the plaintiff, Brock and the defendant Johnson. The defendant Johnson told the plaintiff that the company had a quantity of stock valued at £5,000 to unload and that, in order to obtain liquid cash for expansion, the company was prepared to sell this stock to the plaintiff for £3,000 providing that the plaintiff would leave the stock with the company on the terms that the company would repurchase it from the plaintiff in nine months' time for £3,300. The plaintiff asked the defendant Johnson for his advice about this proposal, and, indeed, the defendant Johnson admits that he knew the plaintiff was looking to him for advice. The defendant Johnson recommended the plaintiff that it would be quite safe and wise for him to enter into this transaction. I think he did tell the plaintiff that the stock should be segregated. He did not tell the plaintiff that the real reason for the company requiring the £3,000 was to reduce the overdraft, nor did he tell him that the company had been trying unsuccessfully to sell the stock to factors and to J. & E. Hall Ltd. Relying on the defendant Johnson's advice, the plaintiff did enter into this transaction and certain documents came into existence which I must read. On December 16, 1950, the plaintiff wrote to the Rock Building Society in the following terms: "I shall be grateful to you if you will pay to Messrs. "Martins Bank Ltd., Quayside Branch, Newcastle-upon-Tyne, "for credit of my account with them the sum of £3,000 out of "my above-mentioned funds with you and I hereby authorize "you to accept the bank's receipt as your full and sufficient "discharge. Please return the passbook to the bank with your "remittance. If you can expedite this I shall be obliged." On December 16, he wrote to the bank: "I hand you herewith my "Rock Building Society preference share passbook together with "an authority addressed to that society to pay the sum of "£3,000 to you for the credit of my account with you. Kindly "expedite the matter and retain the passbook when returned

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

"to you." Then there was a letter from Brocks Refrigeration Ltd. to the plaintiff in these terms: "We hereby acknowledge "your cheque for £3,000 in payment of miscellaneous stock as "per attached schedule. In accordance with the arrangement "with you we agree to hold this said stock to your order in a "separate part of our stores and we hereby further agree that "there will be no storage charge and undertake to keep such "stock fully insured without cost to you. It is a condition of "the arrangement that you on your part will not dispose of any "or all of such stock for a period of nine calendar months from "the date hereof except to this company, Brocks Refrigeration "Ltd., and it is agreed between us that all such sales will be on "the basis of 10 per cent. added to the price at which we have "sold the stock to you as per the attached schedule. We "Brocks Refrigeration Ltd. hereby undertake to repurchase from "you piecemeal or in bulk on the terms stated herein the whole "of the stock within the said period of nine calendar months "from the date hereof. We enclose a duplicate of this letter "which please sign over the sixpenny stamp at the foot thereof "and return it to us." This was done. A list of the stock was drawn up and the summary at the end of the list is in the defendant Johnson's own handwriting. Although the transaction was in form a sale by the plaintiff to the company, in reality it was clearly a loan by the plaintiff on the security of the stock. The documents constitute an unregistered bill of sale, and accordingly afforded the plaintiff no security at all. It would be difficult to imagine a more imprudent transaction from the point of view of the plaintiff, though from the point of view of the company, who were also the defendant bank's customers, and from the point of view of the defendant bank itself the transaction had certain attractions. The defendant Johnson had no reasonable grounds for advising the plaintiff, as he did, that it was safe or wise for the plaintiff to enter into this transaction.

The plaintiff had now, as a result of the defendant Johnson's advice, sunk £10,500 of his disposable capital of about £17,000 in Brocks Refrigeration Ltd. If the company foundered (and there was a grave risk of its doing so, as should have been obvious to the defendant Johnson) the plaintiff would lose his money. If the company made a huge success, as the defendant Johnson no doubt hoped that it would, the equity shareholders would reap the benefit, but it would profit the plaintiff nothing. Any investment in Brocks Refrigeration Ltd. would have been unwise. An investment which gave the investor a share in the equity commensurate with the capital he was investing, though unwise, would at any rate have been a gamble, if an extremely hazardous one. The investment of £7,500 in preference shares and £3,000 in a loan had nothing to commend it. There is nothing to show that 6 per cent. was an unusallly high yield in 1950 on preference shares in sound private companies. There is some evidence that at this time $3\frac{3}{4}$ to 4 per cent. was the average yield on preference

shares in "blue chip" companies. One would expect such a difference of yield between a first class public company where the investor can at any time realise his investment and a private company where he cannot. There are two requirements for any preference share: (i) that the money invested shall be safe; and (ii) that the stipulated interest shall be paid. Any ordinarily prudent and competent bank manager, especially the bank manager of a commercial branch, should know that before advising the investment of money in the preference shares of any company, let alone a private company, he should be able to see from the balance-sheet figures that the financial position of the company is strong enough to ensure that the investor's capital is safe and from the trading history of the company that the interest would be paid. I cannot imagine that any ordinarily prudent and competent bank manager, on the facts and figures which the defendant Johnson had before him, could have advised the plaintiff to make any investments in preference shares of this company, whatever the supposed yield had been, still less that he would have advised a customer to enter into the £3,000 loan transaction.

In April, 1951, the company issued a debenture charging all its assets to the defendant bank. A little while before October 17, 1951, the plaintiff went to see the defendant Johnson to seek his advice, as the defendant Johnson admits, about a proposal that had been made to him by Brock. He told the defendant Johnson that Brock had suggested that the plaintiff should invest a further £4,000 in the company's preference shares and should also acquire 300 ordinary shares of a nominal value of £1 each at par, with a seat on the board. The plaintiff explained that he had been told by Brock that the company needed additional capital for further development in the Yorkshire area. The defendant Johnson appeared to know all about the proposal. He confirmed that the company needed the extra capital of £4,000 for further development, and said that J. & E. Hall Ltd. had asked the company to extend their business in the Yorkshire area. He advised the plaintiff that it would be a very wise move on his part to take up the shares. Relying on this advice, the plaintiff decided to take up the shares, and made out cheques for £4,000 and £300, which he left with the defendant Johnson. At this time the permitted limit of the company's overdraft was £18,000 on the strength of the debenture, the company's assets having been assessed by the defendant bank at £25,000. The company had been allowed by the defendant Johnson to exceed this limit, and in fact had an overdraft of about £20,500. The district head office had been pressing the defendant Johnson, with some acerbity, to secure a reduction of the overdraft to within the permitted limit. The internal memorandum of October 17, 1951, shows that the defendant Johnson told the district head office that the company intended to consolidate and that "their present intense efforts will result in a considerable "reduction in the level of their requirements which after the

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

"receipt of the £4,000"—from the plaintiff—"will be well "within the limit of £18,000 arranged with the bank." No mention of the company's overdraft was made by the defendant Johnson to the plaintiff. The defendant Johnson's statement to the plaintiff that the £4,000 was required for further development in the Yorkshire area was clearly untrue. Nevertheless, having seen the defendant Johnson, I am not satisfied that he realised that it was untrue. In his muddle-headed way he may well have thought that, as the permitted limit of the overdraft had been exceeded to finance development, the £4,000 subscribed to help reduce the overdraft could properly be described as required for further development. The defendant Johnson did not disclose to the plaintiff that a debenture had been issued to the bank, nor did he say a word to the plaintiff about the company's alarming trading position for the year ending October 31, 1951. It is true that the balance sheet and the trading and profit and loss account for the year 1951 were not then in the defendant Johnson's possession but he had been supplied with quarterly figures. During that year the company lost, according to its accounts, over £21,000. In October, 1951, the defendant Johnson had at any rate the balance sheet and trading and profit and loss account of the company for the year ending October 31, 1950. These showed that the liquid assets were not sufficient to meet current liabilities and that the average monthly expenditure exceeded the average monthly revenue. Indeed, it should have been apparent to any bank manager in the defendant Johnson's position in October, 1951, that the company was precariously balanced on the very knife-edge of insolvency and that disaster appeared to be only round the corner. Yet the defendant Johnson, with no conceivable justification, advised the plaintiff that it would be wise for him to invest a further £4,000 in the company's preference shares thus subscribing, with the £3,000 loan, more than half the total money invested in this company in order to obtain £300 worth of ordinary shares, that is to say about one-sixteenth of the equity, and a seat on the board, for all the good that that might then do him.

Shortly before this transaction, as the defendant Johnson well knew, the plaintiff's disposable capital had become exhausted. He had sunk £10,500 in Brocks Refrigeration Ltd. and a considerable sum in True Shapes Ltd., and the balance he had spent on himself. The defendant Johnson advised the plaintiff that he might get his hands on the fund set up by his father to provide his stepmother with an income by paying his step-mother an annuity equal to her then income. This could apparently be done for about £5,000, leaving the plaintiff with the balance of the fund for his own enjoyment or to be invested in accordance with the defendant Johnson's advice. It was out of the moneys received from this fund that the £4,000 for preference shares was found in October, 1951. So urgent was the necessity on October 17,

1951, to reduce the company's overdraft or to obtain some further security against it that, until such time as the plaintiff was able to realize £4,000 worth of securities from his step-mother's fund, he was asked by the defendant Johnson to give, and he did give, a guarantee to the defendant bank of £4,000 in favour of Brocks Refrigeration Ltd. The plaintiff had only the haziest notion of what was happening in relation to this guarantee and relied entirely upon the defendant Johnson.

One day towards the end of October, 1951, the plaintiff, whose company, True Shapes Ltd., was then considerably in debt to the defendant bank, remarked to the defendant Johnson in relation to Brocks Refrigeration Ltd. that it was nice to be associated with a company whose account with the bank was in credit. The defendant Johnson told him that this company, far from being in credit, had an overdraft of £22,000. The plaintiff says that he was stumped. I believe him.

In February, 1952, there was an interview between the plaintiff and the defendant Johnson and Brock. A small private company called F. Adamson Ltd., in which Brock was interested and which was a customer of the defendant bank, required a guarantee of £1,000 on its bank overdraft. Brock, who, I am told and can well believe, had a magnetic personality and considerable powers of persuasion, in effect assured the plaintiff that the signing of the guarantee would be a mere formality and that there was no risk of the plaintiff being called upon to pay. The defendant Johnson confirmed this and advised the plaintiff that F. Adamson Ltd. was sound financially, and that its overdraft would undoubtedly be discharged by moneys outstanding that would be coming in during the next 12 months. The defendant Johnson advised the plaintiff that there was no real risk of his being called upon to pay under the guarantee. The defendant Johnson had no reasonable ground for giving this advice. I am satisfied that the plaintiff signed this guarantee relying upon the advice he received from the defendant Johnson. Ultimately the plaintiff was called upon to pay and did pay £990 3s. under this guarantee

The plaintiff claims in this action the sum of £14,800 which he lost in Brocks Refrigeration Ltd., and the sum of £990 3s. which he was called upon to pay under his guarantee for F. Adamson Ltd. as damages for negligence, alternatively as damages for fraud, against the defendant bank and the defendant Johnson. I have already indicated that the claim in fraud fails, since I am not persuaded that the defendant did not honestly believe in the advice which he gave to the plaintiff. As to the claim in negligence, the defendants take the point that the defendant Johnson did not advise the plaintiff as he alleges. I am against the defendants on this point. It is clear from what I have already said that, in my judgment, the plaintiff did receive the advice from the defendant Johnson that the plaintiff says that he received.

The defendants' next point is that it was no part of their

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

business as bankers to advise upon such financial transactions as the plaintiff entered into with Brocks Refrigeration Ltd. or in relation to F. Adamson Ltd., and that, accordingly, they were under no duty to advise the plaintiff carefully or competently in these matters. They say that, however careless or incompetent the advice the defendant Johnson gave the plaintiff may have been, since the defendants were under no duty to the plaintiff they are not responsible for any loss that may have been caused by that advice. They rely on the well-known cases of *Le Lievre* v. *Gould*,[1] *Low* v. *Bouverie*[2] and, in particular, on *Banbury* v. *Bank of Montreal*.[3] This latter case seems to me to turn on its own special facts, and particularly on the fact that the plaintiff there admitted that the bank manager "had no general authority to "advise—in other words, that it was not within the scope of the "bank's business to advise on investments at large," *per* Lord Parker of Waddington.[4]

In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law.

In considering what is and what is not within the scope of the defendant bank's business I cannot do better than look at their own publications. I look first at their advertisement. That is in these terms: "Although Martins is a bank with over 600 branches "and world-wide connexions, our system of decentralization "keeps us in touch with the customer's closest problems. We "have six district head offices with boards of directors and general "managers, so that the very best advice is available through our "managers virtually on your doorstep"; and the advertisement is headed "We share your problems." Then I consider their booklet. The material parts read as follows: "If you want help "or advice about investments our managers will gladly obtain for "you advice from the best available sources in such matters." I observe that the "best available source" in this case was the bank itself, who were the bankers for Brocks Refrigeration Ltd. and thus knew everything that there was to know, or were in a position to know all that there was to know, about that company's financial standing. The next passage I read is as follows: "In "all these matters strict secrecy is observed and your affairs will "not be divulged to any other person, relative or otherwise, with-"out your knowledge or permission. You may consult your bank "manager freely and seek his advice on all matters affecting your "financial welfare. All these advantages are yours as the "possessor of a bank account, current or deposit, and in these "difficult days, when financial problems of one kind or another "always seem to be cropping up, it is a great comfort to know "that you have an impartial friend whose help you may seek

[1] [1893] 1 Q.B. 491; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243.
[2] [1891] 3 Ch. 82; 7 T.L.R. 582.
[3] [1918] A.C. 626; 34 T.L.R. 518.
[4] [1918] A.C. 626, 702.

"without obligation." I hardly think that it would be reasonable to construe those words as meaning "without obligation to the "bank." Those words seems to me to be in the widest possible terms—"you may consult your bank manager freely and seek "his advice on all matters affecting your financial welfare." Then at the end of the booklet there is this paragraph: "We "have not gone into great detail, but if there is anything about "which you would like more information please call in at the "branch most convenient to you. We shall be delighted to make "your acquaintance and to help you with your finances in every "possible way, and we very much hope that you will have been "sufficiently attracted by the impressions you have formed after "reading this booklet to have made up your mind to join the "great band of satisfied customers who bank at Martins."

It is true that these publications saw the light of day only recently, but the defendant Johnson, who has a lifelong experience with the defendant bank and who was the only witness called on their behalf, said in evidence that the matters they speak to were as true in 1950 as they are today. I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred. It is at any rate remarkable that the defendant bank, who seem to be keen competitors with other banks to obtain custom and who, in order to do so, apparently spend large sums of money in advertising that one of the advantages that they offer is expert advice in all financial matters without obligation, are taking the point in this court that they are under no duty to use any care or skill in giving such advice.

The defendant bank relies upon a book of secret instructions circulated to their branch managers. So secret is this book of instructions that the bank objected to producing it and produced only a photostat copy of the page containing instructions relating to stock exchange transactions. They read as follows: "As the "giving of advice to customers about stocks and shares other "than concerning procedure is fraught with danger, managers "must not directly advise the purchase or sale of any invest-"ment"; and a little lower down it says: "The order should be "recorded in the stocks and shares bought and sold register and "passed in writing to the broker." Then later it says: "Each "branch should transact stock exchange business through the "broker or brokers allotted to it by head office or district office, "unless in any particular case a broker is specifically named by "the customer." These instructions, which are headed "Stock "Exchange Transactions," appear to relate only to stock exchange transactions and do not affect the kind of transactions with which this case is concerned. In any event these instructions do not, in my judgment, alter the true scope of the bank's business any more than any secret instructions issued by a firm of solicitors to their managing clerks forbidding them to advise on

1958

Woods
v.
Martins
Bank Ltd.

Salmon J.

any particular legal topic save through counsel would cut down the scope of the firm's business vis-à-vis its clients.

The next point taken by the defendants is that the plaintiff was not a customer of the defendant bank at the date of the first transaction in May, 1950, in that no current account had then been opened by the plaintiff and that, therefore, they owed the plaintiff no duty of any kind, at any rate in respect of this transaction of May, 1950. I have already stated that, in my judgment, the plaintiff was a customer of the defendant bank on May 9, 1950. Nevertheless, even if he did not become a customer until later, the defendants would still, in my judgment, have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction. I have found that it is part of the defendants' business to advise customers and potential customers on financial matters of all kinds. In May of 1950 the plaintiff paid business not social calls on the defendant Johnson in his office. The plaintiff made it plain that he was consulting the defendant Johnson as manager of the defendant bank's Quayside branch. The plaintiff was a potential customer and one whose custom the defendant Johnson was anxious to acquire and soon did acquire. The plaintiff had asked the defendant Johnson if he would become his financial adviser, to which the defendant Johnson had replied that the defendant bank would be glad to take charge of his financial affairs. No doubt the defendant Johnson could have refused to advise the plaintiff, but, as he chose to advise him, the law in these circumstances imposes an obligation on him to advise with reasonable care and skill. This seems to me to be an even stronger case from the point of view of the plaintiff than cases of gratuitous deposit, such as *Giblin* v. *McMullen*,[5] or gratuitous services, such as *Whitehead* v. *Greetham*,[6] where it has been held that an obligation to use due care and skill may arise.

The defendants then take the point that the defendant Johnson was not negligent in the advice which he gave the plaintiff. Clearly the defendant Johnson was not negligent merely because his advice turned out to be wrong. Nor could he be negligent because he failed to exercise some extraordinary skill or care. His only obligation was to advise with the ordinary care and skill which the ordinary bank manager in his position might reasonably be expected to possess. It seems to me to be plain that in the circumstances of this case he ought never to have advised the plaintiff at all—certainly not without making a full disclosure to the plaintiff of the conflicting interests between the plaintiff and the defendant bank and the plaintiff and the defendant bank's other customers concerned. No one but an extremely foolish man or a knave could have given the plaintiff the advice given him by the defendant Johnson. As I have already indicated, I do not think that he is a knave. On the other hand, for the reasons stated earlier in this judgment, it is quite plain that none of the advice

[5] (1868) L.R. 2 P.C. 317.

[6] (1825) M'Cl. & Y. 205; 2 Bing. 464; 10 Moore 183.

which he gave the plaintiff comes within measurable distance of being reasonably careful or skilful.

The last point taken by the defendants is that the plaintiff's loss was not occasioned by any negligence on the part of the defendants. It is argued that, even had the defendant Johnson advised the plaintiff against making any investment in Brocks Refrigeration Ltd. and against giving the guarantee, the plaintiff would still have acted as he did. Tthe plaintiff did not strike me as being an over-confident young man or one who would not take advice. I think he had just enough sense to realize that he was no match for Mr. Brock, and I am certain that he relied entirely on the defendant Johnson's advice to protect him in his financial dealings with Mr. Brock. I hold that, but for the defendant Johnson's advice, the plaintiff would never have made any of the investments which he did make in Brocks Refrigeration Ltd., nor have given the guarantee in favour of F. Adamson Ltd. The fact that the plaintiff was the kind of young man who might have lost his money in other unwise transactions or soon spent it, perhaps more enjoyably, on extravagant living is beside the point. He has made out his case in negligence against both defendants and has established that he has lost £15,790 by reason of that negligence. There must, accordingly, be judgment for the plaintiff against both defendants for that sum, with costs.

Judgment for the plaintiff against both defendants.

Solicitors: *Swinburn G. Wilson & Son, Newcastle-upon-Tyne; Criddle, Ord & Muckle, Newcastle-upon-Tyne.*

[CHANCERY DIVISION.]

* DUNLOP RUBBER CO. LTD. *v.* LONGLIFE BATTERY DEPOT (A FIRM).

1958
July 21, 22, 23, 24, 31.
Lloyd-Jacob J.

[1957 D. No. 23.]

Patent—Infringement—Licence—Limited licence to sell at list price—Sale below list price—Notice—Patents Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 87), *s.* 59 (1).

Restrictive Trade Practices—Conditions as to resale prices—Whether Act retrospective—Patent—Licence to sell at list price—Sale below—No proof of acquisition by defendant after Act in force—Whether Act retrospective in operation—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2, *c.* 68), *s.* 25 (1).

Statute — Retroactive effect — Restrictive practices — Conditions as to resale prices—Restrictive Trade Practices Act, 1956, *s.* 25 (1).

The plaintiffs sold tyres manufactured by them under letters patent subject to a limited licence, which prohibited the sale or resale of the tyres at prices above or below those in their current retail price list. A notice that the tyres were manufactured under

1958

Dunlop Rubber Co. Ltd. v. Longlife Battery Depot (A Firm).

letters patent was embossed on each tyre. Until November, 1956, the defendants advertised and sold the plaintiffs' tyres below the list price. In November, 1956, the plaintiffs wrote to the defendants drawing their attention to the conditions of sale and resale of their tyres. The defendants instructed their shop managers in writing not to sell the plaintiffs' tyres below the list price, but on December 5, 1956, the defendants sold a tyre of the plaintiffs' manufacture below the list price. The plaintiffs by this action, claiming an injunction and an inquiry as to damages, alleged that the sale on December 5, 1956, constituted (1) an infringement of their letters patent under which the limited licence was granted; and (2) a breach of section 25 (1) of the Restrictive Trade Practices Act, 1956.[1] The Act came into force on November 2, 1956:—

Held, (1) that the defendants, having received notice of the conditions of the limited licence, had infringed the plaintiffs' letters patent, and the plaintiffs were entitled to the relief sought.

Incandescent Gas Light Co. Ltd. v. *Brogden* (1899) 16 R.P.C. 179, and *National Phonograph Company of Australia Ltd.* v. *Menck* [1911] A.C. 336; 27 T.L.R. 239; 28 R.P.C. 229 applied.

(2) That section 25 (1) of the Act of 1956 was not applicable to goods which were disposed of by the supplier before the Act came into force on November 2, 1956; and that, since the date of acquisition of the tyre by the defendants was not established, it must be assumed that they acquired it before November, 1956, and the condition as to price could not be enforced against them under that Act.

Action.

The plaintiffs, Dunlop Rubber Co. Ltd., manufactured tyres under letters patent, which they sold under a limited licence (the conditions of which are set out below). By this action they alleged that the sale by the defendant firm, Longlife Battery Depot, of one of their tyres in breach of those conditions—namely, below the current list price—constituted infringement of their letters patent and was contrary to section 25 (1) of the Restrictive Trade Practices Act, 1956.

The following statement of facts is taken from the judgment:

The relief which the plaintiffs sought was in respect of certain acts the substance of which related to an offer for sale and sale of a Dunlop 4.75/5.00-17 motor tyre on December 5, 1956, to one Terence Peter Burton for the price of £5 11s., which was in fact a "trap" order. This tyre, it was conceded by the defendants, had been manufactured by the plaintiffs in a tyre mould and upon ply turndown and bead setting apparatus in accordance with the terms of the monopoly claimed in the first claim of Letters Patent Nos. 588,170 and 691,195 respectively, both of which letters patent it was further conceded were valid and subsisting.

The plaintiffs' factual evidence (the whole of which Lloyd-Jacob J. accepted) established that the tyre in question was

[1] Restrictive Trade Practices Act, 1956, s. 25 (1): "Where goods are "sold by a supplier subject to a con- "dition as to the price at which "those goods may be resold, either "generally or by or to a specified "class or person, that condition may, "subject to the provisions of this "section, be enforced by the supplier "against any person not party to the "sale who subsequently acquires the "goods with notice of the condition "as if he had been party thereto."

manufactured by the plaintiffs in or about the second week of July, 1956, and was disposed of by them in the ordinary course of their business. The terms of the arrangements which governed the plaintiff company's dealings in tyres of this character, could be summarized as followed: tyres manufactured in accordance with any of the plaintiff company's patent monopolies, were sold subject to expressed conditions, and notice was given that resale otherwise than in accordance with such conditions would be regarded as unauthorized and an infringement of letters patent. One of these conditions forbade the advertisement, public offer for sale, sale or supply of any such goods to a retail customer at a price either directly or indirectly higher or lower than the price appearing in the plaintiffs' current price list, the price therein set out for a tyre of the type there in question being £6 6s.

The defendant firm was the name under which one John Charles Clark carried on business. Besides an office address in Bournemouth, he had six retail shops at which since the summer of 1955 motor-car accessories, including motor tyres, had been offered for sale and sold to the public. One of such shops, at 924 Wimborne Road, Moordown, Bournemouth, was managed by one Stanley Walter Chaney. The defendants admitted that early in 1956 they intended to sell tyres at a discount, and realized that the plaintiffs' tyres could only reach them through dealers who had agreed to sell the tyres only at list price. Until the beginning of November, 1956, advertisements appearing in the public press at the instance of the defendants announced that they offered new tyres of all makes for sale at retail list prices less 12½ per cent., and the evidence established that during the year 1956 the defendant firm stocked and sold new Dunlop motor tyres upon such terms. Each such tyre, if wrapped, bore a label which was embossed on the tyre wall with a reference to manufacture under letters patent.

Early in November the plaintiffs wrote letters marking them for the attention of Clark or addressing them personally to him, in which they complained of this offer of discount from retail list prices and sent for his perusal a copy of their current price list and particulars of their business arrangements and conditions of licence. By such communication, if not before, Clark was made acquainted with the detailed provisions summarized earlier. He said, and the copy correspondence and the evidence of Chaney appeared to confirm it, that he thereupon issued written instructions to his managers not thereafter to procure any Dunlop tyres for resale at a discount from the retail selling price.

Lloyd-Jacob J. stated that neither Clark nor Chaney gave the impression of being candid witnesses, and he suspected that these written instructions were intended to provide a record for the future rather than a guide to the conduct by the manager of his employer's business. The instructions did not, however, in terms extend to the arrangements upon which existing stocks of tyres should be sold, and despite Chaney's acceptance of full responsibility for what he termed a disregard of his instructions, the

1958

Dunlop Rubber Co. Ltd. v. Longlife Battery Depot (A Firm).

judge was satisfied that Chaney, knowing that he was being asked for and was selling to Burton a Dunlop tyre at a discount upon the retail selling price which he had had in stock since before November 9, did so in the knowledge that he was acting as Clark would have him act in the circumstances. Chaney made a momentary mistake in working out the reduced price, and quoted the figure of £6 9s. 6d., but after reference to a record wherein the list price must have been given as £6 6s., he quoted the figure of £5 11s. and drew attention to the amount of discount his quotation provided.

The plaintiffs, who alleged that the above sale constituted infringement of their letters patent, relied in their particulars of breaches on the following particulars: (a) an advertisement inserted by the defendants in the *Bournemouth Times* of November 9, 1956. (b) The offer for sale by the defendants on December 5, 1956, to Burton at the defendants' premises in Wimborne Road, Bournemouth, of a Dunlop 4.75/5.00-17 tyre constructed in accordance with their Letters Patent Nos. 588,170 and 691,195 and manufactured and sold by the plaintiffs under a limited licence and bearing notices referring to the said letters patent and licence, at a price of £5 11s., whereas the price fixed and published by the plaintiffs in their retail list in force at the date of such sale was £6 6s. (c) The sale by the defendants on December 5, 1956, of the said Dunlop tyre consequent upon the acceptance by Burton of the offer particularized in (b) hereof.

Lionel Edwards Q.C. and *P. J. Stuart Bevan* for the plaintiffs.

F. W. Beney Q.C. and *M. G. Polson* for the defendants.

Cases referred to in argument, not cited in the judgment: *In re A Debtor*[2]; *Henshall* v. *Porter*[3]; *Kelly* v. *Batchelar*[4]; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Neal*[5]; *Townsend* v. *Haworth*[6]; *Proctor* v. *Bayley*[7]; *Hood* v. *Anchor Line (Henderson) Bros. Ltd.*[8]; *British Mutoscope and Biograph Co. Ltd.* v. *Homer*[9]; *Columbia Gramophone Co. Ltd.* v. *Murray*[10]; *County Laboratories Ltd.* v. *J. Mindel Ltd.*[11]; *Goodyear Tyre and Rubber Co. (Great Britain) Ltd.* v. *Lancashire Batteries Ltd.*[12]; *Quilter* v. *Mapleson.*[13]

Cur. adv. vult.

July 31. Lloyd-Jacob J., having stated the facts, read the following judgment: There can be no question that in offering

[2] [1936] Ch. 237; 52 T.L.R. 70.
[3] [1923] 2 K.B. 193; 39 T.L.R. 409.
[4] (1893) 10 R.P.C. 289.
[5] (1899) 16 R.P.C. 247.
[6] (1879) 12 Ch.D. 831n.
[7] (1889) 42 Ch.D. 390.
[8] [1918] A.C. 837; 34 T.L.R. 550.
[9] (1901) 17 T.L.R. 213; 18 R.P.C. 177.
[10] (1922) 39 R.P.C. 239.
[11] [1957] Ch. 295; [1957] 1 All E.R. 806, 861.
[12] [1958] 1 W.L.R. 655; [1958] 2 All E.R. 324.
[13] (1882) 9 Q.B.D. 672.

this particular tyre for sale (whether at the originally quoted price of £6 9s. 6d. or the subsequently quoted price of £5 11s.) and its eventual sale for £5 11s., the defendants were not complying with the specified conditions of which Clark was at that date aware. The question is whether or not such offer and sale constitute any infringement of letters patent.

Having regard to the admission of facts given by the defendant firm pursuant to the order dated July 22, 1957, the manufacture of this tyre involved the use of the plaintiffs' inventions covered by the first claims of Letters Patent Nos. 588,170 and 691,195. The second of these two specifications contains no claims to the tyre so manufactured, so that no act of infringement of it could be established by dealing only in the product. The former, on the other hand, does in claim 5 claim a monopoly in tyres when produced by a tyre mould claimed in the earlier claims. The tyre in question accordingly falls within the monopoly rights possessed by the plaintiff company by virtue of the grant to them of Letters Patent No. 588,170, so that unless the defendant firm can establish a title, direct or derivative, from the plaintiff company to use the patent monopoly as they have, they necessarily infringe. Ever since the decision in *Incandescent Gas Light Co. Ltd.* v. *Brogden*,[1] there has been no question that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to deal in a patented article is bound by such conditions, not because such conditions are contractual, but because they are incident to and a limitation upon the grant of the licence to deal in the patented article, so that if the conditions are not complied with, there is no grant at all. Lord Shaw, giving the advice of the Board in *National Phonograph Company of Australia Ltd.* v. *Menck*,[2] summarized the matter as follows[3]: " . . . the owner's rights in a patented chattel " will be limited if there is brought home to him the knowledge " of conditions imposed by the patentee, or those representing " the patentee, upon him at the time of sale." The emphasis, it will be noted, is placed upon knowledge of the conditions at the time of acquisition of the chattel, and the receipt by Clark of particulars of such conditions through the communications from the plaintiff company dated in November, 1956, does not and cannot establish such knowledge, for in the absence of proof of the date of acquisition it cannot be assumed that a date subsequent to November 10 is appropriate, even if the whole of the evidence led by the defendant firm is dismissed as unworthy of credence. Such communications undoubtedly included disclosure of the allegation of patent monopoly rights in the plaintiff company's tyres; and, although I am prepared to accept from Clark that he failed to appreciate this claim and was, in consequence, unaware of it until the writ was issued, the documents

[1] (1899) 16 R.P.C. 179.
[2] [1911] A.C. 336; 27 T.L.R. 239; 28 R.P.C. 229.
[3] [1911] A.C. 336, 353.

1958

Dunlop Rubber Co. Ltd. v. Longlife Battery Depot (A Firm).

Lloyd-Jacob J.

which he received provided grounds upon which he ought reasonably to have supposed that such was the fact. Clark himself has admitted that from the commencement of his dealings early in 1956, he was determined to sell motor tyres to his customers at discounted prices if he could procure supplies, and that he appreciated that such supplies, if of Dunlop tyres, could only reach him from dealers who had acquired them under a written agreement, by which they had bound themselves to the plaintiff company to observe the business arrangements and conditions of licence of which he particularly noted the restriction of resale only at list price.

Mr. Beney has argued that such knowledge is not sufficient to attract liability, and that the plaintiff company must prove that they gave to the defendants notice of the restrictive conditions as well as of the existence of patent protection at or before the date of acquisition by the defendants of this tyre. In my judgment, the admission of knowledge by Clark at the date of acquisition sufficiently establishes the receipt of notice, for only by notice could such knowledge have been acquired, and the greater includes the less. Nor is it, in my judgment, necessary for establishing liability that the defendant firm should have been made aware of the existence of patent protection. The Patents Act, 1949, itself plainly contemplates that acts of infringement may be committed in ignorance of the existence of patent rights, for by section 59 (1),[4] a right to relief from damages is given to an innocent infringer. [His Lordship read section 59 (1) of the Patents Act, 1949, and continued:]

In the present case, at the date of the sale to Burton—and this is the date of the infringing act—Clark had received from the plaintiff company the number of the letters patent in suit, and has not, in consequence, proved that he had no reasonable ground for supposing that Letters Patent No. 588,170 existed. But even if no such notice had been received, the act of reselling in breach of a condition known to be applicable to the goods at the time when they were acquired would still constitute an infringement, albeit one which would not attract an award of damages.

In passing, I may perhaps refer to the exhibit which is the label applied to the wrapped tyre. I am not satisfied that Clark ever examined any of these labels, but in any event the nature of the reference to the patented nature of the tyre is not such as to constitute adequate notice under section 59.

[4] Patents Act, 1949, s. 59 (1): "In proceedings for the infringement "of a patent damages shall not be "awarded against a defendant who "proves that at the date of the in-"fringement he was not aware, and "had no reasonable ground for "supposing, that the patent existed; "and a person shall not be deemed "to have been aware or to have had "reasonable grounds for supposing "as aforesaid by reason only of the "application to an article of the word "'patent,' 'patented,' or any word "or words expressing or implying "that a patent has been obtained for "the article, unless the number of "the patent accompanied the word or "words in question."

One further point remains to be considered on this branch of the case, for by the amended defence it is contended that the plaintiff company, in authorizing Burton to act as he did in making this test purchase, assented to a sale below list price and thereby waived the limited licence restriction. Such contention is, in my judgment, misconceived. The acts of infringement complained of are an offer for sale and a sale, and if, as the evidence plainly establishes, these were made in the ordinary course of business as between a shopkeeper and a customer, neither offer nor sale were conditioned or qualified by a relationship between the customer and his employers, of which the shopkeeper was wholly ignorant, nor affected by the instructions the customer had received. The exhibited invoices suffice to show that the sale complained of was not the only sale by the defendant firm of a Dunlop tyre below list price, and there is, accordingly, no room for the conjecture that Burton's identity or behaviour played a compelling part in procuring this act of infringement.

Accordingly, I hold that the plaintiffs have established the breaches particularized under (a), (b) and (c) in the amended particulars of breaches, and that so far as concerns (b) and (c) thereof, the defendant firm have not proved the absence of reasonable knowledge of the existence of patent protection for the article offered for sale and sold.

I turn now to consider that part of the plaintiffs' claim which is based upon the Restrictive Trade Practices Act, 1956. [His Lordship read section 25 (1) of the Act of 1956.] The other provisions of the section are not applicable in the circumstances of this case, the material matters proved being as follows: (1) The plaintiffs sold the tyre at some date after the second week in July, 1956. (2) It was so sold to a registered dealer upon terms which included a condition that it was not to be resold to a member of the public at a price either directly or indirectly higher or lower than £6 6s. (3) From a date prior to the second week in July, 1956, the defendant firm, by its proprietor, was aware of the condition in (2) above, and this tyre, with others, was acquired for the purpose of being resold by the defendants to the public at a price 15 per cent. lower than the specified price; and (4) this tyre was resold by the defendants to Burton on December 5, 1956, for the price of £5 11s.

The date of acquisition of this tyre by the defendants, save in the sense that it was after manufacture during July, 1956, and before resale in December, 1956, was not established, so that it cannot be predicated that it antedated the coming into force of section 25, which by section 27 of the Act is to be taken as November 2, 1956. Apart from the provisions of this Act, the acquisition of chattels by third parties which had been previously sold subject to conditions gave rise to no cause of action if such third party chose to disregard the conditions or

1958

Dunlop Rubber Co. Ltd. v. Longlife Battery Depot (A Firm).

Lloyd-Jacob J.

any of them, and the presence or absence of knowledge of such conditions at the time of acquisition by the third party was of no consequence. Section 25 created a right in a supplier of goods, so far as concerns a condition as to resale prices of goods, to enforce the terms of his contract with his immediate purchaser against a sub-purchaser who is aware of that condition at the time he acquires the goods. It is to be noted that such awareness is attached to the time of acquisition, so that a conscious restriction of freedom to deal in the goods is to be imputed to the sub-purchaser as a term of his contract.

It becomes necessary, therefore, to examine the language of the section to ascertain whether it is to be construed to cover acquisition of goods with notice of restrictive resale conditions which occurred before the date when the Act became effective, or whether its operation must be restricted to acquisition after that date. The rule of construction to be applied is not, I think, open to doubt. It is that, save as concerns procedural matters—and this exception is not here material—retrospective operation is not to be given to a statute so as to impair an existing right unless that effect cannot be avoided without doing violence to the language of the enactment. If, as I must assume, the defendant firm acquired this tyre before November, it had the right at that time to resell it in complete disregard of such restrictive conditions as the plaintiffs had sought to attach. If section 25 does include within its purview goods which were so acquired, that existing right has been wholly denied, and a limitation introduced into the defendants' rights of ownership.

For my own part, I cannot avoid the conclusion that a construction which would include pre-Act sales involves a more violent distortion of language than does a construction restricted to post-Act transactions. For the latter, all that is required is the notional insertion of the word "hereafter" after the opening phrase "Where goods are sold." For the former, it would require a change of tense and a modification of the opening phrase to read "Where goods have at any time been sold," and of the phrase concerning the person not party to the sale to read "who has subsequently acquired the goods." In my judgment, this section is not applicable to goods which were disposed of by the supplier before the Act came into operation, and I can see no useful purpose in burdening this judgment with references to the detailed arguments which were addressed to me or to the citations referred to as supporting them. This is not, of course, to be understood as reflecting in any way upon the conduct of the case at the hearing, for I am deeply conscious of my indebtedness to counsel for the exhaustiveness of their research into the authorities and the clarity and patience of their exposition. It is rather that, in a judgment already overlong, I prefer to let my conclusion be its own justification, whilst acknowledging that I have endeavoured to comprehend

the various lines of approach which have been canvassed in argument.

In the result, therefore, the plaintiff company have established a right to relief under Letters Patent No. 588,170, but failed to satisfy me that their claim based upon the Restrictive Trade Practice Act, 1956, is justified.

[After argument, an order was made for an inquiry as to damages, and an injunction was granted in the following terms: "An injunction to restrain the defendants from infringing by "themselves or by their servants, agents or workpeople or "otherwise howsoever the plaintiffs' Letters Patent No. 588,170 "by selling or supplying car tyres constructed or manufactured "in accordance with the said letters patent at prices either "directly or indirectly higher or lower than, or upon terms "differing from, those announced by the plaintiffs from time "to time or otherwise in breach of the limited licence granted "under the said letters patent."]

Judgment for the plaintiffs.

Solicitors: *Clifford-Turner & Co.; Kinch & Richardson for Cyril Clark, Bournemouth.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

*IDDENDEN (ORSE. BRAINS) *v.* IDDENDEN.

1958
July 22.

Collingwood J.

Husband and Wife—Nullity—Epilepsy—Finding of recurrent fits of epilepsy at time of ceremony—Whether competent to investigate question of wilful refusal to consummate—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 8 (1) (*b*).

A wife petitioner in a nullity suit proved that the husband was suffering from recurrent fits of epilepsy in circumstances which entitled her to relief under section 8 (1) (*b*) of the Matrimonial Causes Act, 1950.[1] The pleadings also contained, inter alia, cross-allegations of wilful refusal to consummate the marriage:—

Held, that, since the form of relief contained in the section

[1] Matrimonial Causes Act, 1950, s. 8 (1): "In addition to any other "grounds on which a marriage is by "law void or voidable, a marriage "shall be voidable on the ground— . . . "(*b*) that either party to the marriage "was at the time of the marriage of "unsound mind or a mental defective "within the meaning of the Mental "Deficiency Acts, 1913 to 1938, or sub-"ject to recurrent fits of insanity or "epilepsy; . . . Provided that . . . "the court shall not grant a decree "unless it is satisfied—(i) that the "petitioner was at the time of the "marriage ignorant of the facts "alleged; (ii) that proceedings were "instituted within a year from the "date of the marriage; and (iii) that "marital intercourse with the con-"sent of the petitioner has not taken "place since the discovery by the "petitioner of the existence of the "grounds for a decree."

1958

IDDENDEN (ORSE. BRAINS) v. IDDENDEN.

crystallised at the time of the ceremony of marriage, an investigation of the question of wilful refusal to consummate the marriage was unrealistic, and the wife was entitled to a decree.

PETITION for nullity.

The parties went through a ceremony of marriage in March, 1956, and lived together for a period of some six weeks, after which the wife left the matrimonial home and returned to her parents. The marriage was never consummated.

In November, 1956, the wife presented a petition seeking a declaration of nullity on the grounds of, first, the wilful refusal of the husband to consummate the marriage; secondly, in the alternative, that the husband was at the time of the ceremony and had ever since been incapable of consummating the marriage; and, thirdly, that the husband was at the time of the marriage subject to recurrent fits of epilepsy. By his answer, which was dated February, 1958, the husband admitted that the marriage had never been consummated, but he denied that that was due to his wilful refusal or incapacity, and he further denied that at the time of the marriage he was subject to recurrent fits of epilepsy. He alleged that the non-consummation was due to wilful refusal by the wife or, alternatively, incapacity on her part, and cross-prayed for a declaration of nullity. By her reply the wife denied the alleged wilful refusal or incapacity on her part.

At the hearing of the suit the issue as to epilepsy was, at the suggestion of counsel and by agreement, tried first. Collingwood J. found that the husband was suffering from recurrent fits of epilepsy at the time of the ceremony of marriage and that the wife had remained ignorant of the nature of the husband's malady until after she had left him. It was common ground that the marriage had not been consummated. He, therefore, held that the wife was entitled to the declaration sought. Counsel for the husband then submitted that, the mutual allegations of incapacity having been abandoned, the hearing should continue as to the issue of wilful refusal to consummate the marriage. The matter is reported only on this point.

Norman Lermon for the wife.

L. J. Solley for the husband.

COLLINGWOOD J. referred to the facts and the evidence, held that the wife was entitled to relief under section 8 (1) (*b*) of the Matrimonial Causes Act, 1950, and continued: I ought to add that I was asked by counsel for the husband to continue the hearing with a view to deciding whether either party—and if so which—had been guilty of wilful refusal to consummate the marriage—there being now no question of incapacity on either side. But I think that Mr. Lermon is right in the answer which he gave to that suggestion. It would, in my opinion, be quite unreal for the court, having found that, at the time of the

marriage, when the wife's right to relief crystallized, the husband was suffering from recurrent fits of epilepsy, then to go on and investigate the question of wilful refusal.

The wife is, therefore, entitled to a decree of nullity under section 8 (1) (*b*) of the Matrimonial Causes Act, 1950.

1958

IDDENDEN (ORSE. BRAINS) *v.* IDDENDEN.

Order accordingly.

Solicitors: *Edward F. Iwi for Hanchett Copley & Hails, Edgware; Pearce & Sons.*

E. J.

[PROBATE, ETC., DIVISION.]

* *In the Estate of* SKINNER, DECD.

1958 *July* 31.

Sachs J.

Executor and Administrator—Trust corporation—Pending dissolution—Bank named as executor in will—Probate action commenced by bank—Subsequent amalgamation with another bank—Whether first bank entitled to continue action or act as executor after transfer date.

Company—Amalgamation—Scheme—Transfer of rights and duties—Continuation by transferor company of duties as executors—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 206 *and* 208—*Public Trustee Rules,* 1912, *as amended* (*S.R. & O.* 1912, *No.* 348 (*L.*9), *r.* 30).

In August, 1955, Grindlays Bank Ltd. (Grindlays) and others commenced an action for probate of a will of March, 1954, of which they were the executors. Two of the defendants to the action set up a will of December, 1948, of which Grindlays were the sole executors, and the third defendant alleged that the deceased had died intestate. In April, 1956, Grindlays were appointed administrator pending suit of the estate, and at that date they had already so acted as executors under the 1954 will as to disentitle them to renounce that position.

By an order of July, 1957, sanction was given to a scheme of arrangement and amalgamation under section 206 of the Companies Act, 1948, between Grindlays, its members and the National Bank of India Ltd. (National) at which date the whole of the £500,000 issued capital of Grindlays (all of which was fully paid up) was beneficially owned by National. The scheme provided for the transfer to National of the whole of Grindlays' assets and liabilities but not "property vested in Grindlays as . . . the personal repre-"sentative of any deceased person" or any liabilities of Grindlays as the personal representative of a deceased person under the scheme. Grindlays was to continue in existence but would, at some future date, be dissolved. Clause 7 of the scheme provided that, after the transfer date, Grindlays should not take out, or cause to be taken out, any grant of representation to the estate of any deceased person, but should continue until dissolved to act as the personal representative of any deceased person whose personal representative it was at the transfer date. On November 7, 1957, a vesting order giving effect to the provisions of the scheme was made

1958

In the Estate of SKINNER, DECD.

under section 208 of the Companies Act, 1948,[1] and provided, inter alia, that "all proceedings pending by or against the transferor "company on January 1, 1958, other than those to which the "transferor company is a party as the personal representative of "any deceased person, be continued by or against the transferee "company."

On the hearing of a summons issued by the plaintiffs to determine, having regard to the terms of the scheme and of the order of November 7, 1957, whether either Grindlays or National could or should continue the probate action and whether either of them could or should act as personal representative of the deceased under either the 1948 or the 1954 will:—

Held, that (1) no property of the deceased purported to have become vested in National by virtue of the scheme, nor could any provision of the scheme or the order of November 7, 1957, on its true construction lay upon National any of the rights, duties or powers of an executor of the deceased; National was, therefore, neither entitled to be, nor could be, substituted as plaintiff in the action nor could probate of either will be granted to National.

(2) That the office of executor being, according to the general law, an office of personal trust, the rights, powers and duties of an executor could not be assigned by him nor could he properly assign property held by virtue of his office unless in the course of carrying out his duties thereunder.

(3) That orders made under section 208 of the Companies Act, 1948, could only transfer such rights, powers, duties and property as were capable of being lawfully transferred and a scheme which purported to order an act prohibited by the general law of the country or to prohibit an act by a party which that party could not under the general law validly agree to refrain from doing was, to that extent, a nullity; clause 7 of the scheme, if it purported to prohibit Grindlays from taking out a grant of representation in the present action was, therefore, to be disregarded and treated as of no effect, and Grindlays in law should continue to act as plaintiffs in the action and as executors under either the 1948 or the 1954 will.

[1] Companies Act, 1948, s. 208: "(1) Where an application is made "to the court under section 206 of "this Act for the sanctioning of a "compromise or arrangement proposed between a company and any "such persons as are mentioned in "that section, and it is shown to the "court that the compromise or "arrangement has been proposed for "the purposes of or in connection "with a scheme for the reconstruction "of any company or companies or the "amalgamation of any two or more "companies, and that under the "scheme the whole or any part of "the undertaking or the property of "any company concerned in the "scheme (in this section referred to "as 'a transferor company') is to "be transferred to another company "(in this section referred to as 'the "'transferee company') the court "may, either by the order sanctioning the compromise or arrangement "or by any subsequent order, make "provision for all or any of the "following matters:—(*a*) the transfer "to the transferee company of the "whole or any part of the undertaking and of the property or liabilities "of any transferor company; . . . "(*c*) the continuation by or against "the transferee company of any legal "proceedings pending by or against "any transferor company; . . . (2) "Where an order under this section "provides for the transfer of property or liabilities, that property "shall, by virtue of the order, be "transferred to and vest in, and "those liabilities shall, by virtue of "the order, be transferred to and become the liabilities of, the transferee "company, . . . (4) In this section "the expression 'property' includes "property, rights and powers of every "description, and the expression "'liabilities' includes duties."

Nokes v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549 applied.

(4) That, since Grindlays still existed as a legal entity having a capital complying with rule 30 of the Public Trustee Rules, 1912, as amended, and, since by those rules, the qualification for a trust corporation was a matter of capital and not a matter of assets, Grindlays remained a trust corporation and there was no obstacle to their being granted probate of either will as such.

PROBATE SUMMONS.

A probate action was commenced in August, 1955, by which Grindlays Bank Ltd. (hereafter referred to as Grindlays), and two other plaintiffs sought to propound a will of March, 1954, of which they were the executors. The will was contested by three defendants, two of whom sought to propound a will of December, 1948, of which Grindlays were the sole executors, and the third of whom alleged an intestacy. On April 18, 1956, Grindlays were appointed administrator pending suit of the estate, and it became common ground during the hearing of the summons that at that date Grindlays had already so acted as executors as to disentitle them to renounce that position under the 1954 will, and also so as to entitle the court to compel them, if thought fit, to continue so to act under that will if proved. The pleadings in the action were closed on April 4, 1957, by the delivery of a reply and defence to counterclaim.

On July 8, 1957, Roxburgh J. made an order under section 206 of the Companies Act, 1948, sanctioning a scheme of arrangement and amalgamation between Grindlays, the members of Grindlays and the National Bank of India Ltd. (hereafter referred to as National). At the date of the scheme the whole of the £500,000 issued capital of Grindlays, all of which had been fully paid up, was beneficially owned by National and the members of Grindlays, other than National, were the nominees of National. The scheme which recited, inter alia, that Grindlays "carries "on . . . the business of . . . acting as . . . personal representa-"tive," provided that, subject to certain exceptions, the whole of Grindlays' assets and liabilities on December 31, 1957—which was called the transfer date—should be transferred to National on that date, but there was excepted from the assets and liabilities so to be transferred, inter alia, "property vested in Grindlays "as . . . the personal representative of a deceased person."

Clause 7 of the scheme provided that "(1) After the transfer "date Grindlays shall not take out or cause to be taken out any "grant of representation to the estate of any deceased person. . . . "(2) During the period from the transfer date to the date on "which Grindlays is dissolved, in accordance with the provisions "of this scheme, Grindlays shall duly perform (i) its duties as the "personal representative of any deceased person whose personal "representative it was at the transfer date." The scheme then went on to provide that Grindlays should eventually be dissolved without being wound up.

1958

In the Estate of SKINNER, DECD.

On November 7, 1957, Mr. Registrar Berkley made a vesting order under section 208 of the Companies Act, 1948, for the purpose of giving effect to the scheme, and that order provided, inter alia, that "all proceedings pending by or against the transferor "company on January 1, 1958, other than those to which the "transferor company is a party as the personal representative of "any deceased person, be continued by or against the transferee "company." Neither the scheme nor the vesting order made any specific reference to this probate action.

On June 23, 1958, a summons was issued by the plaintiffs to the action seeking directions whether, having regard to the terms of the scheme and of the order of November 7, 1957: 1. Grindlays should continue to act as the first plaintiff in the action. 2. National should be substituted for Grindlays as the first plaintiff. 3. and 4. If the 1948 will or the 1954 will were proved, probate of the will or a grant of administration with the will annexed could be granted to Grindlays or to National or to some other persons.

At the conclusion of the hearing, which was in chambers, Sachs J. reserved judgment and adjourned the matter into open court.

Dimitry Tolstoy for Grindlays Bank Ltd.
Oliver Smith for National Bank of India Ltd.
A. Richard Ellis for the first and second defendants.
R. Bayne Powell for the third defendant.

SACHS J. referred to the facts and questions arising for decision and continued: The answers to the questions put to the court depend partly on the view taken of the general law as to the position of executors and the effect of sections 206 and 208 of the Companies Act, 1948, and partly on the construction of the particular scheme in this case.

A wide range of points have been very helpfully discussed by counsel in argument on the basis of alternative views as to the general law, but I do not propose to deal with any of them except those which arise on the footing that the position is as below stated.

First, it has been axiomatic since before the days of Blackstone's Commentaries that, at common law, there can be no assignment of the office of executor as it is an office of personal trust. Leaving out of consideration certain specific statutory provisions (such as those of the Public Trustee Act, 1906), which do not apply to the present circumstances, it follows that the rights, powers and duties of an executor cannot be assigned by him: nor can an executor properly assign property he holds by virtue of his office, save in the course of carrying out his duties under that office. It is to be noted that not only is the office of executor one of personal trust but that third parties (such as those

who may take under the will) have an interest in seeing that no such assignment by an executor takes place.

Secondly, it has during the hearing of this summons become common ground that already before April 18, 1956, when they were appointed as administrators pending suit, Grindlays had so acted as executors as to disentitle them to renounce that position under the 1954 will, and also so as to entitle the court to compel them, if thought fit, to continue to act as executors under that will, if proved. Further, by virtue of the order of April 18, 1956, the property of the deceased vested in Grindlays by virtue of section 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, remained vested in them on the transfer date—that is to say, December 31, 1957, and will continue to remain vested in them unless and until some order of this court provides otherwise. It is convenient, moreover, to note that if either of the two wills is proved then the property will be shown to have vested in them as personal representatives of the deceased at the date of his death, whilst if it is found that there is an intestacy, the property will be shown at that date to have vested in the President of this Division by virtue of section 9 of the Administration of Estates Act, 1925. In no event can it be held to have vested or be today vested in National.

Thirdly, it has been made clear by the speeches in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[1] that schemes and orders made by virtue of sections 206 and 208 of the Companies Act, 1948, can only transfer such rights, powers, duties and property as are capable of being lawfully transferred by a party to the scheme if no such sections of the Companies Act existed. It is not necessary in a scheme to exclude specifically from its operation things incapable of such transfer as general words in the scheme and any order in furtherance thereof must be taken to operate in a manner not repugnant to the general law of England. (*In re "L" Hotel Co. Ltd and Langham Hotel Co. Ltd.*[2]) If, however, on a proper construction of the terms of a scheme, some part of it happens, by inadvertence, expressly to order an act which, had there been no scheme, the parties could not, either in relation to the interests of third parties or otherwise, bind themselves to do, then that part of the scheme would, in my view, have to be treated as a nullity in so far as it purports so to order. To my mind, this latter principle equally applies where a scheme expressly prohibits an act which the parties could not, under the general law of this country, bind themselves to refrain from doing.

The general law being as above stated, I now turn to the terms of the scheme and of the order of November 7, 1957. The scheme recites that Grindlays "carries on . . . the business of . . . acting "as . . . personal representative." It transfers that business and its assets to National, but by virtue of its definition clause

[1] [1940] A.C. 1014; 56 T.L.R. 924; [1940] 3 All E.R. 549.

[2] (1946) 62 T.L.R. 128; [1946] 1 All E.R. 319.

1958

In the Estate of SKINNER, DECD.

Sachs J.

excludes from that transfer "property vested in Grindlays as . . . "the personal representative of a deceased person." It is accordingly clear that no property of the deceased purports to have become vested in National by virtue of the scheme.

Next to be noted is that part of the order of November 7, 1957, which provides that "all proceedings pending by or against the "transferor company on January 1, 1958, other than those to "which the transferor company is a party as the personal repre-"sentative of any deceased person, be continued by or against "the transferee company." On a normal construction of the above words the present action is not one ordered to be continued by National. If, contrary to my view, the above words "personal "representative" had in the context of the scheme as a whole to be construed as referring only to a "personal representative "who had been granted probate," then the order would purport to cause a right or duty of Grindlays as an executor to be carried out by some third party, would contain a provision repugnant to the general law of this country, and would to that extent have had to be treated as of no effect.

There is no other provision in the scheme or order that can lay upon National any of the rights, duties, or powers of an executor of the deceased, and, accordingly, it follows that National is neither entitled to be nor can be substituted as a plaintiff in this action, nor can there be granted to National probate of the 1954 or of the 1948 will.

There remains the question whether Grindlays are entitled to and should continue to act as plaintiffs in the action: and, if so, whether probate can be granted to them if either the 1954 or the 1948 will is proved. Any difficulty on this point derives from the provisions of sub-clauses of clause 7 of the scheme. [His Lordship referred to the relevant provisions of clause 7 and continued:]

Clause 7 (1) either purports to prohibit Grindlays continuing to proceed with this action or it does not. If it does not so prohibit Grindlays, then clearly they can continue to proceed herein because nothing else in the scheme prevents them from so doing. If, on the other hand, it does purport so to prohibit them, then, to that extent, it purports to stop Grindlays from doing something which the general law empowers them to do, and also from performing a duty which the court can compel them to perform and one in which third parties are interested. Accordingly, if clause 7 (1) does prohibit Grindlays from taking out a grant of representation in the present action, it is, to that extent, to be disregarded and treated as of no effect, as the prohibition would be one which cannot properly be embodied in a scheme under sections 206 and 208. Thus, whichever I adopt of the rival interpretations of clause 7 (1) put forward by Mr. Tolstoy and Mr. Oliver Smith, respectively, as to whether or not, on its proper construction, clause 7 (1) purports to prohibit the continuance of the present action, Grindlays in law can and indeed should continue to act as first plaintiffs in it.

It has been submitted by Mr. Oliver Smith that the vital words in subsection (1), upon a natural construction, mean exactly what they say and purport to constitute a relevant prohibition. Mr. Tolstoy has put forward a more intricate argument to the contrary —an argument which included a submission that there has been an unusual use of the words "take out" in relation to probate. For the purposes of the summons now before me it has, however, been agreed by both counsel that, if, as is the case, it is my view that on either interpretation of clause 7 (1) Grindlays are not in law effectually prohibited from continuing with the present action, then it is not necessary for me to express a final view on the construction of that sub-clause. Indeed, any such expression might well be considered in the circumstances to be obiter (cf. *Everitt* v. *Everitt* [3]). Accordingly, I do not propose to go further than to state that, on the facts of this case, I might have found some difficulty in escaping from the prima facie impression that the words in sub-clause (i) have the natural and plain meaning attributed to them by Mr. Oliver Smith.

The only other point which needs to be dealt with is the submission that Grindlays have, since the transfer date, ceased to be a trust corporation within the definition of those words in section 175 of the Supreme Court of Judicature (Consolidation) Act, 1925.[4] If they are no longer such a trust corporation, then difficulties would arise as to whether and in what form probate could or should be granted to them or their syndic or nominee in the event of one of the wills being proved. Reference has been made to rule 30 of the Public Trustee Rules, 1912, as amended,[5] which provides that such a corporation must, inter alia, be one "having "a capital (in stock or shares) for the time being issued of not "less than £250,000, of which not less than £100,000 shall have "been paid up in cash." It has been submitted by Mr. Oliver Smith that as the whole of Grindlays' £500,000 capital is now vested in National, and as, since the transfer date, all the beneficially owned assets of Grindlays have been vested in or are held in trust for National, the position of Grindlays is equivalent to that

[3] [1948] 2 All E.R. 545, 549.

[4] Supreme Court of Judicature (Consolidation) Act, 1925, s. 175 (1): ". . . 'Trust corporation' means the "public trustee or a corporation either "appointed by the court in any par- "ticular case to be a trustee or autho- "rised by rules made under subsec- "tion (3) of section four of the Public "Trustee Act, 1906, to act as "custodian trustee."

[5] Public Trustee Rules, 1912, as amended. R. 30 (1): "Any corpora- "tion constituted under the law of "the United Kingdom or of any part "thereof and having a place of busi- "ness there and empowered by its "constitution to undertake trust busi- "ness and being either—(*a*) a com- "pany incorporated by special Act or "Royal Charter, or (*b*) a company "registered (whether with or without "limited liability) under the Com- "panies (Consolidation) Act, 1908, "having a capital (in stocks or "shares) for the time being issued of "not less than £250,000, of which not "less than £100,000 shall have been "paid up in cash, or (*c*) a company "registered without limited liability "under the Companies (Consolidation) "Act, 1908, whereof one of the mem- "bers is a company within one of "any of the classes hereinbefore "defined shall be entitled to act as a "custodian trustee."

1958

In the Estate of SKINNER, DECD.

Sachs J.

which would obtain if Grindlays had returned all its capital to its shareholders. It has further been submitted that in those circumstances Grindlays have ceased to be a trust corporation.

The Public Trustee Rules, 1912, as amended, however, have chosen to make the qualification for a trust corporation a matter of capital and not a matter of assets. Grindlays still exist as a legal entity, their capital still complies with the test laid down in the Public Trustee Rules, and, in my view, they thus remain a trust corporation. Accordingly, there is no obstacle to their being granted probate as such.

My answers to the questions set out in the summons are accordingly as follows: (1) Yes. (2) No. (3) and (4) Probate of either will, if proved, can be granted to Grindlays.

Order accordingly.

Solicitors: *H. S. L. Polak & Co.; Sanderson, Lee, Morgan, Price & Co.; Ellis, Piers & Co.; O. L. Blyth.*

E. J.

[PRIVY COUNCIL.]

J. C.†

1958 *July* 24; *Oct.* 2.

* SURUJPAUL CALLED DICK . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Accessory before the fact—Counselling or procuring felony—Alleged principals acquitted but another found guilty as accessory—Whether verdicts inconsistent—Murder—Criminal Law (Offences) Ordinance (Laws of British Guiana, 1930, *c.* 18), *ss.* 24, 25—*Accessories and Abettors Act,* 1861 (24 *&* 25 *Vict. c.* 94), *ss.* 1, 2.

Criminal Law—Evidence—Confession—Hearsay—Whether confession based on hearsay evidence against confessor.

British Guiana.

At the trial of the appellant together with four others on a charge of murder the case for the prosecution—that the murder was committed while the accused were carrying out a plot to steal money—rested largely on the evidence of an accomplice going to prove the existence of the plot, and there was material from which the jury might have drawn the inference that the plan was carried out by all or some of the accused, and that in the course thereof the murder was committed. The jury, however, found the appellant guilty as an accessory before the fact to murder, and his co-accused (other than one who had been discharged) not guilty either as accessories or as principals. The appellant contended that those verdicts were contradictory and inconsistent—that there could be no accessory

† *Present*: LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

without a principal. The Crown contended, inter alia, that as against the appellant the jury might have found something in a statement which he had made to the police which would amount, with the accomplice's evidence, to sufficient evidence and admissible against the appellant that the crime was committed by one or more of those who had been "counselled or procured" by him so to do:—

Held, allowing the appeal and quashing the conviction, that it was essential to the conviction of the appellant as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused to commit the murder and that such person or persons had in fact done so. In finding that murder by any one of the accused had not been proved, but that none the less the appellant was guilty of having counselled one or more of them to commit murder, and that one or more of them, unspecified, in fact committed it, the jury had, at first sight at any rate, given an inconsistent and contradictory verdict.

Although the appellant's statement might afford very strong corroboration of the accomplice's evidence with regard to the part taken by the appellant in the plot, and as to his counselling the others to commit robbery or murder, it was difficult to see how it could afford any evidence as to the actual commission of the crime at which, by their verdict, the jury had found he was not proved to have been present and assisting. A voluntary statement made by an accused person was admissible as a "confession"; he could confess as to his own acts, knowledge or intentions, but he could not "confess" as to acts of other persons which he had not seen and of which he could only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence could not be cured by an "admission" of that nature. There was here no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at.

Reg. v. *Hughes* (1860) Bell C.C. 242; 1 L.T. 450 and *Rex* v. *Rowley* (1948) 32 Cr.App.R. 147; [1948] 1 All E.R. 570 considered.

Judgment of the Court of Criminal Appeal of British Guiana reversed.

APPEAL (No. 15 of 1958) in forma pauperis by special leave from a judgment of the Court of Criminal Appeal of British Guiana (January 8, 1958) dismissing the appellant's appeal from his conviction at the Criminal Assizes for the County of Berbice in British Guiana (July 29, 1957) of being an accessory before the fact to the murder by shooting of police constable Claude Allen on March 9, 1957. He had been sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: The appellant was charged with four other men (hereinafter referred to as accused Nos. 2, 3, 4 and 5) in one count with the murder of Claude Allen on March 9, 1957. At the end of the case for the prosecution accused No. 2 was on the direction of the trial judge (Phillips J.) acquitted by the jury. Owing to uncertainty as to which, if any, of the remaining accused was actually present and taking part in the murder and which, if any, might have been accessories before the fact, the jury were quite properly asked with regard to each accused whether they found him guilty or not guilty of being accessory before the fact to murder, and whether they found him guilty or not guilty as

J. C.

1958

SURUJPAUL
v.
THE QUEEN.

principal. They found the appellant guilty as an accessory before the fact to murder and not guilty as principal, accused Nos. 3, 4 and 5 they found not guilty as accessories and not guilty as principals.

The appellant contended that those verdicts were contradictory and inconsistent and accordingly his conviction should be quashed. The Court of Criminal Appeal (Stoby Ag.C.J., Luckhoo and Date JJ.) rejected that contention on the ground that the jury must have come to the conclusion on the evidence legally admissible against the appellant that he was accessory before the fact to murder committed by the other accused, although they were not satisfied on the evidence legally admissible against each of the other accused considered separately that the Crown had discharged the burden of proving the guilt of any one of them.

Sections 24 and 25 of the Criminal Law (Offences) Ordinance, Chapter 10 of the Laws of British Guiana, 1953, were as follows:

24. "Everyone who becomes an accessory before the fact to "any felony, whether it is a felony at common law or by virtue "of any statute for the time being in force, may be indicted, "tried, convicted, and punished in all respects as if he were a "principal felon."

25. "Everyone who counsels, procures, or commands any "other person to commit any felony, whether it is a felony at "common law or by virtue of any statute for the time being in "force, shall be guilty of felony, and may be indicted and con-"victed, either as an accessory before the fact to the principal "felony together with the principal felon, or after the conviction "of the principal felon, or may be indicted and convicted of a "substantive felony, whether the principal felon has or has not "been previously convicted, or is or is not amenable to justice, "and may thereupon be punished in the same manner as any "accessory before the fact to the same felony, if convicted as an "accessory, may be punished."

Those sections were for all practical purposes identical with sections 1 and 2 of the English Accessories and Abettors Act, 1861, which in their turn had previously appeared respectively in the Acts of 1826 and 1848.

1958. July 22, 23, 24. *W. P. Grieve* for the appellant.
J. G. Le Quesne for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Rutherford* v. *Richardson* [1]; *Lord Sanchar's Case* [2]; *Reg.* v. *Ashmall* [3]; *Reg.* v. *Manning* [4]; *Rex* v. *Plummer* [5]; *Morris* v. *Tolman* [6]; *Rex* v. *Williams* [7]; *Rex* v.

[1] [1923] A.C. 1; 39 T.L.R. 42.
[2] (1612) 9 Coke 117a.
[3] (1840) 9 C. & P. 236.
[4] (1883) 12 Q.B.D. 241.
[5] [1902] 2 K.B. 339; 18 T.L.R. 659.
[6] [1923] 1 K.B. 166; 39 T.L.R. 39.
[7] (1932) 32 N.S.W.S.R. 504.

Cooke [8]; *O'Connell* v. *Reg.*[9]; *Reg.* v. *Thompson* [10]; *O'Sullivan* v. *Thurmer* [11]; *Rex* v. *M'Cue* [12]; and *Ibrahim* v. *The King.*[13]

July 24. LORD TUCKER said that their Lordships would humbly advise Her Majesty that the appeal should be allowed, the conviction and sentence passed on the appellant be set aside, and a verdict of Not Guilty entered. Their Lordships would give their reasons later.

October 2. The reasons of their Lordships for allowing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: It may be convenient at this stage to refer to a passage in Russell on Crime, 11th ed., at pp. 134 and 135, which shortly and accurately states the nature of this crime. It is as follows: "A simple but important point is sometimes "overlooked, namely, that when the law relating to principals "and accessories as such is under consideration there is "only one crime, although there may be more than one person "criminally liable in respect of it; if there are more than one "person, then the question arises as to the category in which each "one is to be placed, that is, whether he is accessory before the "fact, or principal in the first or second degree or an accessory "after the fact. There is one crime, and that it has been com-"mitted must be established before there can be any question of "criminal guilt of participation in it. It is true that one who "procures, advises, solicits or instigates in any way another "person to commit a crime is himself guilty of the common law "misdemeanour of incitement whether or not the offence solicited "is carried out; but incitement is a different offence from the one "which is solicited; if and when the latter offence is committed "then, and not until then, the inciter becomes a party to it, and "if it be a felony, he is classed as an accessory before the fact, "the fact being the crime which the incited person, has, in the "character of principal in the first degree, carried out."

In the present case it was essential to the conviction of any one of the accused as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused persons to murder Claude Allen and that such person or persons had in fact murdered the said Allen. By their verdict the jury have found that murder by any one of the accused has not been proved, but none the less the appellant was guilty of having counselled one or more of them to commit murder and that one or more of them, unspecified, in fact committed it. This certainly appears, at first sight at any rate, an inconsistent and contradictory verdict.

In the course of the argument their Lordships were referred to several authorities, some dealing with the law as to conspiracy,

[8] (1826) 5 B. & Cr. 538.
[9] (1844) 11 Cl. & F. 155.
[10] (1851) 16 Q.B. 832.
[11] [1955] S.A.S.R. 76.
[12] (1831) Jebb's Criminal and Presentment Cases 120.
[13] [1914] A.C. 599; 30 T.L.R. 383.

J. C.
1958
SURUJPAUL
v.
THE QUEEN.

which was said to be analogous for present purposes, and to the history and origins of the law with regard to principals and accessories, but it is sufficient to refer to the only two cases which really throw much light on the present question.

The first is *Reg.* v. *Hughes.*[1] This was a case reserved by the Recorder of Manchester for the opinion of the Court of Queen's Bench. The prisoner Hughes had been charged together with one Hall in the first two counts of the indictment with larceny and in the third count alone with receiving. Both prisoners pleaded not guilty and were put in charge of the jury, whereupon counsel for the prosecution intimated that he did not propose to offer any evidence against Hall and applied that he should be acquitted in order that he might be called as a witness for the prosecution against Hughes. The Recorder acceded to this request and Hall was acquitted. He was called as a witness and testified that he had stolen the goods in question and sold or given them to Hughes. The jury returned a general verdict of guilty against Hughes. The question reserved for the court was "whether, as "the facts showed that Hughes, if guilty at all of the larceny, was "guilty only as an accessory before the fact, and Hall, the prin-"cipal, having been acquitted, I ought not to have told the jury "that Hughes was entitled to his acquittal on the counts for "larceny, and that they were to confine their attention to the "count for receiving only." The judgment of the court was delivered by Erle C.J. He said that 11 & 12 Vict. c. 46, s. 1, had made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory had been done away with. He added that the accessory, "*whether he is* "*tried before or at the same time as the principal, . . . may be* "*found guilty,*" although the principal be acquitted.

In the report of this case in the Law Times[2] instead of the words italicised above the sentence reads: "Whether the prin-"cipal be tried before or at some time after the accessory before "the fact, still there may be guilt in the accessory." The variation is perhaps of little importance, since in the case with which the court was dealing the principal had been acquitted on the same indictment and by the same jury, albeit the acquittal of the principal was reached in the absence of any evidence of the commission of the felony, whereas there was ample evidence of such commission in the evidence adduced on the trial of Hughes.

The second, and more recent case, is *Rex* v. *Rowley.*[3] In this case the appellant had been charged at Birmingham City Quarter Sessions in one count together with two other men with breaking and entering, and stealing, and in a second count together with the other two with receiving. In a further count the appellant was charged alone as an accessory after the fact to the felonious

[1] (1860) Bell 242; 1 L.T. 450.
[2] 1 L.T. 450, 452.
[3] (1948) 32 Cr.App.R. 147; [1948] 1 All E.R. 570.

receiving by the other two. At the trial the appellant's plea on this last count was taken first. He pleaded guilty and was sentenced. The trial of the other two men proceeded and they were acquitted on all counts.

On appeal to the Court of Criminal Appeal (Lord Goddard C.J., Humphreys and Singleton JJ.), counsel for the Crown conceded that the procedure adopted had been quite irregular. Humphreys J., in delivering the judgment of the court quashing the conviction, said [4]: "In the result there is an error on record which cannot be "cured by amendment. Writs of error have been abolished since "1908 by the Criminal Appeal Act, but this court has the power "which the Court of King's Bench used to exercise in dealing "with error on the record. Where there is no means of amending "the record so as to make it consonant with the proved facts of "the case and where the record is inconsistent with itself, as it is "here, the only course which this court can take is to quash the "conviction." The judgment then proceeded to comment on the undesirability of the course which had been adopted at the trial of taking the plea of the accessory before the trial of the principal felons.

It is to be observed that the case of *Reg* v. *Hughes* [5] was not cited to the court and it is true that counsel for the Crown did not seek to support the conviction. None the less, whatever the true view may be with regard to the technicalities, the course which had been adopted by the Recorder of Manchester in the last-mentioned case would now be regarded with even greater disapproval than that of the Assistant Recorder of Birmingham in *Rowley's* case.[6]

Their Lordships do not consider it necessary in this case to decide whether writ of error would have lain by reason of error on the record which could not be cured by reference to the evidence. They are content to deal with the case on the basis upon which counsel for the Crown sought to uphold the conviction, namely, by looking at the evidence to see if the inconsistency on the record is real or only apparent.

The case for the Crown was that the accused men had engaged in a plot to rob the overseer of an estate of the wages of the estate workers, and that on March 9, 1957, Walter Cameron, the overseer, was in a land rover driven by a man named Ashroof together with a police escort, Claude Allen, near a place called New Dam, when two of the accused wearing masks and armed with a stick and a double-barrelled shotgun held them up. Cameron threw the wages to the man with a stick, a shot from the rear of the vehicle was fired and Allen was wounded. Five masked men were seen running away, and Allen died later in the day.

The case for the prosecution rested largely upon the evidence

[4] 32 Cr.App.R. 149; [1948] 1 All E.R. 571.

[5] Bell 242.

[6] 32 Cr.App.R. 147.

J. C.
1958
SURUJPAUL
v.
THE QUEEN.

of a man named Dhajoo, whom the jury were rightly told to treat as an accomplice. His evidence went to prove the existence of a plot by the accused to rob the pay-roll and to make use of masks and to hide guns in preparation for the robbery. If believed, there could be little doubt of the existence of the plot, and there was material in all the circumstances from which they might have drawn the inference that the plan was carried out by all or some of the accused and that in the course thereof the murder was committed. But the jury, whatever they may have thought with regard to the evidence of the plot, evidently did not consider it sufficient to warrant the conviction of any of the accused as a principal. But it is said on behalf of the Crown that as against the appellant, they may have found something in his statement to the police which would amount, with Dhajoo's evidence, to sufficient evidence and admissible against him that the crime was committed by one or more of those who had been "counselled or "procured" by the accused so to do. This necessitates a close examination of the statement, but it may here be observed that although such statement may afford very strong corroboration of Dhajoo's evidence with regard to the part taken by the appellant in the plot and as to his counselling or inciting the others to commit robbery or murder, it is difficult to see how it can afford any evidence as to the actual commission of the crime at which by their verdict the jury have found he was not proved to have been present and assisting. A voluntary statement made by an accused person is admissible as a "confession." He can confess as to his own acts, knowledge or intentions, but he cannot "confess" as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an "admission" of this nature.

The passage in the statement of the accused relied upon by the Crown is as follows: "When Chandee [No. 2 accused] came "back Sunday morning 10-3-'57 about 5 o'clock, he and Jagolall "[No. 5] begin to gaff, and Jagolall ask Chandee why he shoot "the man, and Chandee say when I say stick it up the man put he "hand pon the revolver foh draw am out, and then Chandee and "Battle Boy [No. 4] shoot am." A statement of this nature cannot, in their Lordships' opinion, be regarded as equivalent to evidence by witnesses of the acts spoken to in this conversation and as sufficient to warrant as against the appellant a finding that Chandee (No. 2) and/or Battle Boy (No. 4), both of whom the jury acquitted, in fact committed the murder.

Their Lordships find it difficult to believe that in any event the jury applied this process of reasoning in arriving at their verdict. They consider it much more likely that the jury failed to appreciate the distinction between incitement to murder or conspiracy and being an accessory before the fact, and that the following passage in the trial judge's summing-up dealing with the appellant's case may have contributed to this result. He said:

"If you feel sure that the evidence does not prove that he was "there on the dam, but that he conspired with others to rob this "pay-roll money and to commit this crime of robbery with "violence with loaded guns, then you may convict him of the "offence of being an accessory before the fact to murder." In so saying, their Lordships do not desire to be unduly critical of the trial judge's summing-up taken as a whole. This was a most difficult and troublesome case to deal with and was not made easier for judge or jury by the numerous objections which were taken at various stages, none of which are now relied upon.

Whatever may have actuated the jury in coming to these inconsistent verdicts, their Lordships are satisfied on an examination of the evidence that there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at.

Their Lordships have, accordingly, humbly advised Her Majesty that this appeal be allowed, the verdict against and sentence upon the appellant be quashed and a verdict of Not Guilty entered.

Solicitors: *Lawrence Jones & Co.; Charles Russell & Co.*

C. C.

[COURT OF APPEAL.]

* SCALA BALLROOM (WOLVERHAMPTON) LTD. *v.* RATCLIFFE AND OTHERS.

C. A.
1958
July 29, 30.
Hodson, Morris and Sellers L.JJ.

Conspiracy—Lawful protection of interest—Colour bar—Exclusion of coloured people from dance hall—Musicians' Union retaliate by banning members from performing in orchestra—Predominate reason for ban—Interest of members.

The plaintiffs, who were proprietors of a ballroom, excluded from the dance floor visitors of colour, although they were willing to employ coloured musicians in the orchestra. The Musicians' Union (of which the defendants were officials) which included among its members many coloured musicians of distinction and popularity, thereupon gave notice to the plaintiffs that its members would not be permitted to perform at the ballroom so long as the policy of racial discrimination continued. The plaintiffs claimed an injunction to restrain the union from persuading or attempting to persuade any of its members not to perform at the ballroom, alleging that the defendants had wrongfully combined and conspired to injure them in the way of their trade:—

Held that, prima facie, the predominant purpose of the defendants' action was the lawful protection of their members' interests and livelihood and, therefore, no action in conspiracy would lie and an injunction would be refused.

C. A.

1958

Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe.

Crofter Hand Woven Harris Tweed Co. Ltd. v. *Veitch* [1942] A.C. 435 applied.

Decision of Diplock J. affirmed.

Appeal from Diplock J.

The plaintiffs, the proprietors of the Scala Ballroom at Wolverhampton, which they opened on April 28, 1958, decided after consultation with their patrons to deny admittance to coloured people, although they took no exception to coloured musicians in the orchestra. The defendants, Hardie Ratcliffe, Harry Francis and J. Forman, the general secretary, assistant secretary and Midland area organizer respectively, of the Musicians' Union, at once took exception to the colour bar, and the assistant secretary wrote to the plaintiffs on behalf of the union saying: "Our attention has been drawn to press reports concerning your policy of "racial discrimination as it will affect the clientele of your ballroom. According to the reports, coloured people are not "permitted to enter the ballroom." [He challenged the use of the word "coloured" and continued:] "The long-established "policy of the Musicians' Union is strongly opposed to discrimination of any kind, including, of course, racial discrimination, and, assuming the reports to be accurate, we hereby give "you notice that members of the Musicians' Union will not be "permitted to perform at the Scala Ballroom on any occasion so "long as a policy of racial discrimination is maintained by its "proprietors. Instructions are being issued accordingly, but, "should you decide to abandon your policy of racial discrimination, please notify us immediately."

Various contracts with band leaders to perform at the ballroom were then outstanding, and the question arose whether those contracts were being interfered with by the defendants. On July 2 the plaintiffs issued a writ for damages for conspiracy and claimed an injunction restraining the defendants from, inter alia, persuading or attempting to persuade any member of the Musicians' Union not to perform at the Scala Ballroom.

On July 9 they obtained from Havers J. an injunction restraining the defendants, their servants and agents, from procuring or attempting to procure any member of the Musicians' Union to break any contract to perform at the Scala Ballroom until the trial of the action or until further order. There was no appeal against that order. The rest of the summons was adjourned and came before Diplock J. who, on July 29, refused to grant the injunction asked for.

Diplock J. said, in the course of his judgment, that on the evidence before him he was not prepared to hold that the predominant purpose of the defendants was to injure the plaintiffs. He was satisfied that the defendants and their members, who included a number of persons of colour, bona fide objected to any form of colour bar. In his Lordship's view, so long as the defendants had a predominant object which was not in itself unlawful,

this was a legitimate interest which they were entitled to agree to forward by any means not in themselves unlawful. It was not unlawful to advocate the abolition of the colour bar and to use all methods not in themselves unlawful to achieve that object. It was the right of all citizens to advocate policies in which they bona fide believed, and to use all lawful means to attain the objects they sought. It did not become unlawful for them to agree together on such a course of action unless their predominate object was to injure a man in his trade. On the evidence before his Lordship the plaintiffs had not made out a case in law for the injunction they sought.

The plaintiffs appealed.

J. G. Le Quesne for plaintiffs.
Harry Lester for defendants was not called upon.

Cases referred to in argument are cited in the judgment.

HODSON L.J. This is an appeal by plaintiffs who unsuccessfully applied for an injunction. The matter arises in this way: the plaintiffs, who are the proprietors of the Scala Ballroom, are seeking to restrain the defendants, who are officials of the Musicians' Union, from persuading or attempting to persuade any members of the union not to perform at the Scala Ballroom, and from persuading or attempting to persuade any persons to refrain from employing any musicians on the ground that those musicians have played or agreed to play at the Scala Ballroom.

[His Lordship stated the facts as set out above and continued:] Diplock J. refused to grant the injunction asked for, and in respect of that refusal this appeal has been brought. It calls for consideration of the law of conspiracy which was considered and very closely analysed by the House of Lords in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch.*[1] The relevant claim in the present case is that the defendants have wrongly combined and conspired together to injure the plaintiffs in the way of their trade by preventing members of the union from playing at the Scala, and it has been necessary for the judges who have had to deal with this matter, and for this court to consider the element of the tort of conspiracy as a civil wrong. Any decision arrived at on an application for an injunction is a provisional decision, and it would be wrong to attempt to lay down in detail the law which is relevant to this case. I accept Mr. Le Quesne's submission that if there is a reasonable probability that he is entitled to the relief that he has claimed, this court would be ready to grant an injunction; and he submits, in support of his application, that the judge's approach to this matter has not been correct. I must, therefore, refer to some extent to the *Crofter* case, where Viscount Simon L.C. pointed out,[2] as indeed did

[1] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142.
[2] [1942] A.C. 435, 440.

C. A.
1958
SCALA BALLROOM (WOLVERHAMPTON) LTD. v. RATCLIFFE.
Hodson L.J.

Diplock J., that in order to make out their case the plaintiffs have to establish (a) agreement between the defendants, (b) to effect an unlawful purpose, (c) resulting in damage to the plaintiffs.

The judge has found here an agreement between the defendants, and he has also found resultant damage to the plaintiffs. I think, as I read the affidavits, that there is, prima facie, evidence to support his finding. "In doing so," he says, "they" —that is the defendants—"would necessarily injure the plaintiffs "in their trade." But the remaining element is the one which always gives rise to difficulty in these cases, that which is under the heading (b), namely, "to effect an unlawful purpose."

In one of the leading cases in the House of Lords, *Sorrell* v. *Smith*,[3] Viscount Cave L.C., after examining three cases in their Lordships House, extracted certain principles and formulated two propositions, namely[4]: "(1) A combination of two or more "persons wilfully to injure a man in his trade is unlawful and, "if it results in damage to him, is actionable. (2) If the real "purpose of the combination is not to injure another, but to "forward or defend the trade of those who enter into it, then no "wrong is committed and no action will lie, although damage to "another ensues."

Their Lordships pointed out that those propositions do not necessarily cover the whole ground, and are in various cases difficult to apply. It is clear from the authorities, and I accept the submission of Mr. Le Quesne, that it is not necessary for him to prove malevolence. He submitted that there was here a combination to do acts which necessarily resulted in injury to the plaintiffs' trade. He submitted further that the combination was unlawful unless the real purpose was to protect the legitimate interests of the combiners. His argument really was to the effect that one could equate interests with material interests, which might be described in other words as selfish interests, and he submitted that there was no real material selfish interest of the defendants to be safeguarded here.

In that connexion I will refer to some further language of Lord Simon in the *Crofter* case.[5] He said: "However the origin of the "rule may be explained, I take it to be clear that there are cases "in which a combination of individuals to act in a certain way, "resulting in deliberate damage to others, is actionable, even "though the same thing, if done by a single individual without "any element of combination, would not expose him to liability."

In dealing with what Mr. Le Quesne, I think quite correctly, called the legitimate interests of the defendants, Lord Simon said[6]: "I am content to say that, unless the real and pre-"dominant purpose is to advance the defendants' lawful interests "in a matter where the defendants honestly believe that those "interests would directly suffer if the action taken against the

[3] [1925] A.C. 700.
[4] Ibid. 700, 712.
[5] [1942] A.C. 435, 444.
[6] Ibid. 446.

"plaintiffs was not taken, a combination wilfully to damage a "man in his trade is unlawful. Although most of the cases have "dealt with trade rivalry in some form or other, I do not see "why the proposition as to the conditions under which conspiracy "becomes a tort should be limited to trade competition. Indeed, "in its original sense, conspiracy as a tort was a combination to "abuse legal procedure. See Winfield's History of Conspiracy, "c. ii. I have used the word 'directly' without seeking to "define its boundaries as an indication that indirect gains, such "as the subscription in the illustration above, would not provide "a justification."

I think all their Lordships made it clear that there might be difficult cases for consideration where the interests which the defendants sought to protect were not business interests. We have been taken through a large part of the speeches of all their Lordships and I think they all, or nearly all, touch on that aspect of the problem, and it is submitted by Mr. Le Quesne that the effect of the authority to which I have referred is that only in so far as what may be called in the narrow sense strictly material interests are concerned can the defendants say that they have lawful interests to protect.

This question of a colour bar, of course, has a very wide application, and it is submitted that there are no selfish or material interests for the defendants to protect here. Their own employment is not, it is submitted on the evidence, in peril, and what they are really seeking to do is to prevent the plaintiffs from carrying on their business in their own way by excluding from their ballroom people whom they wish to exclude. But I do not think that that is really the effect of the evidence. Mr. Henry Francis Major, who was the second defendant and was sued as Harry Francis, has sworn an affidavit in this matter, from which I quote:

"A colour bar is a particularly dangerous form of discrimina-"tion in its effect upon musicians since it tends to endanger their "livelihood; it lowers the standards of the profession, and it "creates friction in their relationship with one another. The fact "that the colour bar is limited to the dancers in the 'public' "dance hall and is not imposed upon the musicians themselves "is irrelevant, because the insidious effects of the colour bar are "the same. It is impossible for musicians to insulate themselves "from their audience. The Musicians' Union has many coloured "members, some of whom are of great distinction and popularity. "The feeling that they are welcome so long as they stay on the "band platform, but that neither they nor their relatives would "be permitted to go on to the dance floor, is deplorable. In short, "it is considered by the Musicians' Union to be essential to the "interests of its members that all manifestations of colour bar "should be lawfully opposed as far as possible. The plaintiffs "recently achieved a degree of notoriety in connexion with their "declared policy of excluding coloured people from their dance

C. A.
1958
SCALA BALLROOM (WOLVERHAMPTON) LTD. v. RATCLIFFE.
Hodson L.J.

"hall. In accordance with the declared policy of the Musicians' "Union and with a view to the furtherance of the interests of its "members, the third defendant and myself sent the communica-"tions referred to in Mr. Wade's affidavit. In our view this is a "trade dispute. We have no desire to injure the plaintiffs in "their business; on the contrary, we wish them to prosper. The "action we have taken has been directed solely to secure "conditions of labour, vital to musicians. If we had done "nothing, it would have appeared as though the colour bar policy "of the plaintiffs was being condoned by the Musicians' Union "and there would undoubtedly have been much bitterness "amongst members and damage to the union."

I am not prepared, at any rate for the purposes of this provisional opinion, to say that the interests which can lawfully be protected are confined to the material interests, in the sense of interests which can be exchanged for cash. Lawful interests, in my judgment, may, and I think do, extend further than that; but, reading the affidavit, parts of which I have just read, it seems to me that prima facie, at any rate, the defendants, who represent the members of the Musicians' Union, which includes amongst its members a great many coloured people, have a lawful interest to protect in looking after their members' interests and, taking the long view, in looking after their livelihood as well.

Therefore I would agree that the judge was right. I have not referred to the particular way in which he put the matter himself. It may be that he put it in a somewhat different way from the way in which I have put it; it may be that he was right and that his reasons are more satisfactory than mine, but, at any rate, I come to the same conclusion.

Another matter was raised before the judge and still remains open now, namely, the question whether the Trades Disputes Act, 1906, applies, and whether the defendants are in any event protected from any action by the provisions of that Act of Parliament. I express no opinion upon that for we have not heard argument upon that aspect of the case. The matter has been dealt with on the fundamental issue between the parties whether, apart altogether from the statutory defence which may be available to the defendants, the plaintiffs have made out a prima facie case on the merits entitling them to an injunction. I agree that they have not done so, and I think, therefore, this appeal should be dismissed.

MORRIS L.J. I agree. In his speech in the *Crofter* case Lord Simon said [7]: "If the predominant purpose is the lawful protec-"tion or promotion of any lawful interest of the combiners (no "illegal means being employed), it is not a tortious conspiracy, "even though it causes damage to another person." Assuming for present purposes that there was an agreement between the

[7] [1942] A.C. 435, 445.

defendants, and that what was done pursuant to such agreement has resulted or will result in damage to the plaintiffs, the question now to be considered is whether the agreement was in order to effect an unlawful purpose. It seems to me on the evidence that is before us that it appears that the real purpose—the real reason of any agreement of combination—was to advance the interests of the defendants, and that the proof goes beyond showing that there was merely no purpose of injuring the plaintiffs.

Mr. Le Quesne has forcibly submitted that it should be shown that the purpose of the defendants involved some material advantage to them. If the matter is approached on that basis, then it seems to me that passages in the affidavit of Mr. Francis do suggest that the defendants honestly believe that material advantage to their members is involved. But it seems to me that if the defendants honestly believe that a certain policy is desirable, and if they honestly believe that it is the wish of their members that such policy should prevail, and that there should be no colour bar discrimination, it can be said that the welfare of the members is being advanced, even though it cannot be positively translated into or shown to be reflected in detailed financial terms.

It is unnecessary at the present stage to express final and concluded opinions in regard to these matters, but in my judgment, on the material before us, it would not be appropriate that the injunction which is sought should be granted.

SELLERS J. I agree. Notwithstanding the forcible and interesting argument of Mr. Le Quesne, I do not think that a prima facie case has been made out, and I have nothing to add to the reasons which my Lord has given.

Appeal dismissed.

Solicitors: *Peacock & Goddard for Michael J. Wade, Wolverhampton; Hall, Brydon, Egerton & Nicholas.*

A. W. G.

[CHANCERY DIVISION.]

* THOMSON (INSPECTOR OF TAXES) *v.* MOYSE.

1958
July 16, 17, 22.
Wynn-Parry J.

Revenue—Income tax—Foreign income—Remittance to United Kingdom—Cheques drawn in dollars on foreign bank—Purchase by English bankers—Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England—Whether income from foreign securities or possessions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D,* 1 (*a*) (i), *Cases IV, r.* 2, *and V, r.* 2.

A taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, was entitled to income from the estates of his mother and his father, both estates being situate in the United States. Payments of income

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

from the estates were made by the trustees into an account in the taxpayer's name in the Bank of New York.

The taxpayer carried out the following transactions: (a) he drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in the United Kingdom and requested them to purchase the cheques; (b) his English bankers, as authorized dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques; (c) his bankers then, by registered mail, presented his cheques to the Bank of New York, which honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States.

The taxpayer was assessed to income tax under Cases IV, rule 2, and V, rule 2, of Schedule D to the Income Tax Act, 1918,[1] in respect of these transactions:—

Held, (1) that the taxpayer's receipts were derived from contracts for the purchase of sterling made in England to be performed in England, and the English bankers in purchasing the dollars acted as principals and not as agents, and that the income did not therefore fall within Case IV, rule 2.

Paget v. *Inland Revenue Commissioners* [1938] 2 K.B. 25; 21 T.C. 677 applied.

(2) That there was no evidence that dollars were ever brought into this country, or if they were so brought in it was not as the property of the taxpayer but of the Bank of England and, accordingly, the income did not fall within Case V, rule 2.

Foulsham v. *Pickles* [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261; and dicta in *Inland Revenue Commissioners* v. *Gordon* [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226 applied.

APPEAL from the Commissioners for Special Purposes of the Income Tax Acts.

[1] Income Tax Act, 1918, Sched. D.: "1. Tax under this Schedule "shall be charged in respect of—(*a*) "the annual profits or gains arising "or accruing—(i) to any person "residing in the United Kingdom "from any kind of property whatever, "whether situate in the United King-"dom or elsewhere. . . ."

"Case IV.—Tax in respect of in-"come arising from securities out of "the United Kingdom. . . . Case V. "—Tax in respect of income arising "from possessions out of the United "Kingdom."

"*Rules applicable to Case IV*: 1. "The tax in respect of income arising "from securities in any place out of "the United Kingdom shall be com-"puted on the full amount thereof . . . "whether the income has been or will "be received in the United Kingdom "or not. . . .

"2. The foregoing rule shall not "apply—(*a*) to any person who "satisfies the Commissioners of In-"land Revenue that he is not domi-"ciled in the United Kingdom . . .

"The tax in any such case shall "be computed on the full amount . . . "of the sums which have been, or "will be, received in the United "Kingdom in the year of assess-"ment . . ."

"*Rules applicable to Case V*: 2. "The tax in respect of income arising "from possessions out of the United "... shall be computed on the full "amount of the actual sums annually "received in the United Kingdom "from remittances payable in the "United Kingdom, or from property "imported, or from money or value "arising from property not imported, "or from money or value so received "on credit or on account in respect of "any such remittances, property, "money, or value brought or to be "brought into the United Kingdom ". . ."

The case stated, so far as material, provided:

1. At meetings of the commissioners held on January 23 and 24 and February 1, 1957, Stephen Dickson Moyse (the respondent) appealed against the following assessments to income tax made upon him under Cases IV and V of Schedule D of the Income Tax Act, 1918: (a) Under Case IV for the year 1949–1950 in the sum of £2,335 and for the years 1950–1951 and 1951–1952 in the sum of £2,500 for each year. (b) Under Case V for the year 1949–1950 in the sum of £3,457 and for the years 1950–1951 and 1951–1952 in the sum of £3,500 each year.

The question for determination was whether the respondent was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

. . . . .

3. The following facts were admitted or proved:

(a) The respondent was born an American citizen and was and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom.

(b) At all material times the respondent was entitled to a life interest in a trust in the United States of America under the will of his father the late Leon Moyse. He was also entitled to a life interest in the residuary estate of his mother, the late Mrs. A. D. Schmucker (widow of the said Leon Moyse) also in the United States of America. This estate was in course of administration from August 19, 1943, until April 18, 1951. The income from those two life interests was paid in dollars by the executors and trustees into the respondent's account at the Wall Street, New York branch of the Bank of New York.

It was common ground that this income, in so far as it arose in the course of the administration of the Schmucker estate, was income arising from securities out of the United Kingdom and that, in so far as it arose from that estate after the completion of the administration and from the Leon Moyse trust, it was income arising from possessions out of the United Kingdom.

(c) Under section 1 (1) of the Exchange Control Act, 1947, the respondent was prohibited from selling, without Treasury permission, the said dollars to any person other than an authorized dealer as defined by section 42 of the Act. By section 2 (1) of the Act, in default of Treasury permission to retain them, he was compelled to offer the said dollars for sale to such a dealer. At no time during the material period did the respondent have permission to sell (otherwise than to an authorized dealer) or to retain the said dollar income the subject of these appeals. Both Seligman Brothers, Merchant Bankers of Austin Friars in the City of London, and the Midland Bank, Ltd., were authorized dealers.

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

(d) Between 1924 and 1926 the respondent trained as a volunteer with Seligman Bros. From his experience in banking the respondent was aware that a practice existed whereby a banker, provided he knew the particular customer, might be willing to purchase outright cheques in foreign currencies drawn on foreign banks. This practice of buying and selling cheques drawn in foreign currencies was a very old established one in the City of London and was part of the normal banking business of Seligman Bros. A banker might be willing to act as a principal in this manner even though he had no knowledge of the state of the customer's account at the foreign bank, provided that he was satisfied as to the customer's integrity. Otherwise he would follow the normal method, used, for example, in the case of cheques drawn in this country on banks in the United Kingdom, and collect the money from the drawer's foreign bank as an agent and credit the customer's account in due course.

(e) Nothing, except as shown in sub-paragraph (i) below, was paid into the respondent's New York bank account other than his income from the aforesaid life interests. For the period relevant to the assessments in question the respondent drew certain cheques in dollars on his New York bank account in favour of either Seligman Bros. or Midland Bank, Ltd. (of London).

(f) With each of the four cheques drawn in favour of Seligman Bros. in June, August and December, 1948, and February, 1949, the respondent sent Seligman Bros. a letter asking them to purchase the cheque and to credit his account with the proceeds in sterling and subsequently to transfer part of the proceeds to the credit of his bank account with Midland Bank, Kingsway. The letter sent to Seligman Bros. on August 24, 1948 (for example) stated as follows: "I enclose herewith "my cheque on New York in the amount of $6,144.04. Would "you kindly purchase this and credit my sterling account "correspondingly, under the usual advice. Upon completion of "the above, kindly arrange to credit my account with the "Midland Bank Ltd. Kingsway Branch, with the amount of "£1,750.0.0, debiting my account with your goodselves corre-"spondingly. . . ." The cheque dated February 16, 1949, was enclosed with the following letter to Seligman Bros.: "I enclose "herewith my cheque on New York in the amount of $7,266.29. "Would you kindly purchase this and credit my sterling account "correspondingly, u.u.a. On completion of the transaction would "you kindly arrange to credit my account at the Midland Bank "Ltd., Kingsway Branch, with £1,600 (Sixteen hundred pounds) "u.u.a."

(g) Seligman Bros. purchased the aforementioned four cheques. On receipt of each cheque Seligman Bros. wrote to the respondent using the following form of letter: "We confirm "having sold for your account today:

" $7,266.29 at 4.03½ producing	£1,800	16s.	4d.
" for which amount, less 1/8% Exchange Commission & stamp and other charges	£2	5s.	2d.
i.e.	£1,798	11s.	2d.

" We credit your account val. 18th inst. u.u.r. We have " received the above foreign currency by cheque on New York." The phrase " sold for your account " was used by Seligman Bros. in these letters because during this period Seligman Bros. believed that owing to the exchange control which was introduced under the defence regulations they were not permitted to deal in foreign currency on their own account, but that they were required to act as agents of the Bank of England and to sell either to the Bank of England or to persons holding a permit from the Bank of England. Consequently, the pre-war form of confirmation used by Seligman Bros. " We confirm that we " have bought from you a cheque for . . ." was altered to " We " confirm we have sold for your account." The dollars so purchased were either sold to the Bank of England or to a customer with a permit to purchase dollars from the Bank of England or to a person to whom Seligman Bros. were entitled to deal within the limits set by the Bank of England. The words " We " credit your account val. 18th inst." were employed by Seligman Bros. in the above letter in accordance with their usual practice whenever they purchased cheques in foreign currency. The foreign currency was valued in sterling on the day following, which in fact would be the actual day upon which the currency would normally be sold by Seligman Bros. on the market or to the Bank of England. The letters " U.U.R.," meaning " under " usual reserve," were always put in any statement by Seligman Bros. whenever they bought or negotiated cheques or bills of exchange. " U.U.R." in no way altered the customer's legal obligation under the contract under the Bills of Exchange Act, 1882, but drew his attention, in case he was not conversant with the legal position, to the fact that recourse could be had to him should any defect be found in the cheque when it ultimately was presented for payment. Seligman Brothers viewed the transactions with the respondent as purchases and sales of currency. They considered that the contracts were for dollars implemented by the respondent handing them a cheque in that currency.

(h) Seligman Bros. employed correspondents in New York to whom they sent all New York cheques acquired by them by registered mail every day. The New York correspondents were instructed by Seligman Bros. to carry out the following transactions in relation to each one of the respondent's cheques: (a) to have the cheque cleared on the respondent's bank in New York; (b) to credit the dollars to Seligman Bros.' bank account in New

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

York; and (c) to pay out of Seligman Bros.' New York bank account so many dollars (as had been sold to the Bank of England) to the Federal Reserve Bank in New York for the credit of the account of the Bank of England. The procedure of the Midland Bank, Ltd., was similar to that of Seligman Bros.

(i) A cheque drawn in favour of the respondent by the United States Treasury representing a refund of United States Federal Tax in the sum of $908.19 was received by the respondent through the post for the United States Treasury and forwarded by him to Seligman Bros. on December 8, 1948, with instructions "to convert this into sterling." This particular item was quite distinct from all the other transactions with which this appeal was concerned as the cheque was not drawn on the respondent's bank account in New York. Nevertheless Seligman Bros. adopted the same practice and purchased this cheque crediting the respondent with the sterling equivalent.

(j) On June 16, 1949, the respondent drew a cheque on his New York bank account in favour of the Midland Bank, Ltd., in the same manner as previously he drew cheques in favour of Seligman Bros. From and after this date the respondent used the Midland Bank, Ltd., for all these transactions during the relevant period from June 16, 1949, to January 29, 1952. No copies of the respondent's letters which accompanied these cheques to the Midland Bank were available except a letter dated January 29, 1952, from the respondent to the Midland Bank as follows: "I am enclosing herewith my cheque on New York in "the amount of $5,700 and shall be glad if you will credit my "account with the sterling equivalent."

On January 30, 1952, the Midland Bank wrote to the respondent as follows: "We are in receipt of your letter of the "29th inst. enclosing your cheque on New York for $5,700, and "your account has today been credited with the proceeds, "amounting to £2,045 9s. 10d. This is made up as follows:

"$5,700 at 22.78 5/16ths	£2,048 1s. 1d.
"*Less* Commission	£ 2 11s. 3d.
	£2,045 9s. 10d."

(k) Neither Seligman Bros. nor Midland Bank, Ltd., was aware of the source of the respondent's funds lying in his New York bank account nor did either of the two English banks make any inquiry as to the extent of his resources in the United States. The respondent had been acquainted with the general manager of Seligman Bros. for some thirty years. Seligman Bros. would not purchase a cheque drawn on a foreign bank if the person desiring to sell the cheque was not well known to them as a person of integrity.

(l) Seligman Bros. never made returns to the Exchange Control Committee of the Bank of England showing individual

items relating to the respondent. The cheques purchased from the respondent were included with other cheques in the periodical returns which Seligman Bros. as an "authorized bank" were required to make to the Bank of England. Such returns were in a global sum and did not show individual items. A similar practice was followed by the Midland Bank, Ltd.

(m) Midland Bank, Ltd., bought cheques drawn on New York and in such cases would credit the account of the customer the same day, whereas in cases where they were clearing a cheque (which did not arise in the case of the respondents) it would be a matter of some days before the customer got the credit.

4. It was contended on behalf of the respondent:

(a) that the sums received by the respondent in the United Kingdom arose from contracts concluded in the United Kingdom between the respondent and the respective bank, and that these sums were not remittances of United States income;

(b) that the respondent's United States income was not property received by him in the United Kingdom within the meaning of Case IV and rule 2 of Case V;

(c) that the source of the sterling credited to the respondent's London bank accounts was the sale and purchase as between the respondent and the particular one of the two United Kingdom banks in each transaction.

5. It was contended on behalf of the Crown:

(a) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the estate of the respondent's mother during the period of administration were sums received in the United Kingdom, within the meaning of Case IV, rule 2 of Schedule D;

(b) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the income from the estate of the respondent's mother after the period of administration or to the income from the estate of the respondent's father were sums received in the United Kingdom within the meaning of Case V, rule 2 of Schedule D.

7. The commissioners gave their decision in the following terms. "The question we had to answer was whether on the "facts of the present case—and we had heard evidence not only "from the respondent but also from eminent bankers—the "respondent was liable to tax under Case IV and Case V of "Schedule D in respect of income from foreign securities and "foreign possessions. The respondent had a bank account in "New York and into that bank account there was credited the "whole of his American income. The respondent gave no "instructions to his New York bank to remit sums of money to "him in the United Kingdom. From time to time the respon-"dent drew cheques in dollars on his New York bank account "in favour of Seligman Bros. or Midland Bank, Ltd., which he "asked those banks to purchase from him. At the time of each "such request the respondent instructed the purchasing bank to

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

"place the proceeds in sterling to the credit of his United "Kingdom account. The respondent's requests and instructions "were in every case duly complied with. It seems clear to us "that neither Seligman Bros. nor the Midland Bank, Ltd., were "acting as a collecting agent on the respondent's behalf but in "every case acted as a principal, and we so found.

"Evidence had also been given of the transactions which took "place between the purchasing banks and the Bank of England "and the correspondents in the United States. Having regard to "that evidence (which we accepted) and the arguments that had "been addressed to us, we held that no remittances of American "income had been brought into the United Kingdom. Further-"more, on the reasoning employed by Lord Cohen in . . . *Inland "Revenue Commissioners* v. *Gordon*,[2] we did not accept the view "that there had been a constructive remittance. Our decision "applied equally to the Case IV assessments as to the Case V "assessments. Accordingly, we held that the appeal succeeded in "principle and we left figures to be agreed between the parties."

On appeal by the Crown from that decision the question was whether on the facts as found by the Commissioners there was evidence on which they could properly arrive at their decision, and whether on the facts so found their determination was correct in law.

John Foster Q.C. and *Alan S. Orr* for the Crown.

F. N. Bucher Q.C. and *P. J. Brennan* for the respondent taxpayer.

Cases cited in argument not referred to in the judgment: *Standard Life Assurance* v. *Allan*[3]; *Scottish Widows Fund Life Assurance Society* v. *Farmer*[4]; *Hall* v. *Marians*[5]; *Hall* v. *Marians (No. 2)*[6]; *Timson's Executors* v. *Yerbury*[7]; *Forbes* v. *Scottish Widows Fund and Life Assurance*[8]; *Norwich Union Fire Insurance Co.* v. *Magee*[9]; *Gresham Life Assurance Society Ltd.* v. *Bishop*[10]; *Bartholomay Brewing Co.* v. *Wyatt, Nobel Dynamite Trust Co.* v. *Wyatt*[11]; *Kneen* v. *Martin*[12]; *Wild* v. *King Smith*[13]; *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Income Tax Commissioners for Trinidad and Tobago.*[14]

WYNN-PARRY J., having stated the facts, continued: On the facts the question arises: Do those transactions fall within Case IV or Case V of Schedule D to the Income Tax Act, 1918? It is

[2] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.
[3] (1901) 8 T.C. 446.
[4] (1909) 5 T.C. 502.
[5] (1933) 18 T.C. 148.
[6] (1935) 19 T.C. 582.
[7] [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155.
[8] (1895) 3 T.C. 443.
[9] (1896) 3 T.C. 457.
[10] [1901] 1 K.B. 153; 4 T.C. 464.
[11] [1893] 2 Q.B. 499; 9 T.L.R. 658; 3 T.C. 213, 224.
[12] [1935] 1 K.B. 499; 19 T.C. 33.
[13] (1941) 24 T.C. 86.
[14] [1945] A.C. 1; 61 T.L.R. 30; [1945] 1 All E.R. 9.

to be remembered that the charge is levied under Schedule D, paragraph (1) (*a*) (i), and that Case IV and Case V of that Schedule are relieving provisions. It follows, in my view, that they should not be used to extend the liability of the taxpayer.

Mr. Bucher contends that the transactions between the respondent and his English bankers is reducible to this: (1) I give you a cheque drawn on the Bank of New York in dollars; (2) you give me the sterling equivalent at the prevailing rate of exchange; (3) my cheque on the Bank of New York is the consideration for your payment to me of that sterling sum; (4) if the Bank of New York meet my cheque the transaction is finished; but if they do not do so for lack of sufficient funds, then you can come upon me for the amount of sterling which you have paid to me. In other words, it can be said that this is a contract for the purchase of sterling made in England and to be performed in England, and it is no part of the contract that dollars are to be brought into England. Further, there is no evidence that dollars were brought into England, but, if they were brought in, they were so brought in not as the property of the respondent but as the property of the Bank of England. In my view, this reasoning is correct.

It is further said: income tax is a tax on sterling; suppose that between the date of the giving of the cheque drawn on the Bank of New York by the respondent to his English bankers there had been a fluctuation in the rate of exchange, then it must follow that when the cheque drawn by the respondent was presented by the English bankers to the Bank of New York it would not produce a sum in sterling equivalent to the sum which had been paid by the English bankers on taking over (to use a neutral term) the respondent's cheque drawn on the Bank of New York. This, it is said (and I think rightly so), emphasizes and supports the view of the special commissioners that, however the transaction is regarded, the English bankers acted as principals and not as agents.

Mr. Foster strongly contested this conclusion of the special commissioners, but, having carefully considered their findings in paragraph 7 of the case, which I regard as findings of primary facts, and applying the test applied by Lord Radcliffe in *Edwards* v. *Bairstow*,[1] I am not prepared to say that the conclusion of fact at which they arrived was contrary to the only reasonable possible conclusion. Apart from the statement of primary facts in paragraph 7 of the case, I observe that the special commissioners had the benefit of considering a large number of documents which do not form part of the case, though they were available for examination, and of hearing witnesses examined and cross-examined. In those circumstances, it appears to me that I should hesitate long before I interfere with their conclusion that the English bankers acted as principals, particularly as it appears to me to be the proper conclusion on my analysis of the facts.

[1] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

Wynn-Parry J.

Upon that view of the facts it appears to me that the result must be the same, whether the case is considered under Case IV or Case V. I do not, for myself, feel, upon that issue, that it is necessary to embark upon any detailed review of the authorities.

So far as Case IV is concerned, I think I need do no more than refer to *Paget* v. *Inland Revenue Commissioners*.[2] So far as material the headnote reads as follows[3]: "Miss Paget held "certain Hungarian bearer bonds the interest coupons of which "were payable in London in sterling and in certain other countries "in the respective currencies of those countries. By a decree "dated December 22, 1931, the Hungarian Government directed "that the interest on the bonds should not be paid direct to "creditors but that its equivalent in pengos should be deposited "with the Hungarian National Bank and placed in a foreign "creditors' fund, out of which bondholders might obtain payment "of interest coupons in pengos, but only for use for certain "purposes in Hungary. Miss Paget did not obtain payment in "this way, but sold certain coupons, after they had fallen due, "through agents or coupon dealers in London, who deducted "income tax on payment to her of the proceeds of such sales. "Miss Paget also held certain bearer bonds of the Kingdom of "Yugoslavia, the coupons of which were payable in American "dollars in New York. On July 24, 1933, the Yugoslavian "Government gave notice of its inability to pay the interest in "full and offered to meet the coupons maturing from November 1, "1932, to May 1, 1935, either by payment in 'blocked' dinars "in Belgrade or by payment of 10 per cent. of their face value in "dollars and by the issue of funding bonds for the balance. Miss "Paget did not accept this scheme but in September, 1933, sold "the interest coupons due on November 1, 1932, and May 1, "1933, through agents or coupon dealers in London, who "deducted income tax on payment to her of the proceeds of such "sale. On an appeal against assessments to surtax for the year "1932 to 1933 and 1933 to 1934 the special commissioners decided "(a) that the deposit of pengos with the Hungarian National "Bank constituted performance of the obligation to pay interest "on the Hungarian bonds and the proceeds of the coupons falling "due at the respective dates of deposit represented interest "arising to Miss Paget and must be included in her total income "for surtax purposes." Then they held differently as regards the Yugoslavian bonds. On appeal to the court it was held "that in "neither case did the proceeds of sale of coupons received by "Miss Paget constitute income for income tax purposes."

In the course of his judgment in the Court of Appeal Greene M.R., having considered the argument that the case fell within Schedule C and having rejected it, said[4]: "The appellants' main "argument, therefore, fails. But they claimed in the alternative

[2] [1938] 2 K.B. 25; 21 T.C. 677.
[3] 21 T.C. 677.
[4] [1938] 2 K.B. 25, 35.

"that the purchase price of the coupons was 'income arising from "'securities out of the United Kingdom,' and was charged with "income tax under Case IV of Schedule D. There are two sub-"divisions of this argument. The first is that the purchase price "was taxable by deduction under Miscellaneous Rule 7, which "applies to certain interest, etc., the Rules of Schedule C already "discussed. The second is that Miss Paget was directly assess-"able in respect of the purchase price. The latter of these two "contentions can be disposed of quite shortly. The purchase "price received by Miss Paget was not income arising from the "bonds at all. It arose from contracts of sale and purchase "whereby Miss Paget sold whatever right she had to receive such "income in the future, as well as her right to take what was "offered by the defaulting debtors. It is, in my opinion, quite "impossible to treat this as equivalent in any sense to 'income "'arising from' the bonds."

Lord Romer also rejected the argument that the case fell within Schedule C, and he said [5]: "In these circumstances, the "only question to be decided is whether the proceeds of sale of a "right to receive income in the future can be treated as income "for the purpose of the Income Tax Acts. The question thus "broadly stated plainly admits of but one answer; and that "answer must be in the negative. The proceeds of the sale for a "lump sum of an annuity, for instance, are capital in the hands "of the vendor and not income. And this is true even when the "subject of the sale is not the annuity for the whole duration but "the right to be paid the annuity for a number of years or even "for one year. Nor is it any the less true because the purchaser "will pay less for an annuity that will be subject to deduction of "income tax in his hands than he would pay for a tax free "annuity. Nor is it any the less true because in many cases the "net income when paid to the purchaser is not income in his "hands. In the case, for instance, of a man carrying on the "business of dealing in coupons, the sum collected by him on "cashing a coupon will be merely a trade receipt and not income. "Tax may have been deducted on payment of the coupon, but "for sur-tax purposes the interest represented by the coupon "cannot be regarded as forming part of the total income of "anybody. This is a position that frequently occurs. The net "income received by a trustee under a trust for accumulation "of income is a case in point. But it is easy to conceive cases "which, while appearing at first sight to be sales for money or "money's worth of a right to receive income in the future, are "not in reality sales at all. If a man possessed of a coupon "representing interest payable under deduction of tax hands it "to his tailor as a convenient method of paying for a suit of "clothes, the tailor, when cashing the coupon may well be "considered as doing so on behalf of his customer, and then

[5] [1938] 2 K.B. 25, 35, 44, 45.

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

Wynn-Parry J.

"paying himself out of the proceeds. The customer in such a "case could not avoid returning the gross amount of the interest "as part of his total income for sur-tax purposes. If, on the "other hand, the tailor were to accept the coupon in full dis-"charge of his account the interest that it represents would not, "when paid, be income of the customer. Still less would the "suit of clothes form part of his income."

On the reasoning of those passages and having regard to the view which I have taken of the transactions in this case, I conclude that none of the transactions in question fall under Case IV.

So far as Case V is concerned the transactions in the present case appear to me to fall within the decision in *Carter* v. *Sharon*.[6] In the case of income from foreign possessions it must be shown either that the taxpayer received it in this country or that he was entitled to it at the time it arrived in this country.

There is a passage in the speech of Lord Cave in *Foulsham* v. *Pickles*[7] to which I would desire to refer. Having stated rule 2 of Case V, Lord Cave said[8]: "From this rule it follows that, in "order to be taxable under Case V, an income arising from "possessions out of the United Kingdom must be received in the "United Kingdom either (a) from remittances payable in the "United Kingdom, or (b) from property imported into the United "Kingdom, or (c) from money or value arising from property not "imported, or (d) from money or value received on credit or on "account of remittances, property, money, or value brought or "to be brought into the United Kingdom. The word 'remit-"'tances' (which recalls the expression 'remittances from "'thence' in the corresponding rule contained in the Act of "1842) clearly refers to money remitted into the United Kingdom "from outside. The other branches of the rule all refer to "property, money or value imported or brought into the United "Kingdom, and there are no words in the rule which can com-"prise money arising and payable here. If so, the inference is "that money so arising and payable is outside the rule, and so "is not taxable under Case V at all."

I cite that passage in support of the proposition, which I do not see can be denied, that in order for Case V to operate the dollars in question in this case must be shown to have been brought into the United Kingdom. I have, however, held that it is not shown that any dollars were brought into the United Kingdom as a result of the transactions in question.

The only observation I would add is upon a passage from the speech of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[9] where he said, in considering an argument put forward by Mr. Tucker which he abandoned in the course of the case[10]:

[6] [1936] 1 All E.R. 720; 20 T.C. 229.

[7] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261.

[8] [1925] A.C. 464.

[9] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.

[10] [1952] 1 T.L.R. 917.

"There might have been another difficulty in Mr. Tucker's way "had he persisted in this argument. To succeed on it, it would "have been necessary for him to satisfy us that the 'money or "'value arising from property not imported' need not itself be "brought into the United Kingdom. It is plain from the wording "of the rule that sums cannot be said to be received in the "United Kingdom from the first, second or fourth sources unless "the source was itself payable in, imported into, or brought or "to be brought into the United Kingdom. It would be strange "if the sums received in the United Kingdom from the third "source were within the rule although the money or value was "not imported or to be imported into the United Kingdom. It "would be all the more strange since sums received in the "United Kingdom from the fourth source, i.e., 'money or value "'so received on credit or on account or in respect of . . . such "'money or value' (i.e., the third source)—could not bring the "rule into operation unless such money or value had been brought "or was to be brought into the United Kingdom. I incline, "therefore, to the view that to succeed under the rule in respect "of sums received from the third source the Crown must estab-"lish that the money or value had been brought or was to be "brought into the United Kingdom."

It is true that the point there dealt with by Lord Cohen and the opinion which he said he inclined to express was expressly reserved by Lords Morton and Tucker, though Lord Normand adopted the whole of Lord Cohen's speech. I propose for the purposes of this judgment to assume that what Lord Cohen said is strictly speaking to be regarded as obiter, but, accepting that basis, I would respectfully adopt the language of Lord Cohen as my own for the purposes of this judgment, because the analysis which he there makes appeals to my mind.

Mr. Foster relied strongly on *Scottish Mortgage Company of New Mexico* v. *McKelvie*.[11] That case has been the subject of both comment and criticism. Where it has been considered to have been rightly decided, it has been regarded as a case turning on its very special facts. Certainly it has been said that it is not to be regarded as a starting point from which to draw new inferences. Even more so, I cannot regard it as a satisfactory authority for the purpose of cutting down the relieving effect of Case IV or Case V.

During the argument, a great many authorities were referred to and carefully and exhaustively examined by Mr. Foster. I am grateful to him, and indeed also to Mr. Bucher, for the care which was bestowed upon the authorities, and I intend no disrespect to either of them, particularly to Mr. Foster, for not having traversed them seriatim. As I hope will be seen from my judgment, my decision really first and last turns on the analysis of the transactions which I have made; and upon that analysis

[11] (1886) 2 T.C. 165.

1958

THOMSON (INSPECTOR OF TAXES) v. MOYSE.

and having regard to what I conceive to be the effect of Cases IV and V, then under whichever case the matter can be said to fall no dollars representing the income of the respondent were, over the material period, brought into the United Kingdom.

For these reasons, in my view the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Vandercom Stanton & Co.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1958 *July* 21, 22, 30.

Jenkins, Parker and Pearce L.JJ.

* TEASDALE *v.* WALKER.

[Plaint No. N. 525.]

Landlord and Tenant—Business premises (security of tenure)—Occupation for purposes of tenant's business—"Mock auction" room used only in summer season—Business carried on by third party as tenant's "manager" under fictitious agreement—Premises vacated by "manager" at close of season—Application for new tenancy—Whether premises within Act of 1954*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (1), 24 (1).

On May 10, 1955, the predecessor in title of the appellant landlord let certain shop premises to the respondent tenant for one year from March 2, 1955, together with a right to erect a rostrum "for "the purpose of auctioning articles in connexion with the business "of the tenant," the tenant agreeing not to assign, underlet or part with possession.

The premises were near the front of a seaside resort, and were used for "mock auctions," being open only at Easter, Whitsun, and from July to the end of September. During these periods in 1955 and 1956 the auctions were conducted by servants or agents of the tenant who received wages or commission, the tenant receiving the profits of the business. In April, 1957, the tenant made an agreement with one G. to the effect that she would for one year "employ" G. as "manager" at a "salary" computed on the basis that G. should pay her £750, retain the whole of the business profits, conduct the business as he thought fit and without her interference during the usual periods, and discharge all expenses and outgoings including rent and rates; he also received an option to renew the agreement for the year 1958. G. conducted the business accordingly, and at the end of the season vacated the premises, which thereafter as usual remained closed.

On August 27, 1957, the landlord gave notice under section 25 of the Landlord and Tenant Act, 1954, requiring the tenant to give up possession on March 2, 1958. The tenant made an application to the court on December 17, 1957, pursuant to section 24 (1) [1] of

[1] Landlord and Tenant Act, 1954, s. 23 (1): "Subject to the provisions "of this Act, this Part of this Act "applies to any tenancy where the "property comprised in the tenancy "is or includes premises which are "occupied by the tenant and are so "occupied for the purposes of a busi-"ness carried on by him or for those "and other purposes." S. 24 (1):

the Act for a new tenancy, which the landlord opposed on the ground, inter alia, that the tenant was not in occupation of the premises for the purpose of a business carried on by her, as required by section 23 (1). After a hearing on March 2, 1958, the county court judge granted a new lease. On appeal:—

Held, (1) that the form of the agreement with G. as "manager" was a sham concocted in an endeavour to preserve the tenant's rights under the Act, and to avoid a breach of her obligation not to part with possession, so that during G.'s period of activity the premises were not occupied by her for the purposes of her business and were not within the Act; (2) that, whether the material date for consideration was that of the tenant's application to the court, or that of the hearing below, or that of the expiration of the landlord's notice, the tenant could not, after G. had left the premises, be considered to have resumed occupation for the purposes of her business, so that the premises had ceased to be premises to which the Act applied.

Pegler v. *Craven* [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685 applied.

APPEAL from Judge Shove, sitting at Skegness and Spilsby County Court.

The following statement of facts is taken substantially from the judgment of the court.

The appellant landlord was owner of shop premises at Skegness. By a written agreement of May 10, 1955, the then owner (who was the present landlord's wife and who had since died) let the premises to the respondent tenant. By clause 1: "The "landlord lets and the tenant takes all that lock-up shop and "cellar beneath situate on the ground floor of the premises known "as 'The Windsor Grill,' No. 89, Lumley Road, Skegness, in "the County of Lincoln and together with the right for the tenant "at her own expense to erect a rostrum inside the said demised "premises for the purpose of auctioning articles in connexion with "the business of the tenant . . . to hold the same unto the tenant "from the second day of March, 1955, for one year paying there-"fore the yearly rent of £400 by two equal instalments on the "seventh day of June, 1955, and the second day of August, "1955." By clause 2 (4) the tenant agreed not to assign, underlet or part with the possession of the demised premises or any part thereof.

The premises were used for "mock auctions." A so-called auctioneer, without holding a regular auction or receiving bids in the normal sense, collected a crowd about his rostrum and managed by amusing patter and skilful salesmanship to sell the articles of his stock to the various members of the crowd at prices which he induced them to believe were very cheap. These premises were near the sea front. Their use, being dependent on

"A tenancy to which this Part of this "Act applies shall not come to an "end unless terminated in accord-"ance with the provisions of this Part "of this Act; and, subject to the pro-"visions of section 29 of this Act, "the tenant under such a tenancy "may apply to the court for a new "tenancy—(*a*) if the landlord has "given notice under the next follow-"ing section to terminate the tenancy ". . ."

C. A.
1958
TEASDALE
v.
WALKER.

holiday crowds, was limited to certain seasons. They were only wont to open for about 15 weeks in a year, namely, a week at Easter, a week at Whitsun and the three months of July, August and September. For the remainder of the year they were unused.

Before 1955 one Arnold had for some time been tenant of these premises and conducted mock auctions there on his own account. In 1955 the respondent tenant provided money for the business, Arnold gave up his tenancy and she entered into the tenancy agreement of May 10 for one year. She carried on the business there during the summers of 1955 and 1956.

In 1955 the auctions were conducted by Arnold, who received a wage, and one Freedman, who received a commission and percentage on profits. The resulting profits were paid to the tenant. In 1956 she employed one Davis to act as auctioneer. He was paid on the same basis as Freedman. Again the profits were paid to her. In 1957, however, a change of procedure took place. Owing to the illness of her mother the respondent tenant had to go to live in Derby. She, therefore, entered into a written agreement with one Glassman by which he became entitled to occupy the premises and to conduct the mock auctions on his own account on payment to her of a sum of £750 for the year. The agreement in its material parts provided as follows: "This "agreement is made the (blank) day of April, 1957, between "Gladys Teasdale (widow) (hereinafter called 'the employer') of "the one part and Nathan Glassman (hereinafter called 'the "'manager') of the other part whereby it is agreed as follows:— "(1) The employer shall employ the manager as manager of her "shop at 89, Lumley Road, Skegness, in the County of Lincoln- "shire for a period of one year from the date hereof at a salary "computed in accordance with the terms hereunder specified. "(2) In consideration of such appointment the manager hereby "agrees to pay to the employer the sum of £750 on the signing "hereof. (3) The emoluments of the manager shall consist of "the whole of the profits of the business except the said sum of "£750 and the manager shall have full liberty to conduct the "business of the employer in whatever manner he considers fit "without any hindrance or interference on the part of the "employer. (4) The manager shall pay for all the goods supplied "for the purpose of the business and shall discharge all the out- "goings of the shop premises including the full rent for the year "commencing March, 1957, and the rates and water rates and "any other outgoings of a recurring nature in the like period. "(5) The manager hereby indemnifies the employer against any "liability arising in respect of his non-payment of any such "outgoings or non-payment for goods supplied. (6) It is hereby "declared that the said tenancy of the shop premises being "dependent of the application of the Landlord and Tenant Act. "1954, and it is expressly agreed that in the event of circum- "stances arising whereby the employer is deprived of the use of "the shop or of the right to grant this agreement then the

"agreement shall be null and void and all the moneys paid "hereunder shall be repaid to the manager forthwith." Clause 7 provided for the repayment of certain sums on the death of the manager before or during the currency of the agreement. "(8) For the purpose of this agreement the active season "is defined as the duration of the following periods: Easter "week-end. Whitsun week-end, July 1 until October 1, 1957. "(9) It is hereby expressly agreed and declared that in the event "of the employer having ownership and control of the shop "during the seasons of Easter, Whitsun and Summer of 1958 "that the manager shall have the first option to carry out similar "transaction for that period as in respect of the current period "on the same terms as are herein contained."

Glassman carried on business under that agreement during the season in 1957. He locked up the premises in September or October and the keys were returned to the landlord and then to the tenant. On August 27, 1957, the landlord gave notice under section 25 purporting to determine the tenancy on March 2, 1958. On September 20, 1957, the tenant notified the landlord that she would not be willing to give up possession of the property. On December 17, 1957, she filed an application under section 24 (1) of the Landlord and Tenant Act, 1954, asking for a new lease for seven years at a rent of £400 per annum. The landlord opposed the grant of a new tenancy. After a hearing on February 21, 1958, the county court judge on March 11 ordered the grant of a new tenancy at a rent of £420 per annum. The landlord appealed.

Paul Curtis-Bennett for the landlord.
E. Ashley Bramall for the tenant.

The following cases which were cited in argument are not referred to in the judgment: *Stening* v. *Abrahams* [2]; *Abrahams* v. *MacFisheries Ltd.* [3]; *Harewood Hotels Ltd.* v. *Harris* [4]; *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors* [5]; *Fitton* v. *Wood* [6]; *Peebles* v. *Crosthwaite.* [7]

Cur. adv. vult.

July 30. JENKINS L.J. The judgment about to be read by Pearce L.J. is the judgment of the court.

PEARCE L.J., after stating the facts, continued: Of the points relied on by the landlord in opposition to the grant of a new tenancy only two are now material. (1) It was contended that the tenant was not in occupation of the premises for the purposes

[2] [1931] 1 Ch. 470.
[3] [1925] 2 K.B. 18.
[4] [1958] 1 W.L.R. 108; [1958] 1 All E.R. 104.
[5] [1956] 1 Q.B. 91; [1955] 3 W.L.R. 523; [1955] 3 All E.R. 365.
[6] (1875) 32 L.T. 554.
[7] (1897) 13 T.L.R. 198.

C. A.
1958
TEASDALE
v.
WALKER.

of a business carried on by her as required by section 23 (1) and, therefore, the tenancy was not one that enabled her to make an application under section 24 (1). Section 23 (1) reads as follows: "Subject to the provisions of this Act, this Part of this Act "applies to any tenancy where the property comprised in the "tenancy is or includes premises which are occupied by the "tenant and are so occupied for the purposes of a business "carried on by him or for those and other purposes." Section 24 (1) reads: "A tenancy to which this Part of this Act applies "shall not come to an end unless terminated in accordance with "the provisions of this Part of this Act; and, subject to the "provisions of section 29 of this Act, the tenant under such "a tenancy may apply to the court for a new tenancy—(*a*) if the "landlord has given notice under the next following section to "terminate the tenancy"—(*b*) does not apply here.

(2) Alternatively, it was contended that the tenant ought not to be granted a new tenancy because she had broken her obligations under the tenancy. Section 30 (1) reads: "The grounds "on which a landlord may oppose an application under subsec-"tion (1) of section 24 of this Act are such of the following "grounds as may be stated in the landlord's notice under "section 25 of this Act or, as the case may be, under subsection "(6) of section 26 thereof, that is to say"—(*a*) and (*b*) do not apply—"(*c*) that the tenant ought not to be granted a new "tenancy in view of other substantial breaches by him of his "obligations under the current tenancy, or for any other reason "connected with the tenant's use or management of the "holding."

Here it is said the tenant has parted with possession of the premises contrary to clause 2 (4) of the tenancy agreement of May 10, 1955. The judge dealt with the question whether the tenant had sub-let, but he did not deal specifically with the question whether there had been a "parting with possession," words which, the appellant argues, are deliberately intended to cover something less than sub-letting. There is a further alternative point in the appeal in that it is said on behalf of the landlord that the judge fixed the rent of the new tenancy at too low a figure.

The first point depends on whether at the material times the premises were occupied by the tenant and were so occupied for the purposes of a business carried on by her. For the landlord it was argued that the material times are the dates of the filing of the application, namely December 17, 1957, and the hearing on February 21, 1958. For the tenant it was argued that March 2, 1958, is the material date. But we do not think that the situation differed materially at any of these dates, since by December 17, 1957, Glassman had already returned the keys of the premises. Unless the premises were so occupied by the tenant at the material dates, the Act had no application and the court could not make the order.

Mr. Curtis-Bennett for the appellant argues that under her agreement with Glassman the tenant had no part in the carrying on or control of the business or in whether it made a profit or a loss. She was, therefore, not in occupation of the premises for any business purpose at all. Further he argues that if it can be said that the tenant was occupied in the business of letting the concession of carrying on mock auctions or licensing another to occupy the premises, it was a business whose only aim was to exclude herself from possession of the premises and is, therefore, not within the Act. See the observations of Jenkins L.J. in *Bagettes Ltd.* v. *G. P. Estates Ltd.*[1] He referred to the unreported case of *Bobbio* v. *Watney, Combe, Reid & Co. Ltd.*,[2] where Parker L.J. in the leading judgment said that a somewhat similar arrangement was a subterfuge to avoid a breach of a covenant against sub-letting and parting with possession, and that it clearly amounted to parting with possession. In that case, however, the tenant had granted exclusive occupation and the facts of the case were thereby more strongly in the landlord's favour than the facts in this case.

Mr. Bramall for the tenant argues that one must look at the whole picture of the tenant's activities to get a fair perspective of her arrangement with Glassman. One must look at the situation on March 2, 1958, when the tenancy is alleged to have been determined to see whether she was then in occupation of the premises and was so for the purposes of a business carried on by her. The arrangement with Glassman had been only another variant of the varying arrangements she had made in previous years when she was undoubtedly in occupation for the purposes of a business carried on by her. The Glassman agreement contained nothing about repairs or inspection of the premises. To hold that it resulted in her parting with her occupation is to confuse the premises with the business. Though the tenant has ceased to be in occupation of the business, she remained in occupation of the premises, and, so remaining, she was there for the purposes of a business carried on by her, namely, letting out the auction concession. He instances the case of the owner of a dance hall who parts with control when someone hires it and runs a dance there. But we doubt if that example is really helpful, since if such a person let out his dance hall for the whole year with an option of renewal, he would, we think, be faced with the same arguments as face the tenant in this case. The application, it should be noted, alleges that the tenant's business is "sale by retail of fancy goods" and not the letting out of the auction concession. He argues that Glassman's return of the keys to the tenant showed that his occupation was a transitory matter and thereafter the tenant resumed the thread of her business of mock auctions which had a continuing existence. By March, 1958, Glassman had come and gone and she

[1] [1956] Ch. 290, 302; [1956] 2 W.L.R. 773; [1955] 3 All E.R. 451.

[2] Unrep. C.A. July 13, 1955.

C. A.
1958
TEASDALE
v.
WALKER.

was again in full occupation. The interruption of Glassman's year does not end the tenant's business. Section 24 (3) gave the landlord an opportunity to end the tenancy on cesser of the tenant's business by serving a three-six months' notice, but he did not avail himself of that since he served a notice of more than six months under section 25.

After considering the agreement between Glassman and the tenant, the judge said this: "On the face of it, it purports to be "an agreement for the employment of Glassman as manager of "Mrs. Teasdale's shop at 89, Lumley Road. I think, however, "that I am entitled, and indeed bound, to scrutinize the agree-"ment, as in cases under the Rent Restrictions Acts, in order "to see whether it is genuine and not a mere subterfuge for "avoiding the Act of 1954. The form of the agreement is at "first sight somewhat strange. It provides that Mrs. Teasdale "shall employ Glassman as manager of her shop at a salary "computed in accordance with the terms specified. The "'manager' agrees in consideration of that appointment to pay "to the employer the sum of £750. It is then provided that the "emoluments of the manager shall consist of the whole of the "profits except the said sum of £750 and that he is to have full "liberty to conduct the business of the employer in whatever "manner he considers fit without any hindrance or interference "on her part. The manager is to pay for all goods supplied for "the purpose of the business and discharge all outgoings, "including rent and rates, and is to indemnify the employer in "respect of the matters set out in the agreement. By clause 6 "it is declared that the tenancy of the shop (i.e. Mrs. Teasdale's "tenancy) is dependant on the application of the Landlord and "Tenant Act, 1954, and provided that in the event of her being "deprived of the use of the shop or the right to grant the "agreement, the agreement shall be null and void and the £750 "be repayable to the manager."

He then refers to certain further provisions and continues: "In my view the agreement is genuine in the sense that it was "not a mere subterfuge designed for the purpose of preserving "Mrs. Teasdale's rights under the Act. Glassman said that "Arnold, who negotiated the arrangement, and signed the "agreement on behalf of Mrs. Teasdale, said that the agreement "must be drawn up designating Glassman as manager because "Mrs. Teasdale was not allowed to sub-let. He further said that "the agreement was a 'cover-up.' It is, I apprehend, legitimate "for parties to devise arrangements so as to keep themselves "within the four corners of the Act, provided that such "agreements are not merely colourable devices for evading its "provisions. In my opinion this was not such a mere colourable "device. Whether or not 'manager' is a strictly appropriate "way of describing Glassman's position, as to which I will say "more hereafter, it seems to me plain that Mrs. Teasdale did "not give up her right to enter upon the premises whenever she

"liked so long as she did not interfere with the conduct of the "auctions by Glassman. She said she had keys or a key to the "premises and I cannot see that she was in any way precluded "from freely entering the premises either during or out of the "'active season' and she testified that she did in fact visit "the premises about three times in 1957. I do not think it is "possible to regard the agreement as creating a sub-tenancy on "the face of it or as a cloak therefor. In my view, therefore, "whether or not the relationship of employer and employee, or "of principal and agent existed between Glassman and Mrs. "Teasdale, the latter was in occupation of the premises."

We cannot agree with the judge that that agreement was not a sham. So far as it alleged that the tenant was the employer and Glassman was her manager, it seems to us that it was a mere fiction. She had no control whatever over Glassman's method of conducting the business. She had expressly agreed not to interfere. She had no interest in the financial result. She had received her £750; and whether he made a profit or a loss did not concern her. It seems clear to us that it was cast in those misleading terms so that it might take a form that would preserve the tenant's rights under the Act, and avoid putting her in breach of clause 2 (4) of the tenancy agreement.

The plain effect of it was that she had sold to him for £750 the right to occupy the premises for his mock auctions for a year with an option for a similar arrangement the year following, and he took over all liability in respect of outgoings during that year. Did she herself in spite of that remain in occupation of the premises for the purposes of a business carried on by her? In our view the answer must be No. It is true that she had a right to resort to the premises. It may be argued that technically she could have carried on some business activity that did not conflict with Glassman's auctions, but the agreement certainly does not indicate that such a thing was ever contemplated by the parties. In fact she did not do so. It seems to us that during the agreement with Glassman such theoretical residue of occupation as remained in her was not sufficient to give to her the protection of the Act. Nor, if she had any such occupation, was it for purposes of any business. What business can it really be said that she was carrying on? In our view none. She certainly was not carrying on the business of selling fancy goods by retail, which is alleged in her application, since Glassman was carrying on that business.

In *Pegler* v. *Craven*,[3] the headnote reads: "The plaintiff was "the tenant under a lease of premises comprising living accom-"modation and a shop. The business of the shop was carried "on by a company to which the landlord had assigned the "goodwill at the request of the tenant; but the company paid "no rent to the tenant and the shares of the company were held

[3] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.

C. A.
1958
TEASDALE v. WALKER.

"by the tenant and his wife, some relations and friends and he "was the managing director. He held alone rather less than "half the shares of the company. *Held*, that the plaintiff was "not the occupier of the shop seeing that the business of the "shop was the business of the company and was not the tenant's "business. He was not, therefore, entitled to the grant of a "new lease under the Act."

Jenkins L.J. said[4]: "I quite agree that the conception of "'occupation' is not necessarily and in all circumstances con-"fined to the actual personal occupation of the person termed "the occupier himself. In certain contexts and for certain "purposes it obviously extends to vicarious occupation by a "caretaker or other servant or by an agent. Clearly the tenant "of a retail shop who through persons in his employment carries "on business there for his own benefit under a tenancy with "respect to which he was tenant, would properly be described "as the occupier of the shop and the person carrying on business "there, though not himself in actual personal occupation of it. "But I cannot regard the words 'the occupier of a shop' in "section 10 (1) of this Act as going so far as to include as "occupier, within the meaning of the subsection, a tenant who "is not himself carrying on business on the premises in question "at all either personally or by a servant or agent, but who is "tenant of premises, the shop portion of which is in fact wholly "taken up with the stock and the business of a limited company, "that is, of an entirely distinct and different legal person. . . . "Further, it may be said that the reference to occupation by a "person employed by the tenant for the purposes of the business "carried on in the shop in itself suggests that the terms "'occupier' and 'occupation' are not used in the section in the "unrestricted sense demanded by the argument put forward for "Mr. Pegler; for according to that argument, occupation, not "merely by the tenant's servant, but by any third party with "the tenant's consent, would be occupation by the tenant himself "for the purposes of the section."

Again, he said[5]: "Mr. Eastham, who presented us with a "careful and persuasive argument the other way, endeavoured "to satisfy us that the expression 'occupier' in section 10 (1) "extended (as I understood his argument) to any person carrying "on business on the premises by permission of the tenant, "whatever the interest of the tenant in the business might be, "and even if the tenant had no interest in it at all. He founded "that argument on the theory that where a tenant entitled to the "possession of premises grants a third party a licence to occupy "those premises, then the premises are in the occupation of the "tenant by his licensee. I think the answer to that argument "is that the meaning of the word 'occupation' is one which "must be determined by reference to the context in which the

[4] [1952] 2 Q.B. 69, 74. [5] Ibid. 76.

"expression is used; and in my view the context makes it "reasonably plain that occupation by a third party under a "licence otherwise than for the purpose of carrying on a business "belonging to the tenant himself does not suffice to make the "tenant the occupier of a shop under a tenancy within the "meaning of the Act."

It is true that in that case the Act under consideration was the Leasehold Property (Temporary Provisions) Act, 1951, where the relevant words were: "This section applies to a tenancy the "subject of which consists of a shop and of living accommodation "occupied wholly or mainly by the tenant or by a person who is "employed by the tenant for the purposes of the retail trade or "business carried on in the shop." But in the Landlord and Tenant Act, 1954, the words of section 23 (1), when read in the light of sections 23 (3) and 23 (4), are not greatly dissimilar, and those passages from the judgment of Jenkins L.J. are applicable here.

Section 23 (3) reads as follows: "In the following provisions "of this Part of this Act the expression 'the holding,' in relation "to a tenancy to which this Part of this Act applies, means the "property comprised in the tenancy, there being excluded any "part thereof which is occupied neither by the tenant nor by a "person employed by the tenant and so employed for the "purposes of a business by reason of which the tenancy is one "to which this Part of this Act applies." Section 23 (4) reads: "Where the tenant is carrying on a business, in all or any part "of the property comprised in a tenancy, in breach of a pro-"hibition (however expressed) of use for business purposes which "subsists under the terms of the tenancy and extends to the "whole of that property, this Part of this Act shall not apply to "the tenancy unless the immediate landlord or his predecessor in "title has consented to the breach or the immediate landlord "has acquiesced therein."

But there are further matters that fall to be considered. It was contended in this court for the first time that even if the Act did not apply to these premises during the time of Glassman's occupation, it applied to them at material times thereafter. Now these premises were brought under the Act by section 24 (1), which reads: "A tenancy to which this Part of this Act applies "shall not come to an end unless terminated in accordance with "the provisions of this Part of this Act." Subsection (3) provides: "Notwithstanding anything in subsection (1) of this "section (*a*) where a tenancy to which this Part of this Act "applies ceases to be such a tenancy, it shall not come to an "end by reason only of the cesser, but if it was granted for a "term of years certain and has been continued by subsection (1) "of this section then (without prejudice to the termination "thereof in accordance with any terms of the tenancy) it may "be terminated by not less than three nor more than six months' "notice in writing given by the landlord to the tenant; (*b*) where,

C. A.
1958
TEASDALE
v.
WALKER.

"at a time when a tenancy is not one to which this Part of this "Act applies, the landlord gives notice to quit, the operation of "the notice shall not be affected by reason that the tenancy "becomes one to which this Part of this Act applies after the "giving of the notice."

The words "notice to quit" are defined by section 69 as meaning "a notice to terminate a tenancy (whether a periodical "tenancy or a tenancy for a term of years certain) given in "accordance with the provisions (whether express or implied) of "that tenancy."

It is, we think, clear that during Glassman's occupation a three to six months' notice could have been given, and the fact that the tenancy becomes one to which the Act applies (e.g., by subsequent resumption by the tenant of occupation for the purposes of a business carried on by her) would not have affected the operation of that notice (section 24 (3) (*b*)). But the notice in fact given was a notice in excess of six months under section 25 (1) and that section has no such provision as section 24 (3) (*b*) to prevent the notice being affected by the fact that the tenancy subsequently becomes one to which the Act applies.

If, therefore, in this case at the material dates the tenancy has once again, after the interlude of Glassman's occupation, become a tenancy to which the Act applies, the tenant is entitled to apply for a new tenancy.

If one looks at the position as it existed on December 17, the date of the application, or on March 2, 1958, the date of the expiry of the notice under section 25, were they then premises to which the Act applies or, in other words, were they occupied by the tenant for the purposes of a business carried on by her?

Where premises are only occupied during seasonal periods, that question has additional difficulties. It must, we think, be a question of fact and degree whether premises that, for instance, are used only for summer purposes can be said to be so occupied during the winter months. The answer to the question will no doubt depend partly on the length of the gap between the intermittent activities, especially in view of the past history of the occupation. If the tenant in this case had been in occupation for the purposes of a business carried on by her during the summer season of 1957, as well as those of 1955 and 1956, she would clearly, we think, be held to be in such occupation in the inactive months in the winter and spring of 1957–8. But in 1957 she had by the agreement with Glassman ceased her occupation for the purposes of a business carried on by her and broken the thread of her business.

The inference of continuous occupation, that during the vacant months of winter she could formerly successfully ask the court to draw in her favour from her summer occupation for the purposes of her business, is no longer available to her. We are asked to draw that inference from her answer given in evidence: "If I get tenancy and Glassman does not exercise option Arnold

"will carry on" (presumably she meant as her agent). "I have "the keys." In our view, particularly in view of the sham agreement with Glassman, that evidence is not sufficient to support the inference. She can hardly complain if her more recent activities are taken as a better guide than her earlier ones, especially since there is no evidence that she was going to give up living at Derby. Once the premises have ceased, as did these, to be premises to which the Act applies, some clearer indication is needed to bring them again within the Act. Indeed, we doubt if a mere intention to restart such a business in the coming season (a fortiori if it were only a conditional intention) would be enough to bring the premises again within the Act when once the thread of continuity has been broken and the premises have ceased to be within it. They were not then occupied by her for the purposes of any business carried on by her and they had not been so occupied during the preceding season. In our view, notwithstanding Mr. Bramall's able and forceful argument, the premises are not shown to be within the Act either on December 17, 1957, or on February 21, 1958, or on March 2, 1958, and the tenant's application was, therefore, ill founded.

It, therefore, becomes unnecessary to consider the question whether the judge should have refused her application on the ground of her alleged breach of agreement not to part with possession.

In our view the appeal should be allowed.

Appeal allowed.

Solicitors: *Kennedy, Genese & Syson, for Hodgkinson & Beevor, Newark-on-Trent; Beach & Beach.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* SERENE SHOES LTD.

1958
Oct. 7.
Vaisey J.

[No. 00681 of 1958.]

Company—Winding up—Voluntary liquidation—Report by official receiver—Whether appropriate—Meaning of "the official receiver"—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 256 (1) (2), 307 (1) (2).

The liquidator and the three sole contributories of a company undergoing a voluntary winding up had sought an order under section 307 (1) of the Companies Act, 1948, for the winding up to be stayed. The registrar ordered the official receiver to furnish to the court a report pursuant to section 256 (2) of the Act. Upon an

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

1958

Serene Shoes Ltd., *In re.*

application by the liquidator and the contributories for this order to be discharged or varied:—

Held, the order was bad on the face of it and unenforceable, in that it did not indicate who was meant by the term "the official "receiver," there being more than one.

Semble, that the procedure of calling for a report from the official receiver in accordance with the compulsory winding up procedure of section 256 (2) is inapplicable in a voluntary winding up.

Motion.

Serene Shoes Ltd. was incorporated on July 7, 1947, and on June 1, 1957, a resolution was passed for the winding up of the company. By originating summons dated August 27, 1958, the liquidator and the three sole contributories sought an order that "all further proceedings in the winding up of the "said company be stayed or for such further or other orders "as to the court should seem meet." Mr. Registrar Bowyer, purporting to act under section 307 [1] of the Companies Act, 1948, ordered that "the official receiver do furnish to the court a "report pursuant to section 256 (2)" [2] of the Act, and adjourned the hearing of the summons. The liquidator and the three sole contributories now applied for the order of the registrar to be discharged or varied.

Bryan Clauson for the applicants.

Denys Buckley appeared as amicus curiae.

The only case cited in argument is referred to in the judgment.

Vaisey J. This is an application by way of a motion to discharge, or alternatively to vary, an order made by Mr. Registrar Bowyer on September 12, 1958. What the order directs to be done is this: "The official receiver do furnish "to the court a report pursuant to subsection (2) of section 256 "of the Companies Act, 1948." A very interesting discussion

[1] Companies Act, 1948, s. 307: "(1) The liquidator or any contributory or creditor may apply to the "court to determine any question "arising in the winding up of a company, or to exercise . . . all or any "of the powers which the court might "exercise if the company were being "wound up by the court. (2) The "court, if satisfied that the determination of the question or the "required exercise of power will be "just and beneficial, may accede "wholly or partially to the application on such terms and conditions "as it thinks fit or may make such "other order on the application as it "thinks just."

[2] S. 256: "(1) The court may at "any time after an order for winding "up, on the application either of the "liquidator or the official receiver or "any creditor or contributory, and on "proof to the satisfaction of the court "that all proceedings in relation to "the winding up ought to be stayed, "make an order staying the proceedings, either altogether or for a "limited time, on such terms and "conditions as the court thinks fit. "(2) On any application under this "section the court may, before "making an order, require the official "receiver to furnish to the court a "report with respect to any facts or "matters which are in his opinion "relevant to the application."

has arisen on that on a point which was considered quite recently by the Court of Appeal in *In re Campbell Coverings Ltd.*[1]

That point may be summarized thus: section 256, which gives the court power to stay a winding up, contains in subsection (2) a provision that on any application made under that section "the court may, before making an order, require the "official receiver to furnish to the court a report with respect "to any facts or matters which are in his opinion relevant to "the application." That is the first of a fasciculus of sections which are headed "General powers of court in cases of winding "up by court." Both subsection (1) and subsection (2) of section 256 are perfectly apt and easy to apply in the case to which the section normally applies, that is, the case of a winding up by the court. The difficulty arises when one goes to section 307.

[His Lordship read section 307 (1) and (2), observing that the expression "just and beneficial" in subsection (2) resembled the more familiar expression "just and equitable" and that he did not know the difference between them, and continued]: The short question is whether section 307 introduces into the machinery of voluntary winding up the provisions of section 256 to which I have already referred. It is under those two sections that the order of the registrar was made.

Mr. Clauson has pointed out various difficulties in fitting the provisions of section 256 into the body of voluntary winding up procedure. He points out in the first place that subsection (2) of section 256 refers to "any application under this section." That must mean section 256. This present application under which the order complained of was made was not "under this "section" at all but under the powers arising from section 307.

Then there is a further curious point, namely, that the order which was made under section 256 requires "the official receiver "to furnish to the court a report" with respect to certain matters therein mentioned. What is meant by the term "official "receiver"? It is an expression which is quite out of place if one is dealing with a voluntary winding up, and, for the reasons referred to in the decision of the Court of Appeal in the case I have already mentioned, it looks very much as though this is procedure which could not be dragged into, if I may use a colloquial expression, the machinery of voluntary winding up, which simply does not fit.

When I look at the order which was made, which is now sought to be set aside, I find that what the order says is this: "It is ordered that the official receiver do furnish to the court "a report." I pause to inquire, what official receiver? The official receiver as such does not come into a voluntary winding up at all. I am informed that there are in fact no fewer than six official receivers. Which of them is supposed to furnish

[1] [1953] Ch. 488; [1953] 2 W.L.R. 1135; [1953] 2 All E.R. 74.

1958

SERENE SHOES LTD., *In re.*

Vaisey J.

the court with his report I have no power to discover. The truth is, I think (without doing more than pointing out the difficulty of discovering the basis of the jurisdiction under which this order is made), that this order is bad on the face of it. Nobody knows which of the number of official receivers is the person indicated and therefore obliged to comply with the direction that is contained in the order. I think that the order is unworkable and cannot be treated as in any way dealing with anything ascertainable or imposing any obligation which could possibly be enforced by the court.

For that reason alone, the impossibility of finding out exactly what the order means and what is intended by the expression "official receiver," I think I must on this application set aside the order and declare it to be a nullity and therefore one which should be disregarded.

Application allowed.

Solicitors: *Lieberman, Leigh & Co.; Solicitor to the Board of Trade.*

[BIRMINGHAM ASSIZES.]

1958 *July* 15, 16.

Karminski J.

* WILSON *v.* WILSON.

[1958 D. No. 138.]

Husband and Wife—Practice—Submission of no case—Divorce—Submission of no case by husband—Election.

The established practice of the Divorce Division is that counsel making a submission that there is no case to answer must be put to their election whether or not to call evidence, and although the court has a discretion not to put counsel to their election, it should only be sparingly exercised in quite exceptional cases.

Alexander v. *Rayson* [1936] 1 K.B. 169; 52 T.L.R. 131; and *Yuill* v. *Yuill* [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183 applied.

Gilbert v. *Gilbert and Abdon* (*Adams intervening*) [1958] P. 131; [1958] 2 W.L.R. 8; [1957] 3 All E.R. 604 and *Lance* v. *Lance and Gardiner* [1958] P. 134n.; [1958] 2 W.L.R. 316n.; [1958] 1 All E.R. 388n. distinguished.

DEFENDED PETITION by the wife for divorce on the ground of cruelty.

The wife by her petition alleged cruelty by the husband, which he by his answer denied. At the conclusion of the wife's case counsel for the husband submitted that there was no case to answer and, further, that he was entitled to make such a submission without being put to his election whether or not to call

---

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

evidence. The present report is concerned only with the ruling on this submission.

M. E. Holdsworth for the wife.
A. W. M. Davies for the husband.

No cases were cited other than those referred to in the judgment.

KARMINSKI J. I shall deal first with the preliminary submission by counsel for the husband, that he is entitled in this case to make a submission of no case to answer at the conclusion of the wife's case, without himself being put to the election of whether or not to call evidence.

The practice in this Division on that matter has, I think, to some extent changed in the last quarter of a century. Counsel for the wife, in opposing this submission, conceded that there is a discretion in the court to abstain from putting counsel, who makes the submission, to his election, because after all, the matter is one of practice only, and is not a rule of law, but he argued with force that, although it is only a matter of practice, it should not be departed from except in circumstances of a somewhat unusual nature.

As I understand and recollect the practice in this Division, the true position is this: Before the decision of the Court of Appeal in *Alexander* v. *Rayson*,[1] there was some doubt whether in matrimonial suits counsel submitting no case to answer should be put to his election to call no evidence, but after that decision it became the general practice, that, although necessarily the court had a judicial discretion in the matter, nevertheless counsel should be put to his election before making his submission.

In 1944 there came before the Court of Appeal a matrimonial suit, *Yuill* v. *Yuill*,[2] in which the facts were very different from the present, and, indeed, so were the issues, the charge in the petition in that case being one of adultery. Lord Greene M.R., reading the judgment of the Court of Appeal said[3]: "The "practice which has been laid down amounts to no more than a "direction to the judge to put counsel who desires to make a sub-"mission of no case to his election, and to refuse to rule unless "counsel elects to call no evidence. Where counsel has so "elected he is, of course, bound."

There the matter seems to have rested until quite recently, where in two decisions of this Division, one by Sachs J., and the other by Mr. Commissioner Latey, it was decided to allow counsel to make a submission of no case without putting him to his election. The cases are *Gilbert* v. *Gilbert and Abdon* (*Adams*

[1] [1936] 1 K.B. 169; 52 T.L.R. 131.

[2] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183.

[3] [1945] P. 15, 18.

1958

WILSON
v.
WILSON.

Karminski J.

intervening)[4] and *Lance* v. *Lance and Gardiner*.[5] Both those cases are to be distinguished from the present, in that they related to the position of a co-respondent or an intervener when charges of adultery were made. Both the judge and the commissioner referred to section 5 of the Matrimonial Causes Act, 1950, which deals expressly with the position in petitions on the grounds of adultery in relation to dismissing the co-respondent or the intervener from the suit where there is not sufficient evidence against him or her, but so far as the industry of counsel has shown it was not until the last assizes here in March that counsel was allowed to make a submission without being called upon to elect. That was in *Salmon* v. *Salmon*,[6] a husband's petition on the ground of cruelty, in which at the end of the husband's case it was submitted by Mr. Davies, who appeared in that case as in the present, that there was no case to answer. After some discussion and argument Barnard J. ruled that he was not in that case bound to put counsel to his election.

Unfortunately I have no record of the observations of Barnard J., but I am informed by Mr. Davies—and, of course, I accept it—that they were quite brief, and that there was in fact no very full argument. I must not for one moment assume that one with the very long and close experience of the practice in this Division of Barnard J. was not aware of the decided cases, but he did not have the advantage, which I have had, of listening to a full and very helpful argument by both counsel.

I pay the very closest attention to any decision of Barnard J., but I think I ought not, in a case of this kind, to depart from the well-established practice of this Division, now maintained for over 20 years, that counsel in making a submission must be put to their election. There is, as counsel for the wife at once admitted, a discretion, but I am satisfied that that discretion should be somewhat sparingly exercised, and then only in quite exceptional circumstances. There are not, as I see it, any exceptional circumstances in this case, except that I thought it right to say, at the conclusion of the wife's case, that I felt it was a very weak case indeed on the evidence.

Having heard the arguments, I have come to the conclusion that this is a case where I ought to follow the usual practice, and put counsel for the husband to his election.

Solicitors: *Blackham, Maycock & Hayward, Birmingham; Charles C. Ladds, Birmingham.*

[4] [1958] 2 W.L.R. 8; [1957] 3 All E.R. 604.

[5] [1958] 2 W.L.R. 316n.; [1958] 1 All E.R. 388.

[6] Unreported, Barnard J., Birmingham Assizes, March 20, 21, 1958.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* RANK ORGANIZATION LTD.

1958
Oct. 10.

Lord Parker C.J., Cassels and Streatfeild JJ.

Town and Country Planning—Purchase notice by owner—Minister's permission for other development—Limitation on Minister's power to direct development other than that for which permission refused—Undeveloped site—Permission to develop as shops with residential accommodation over refused—Permission granted for development as residential accommodation—Whether Minister's order valid—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 19 (2), *proviso* (*b*), (2A); *Sch. III—Town and Country Planning Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 70.

The owners of a vacant site bordering a main trunk road, who were refused permission to develop by erecting shops with living accommodation over, served a purchase notice on the appropriate local authority pursuant to section 19 (1) of the Town and Country Planning Act, 1947 (as amended).[1] The Minister of Housing and Local Government, to whom the notice was transmitted, refused to confirm it. He took the view that the land could be rendered capable of reasonably beneficial use by the carrying out of development for residential purposes and, purporting to exercise his power under proviso (*b*) to section 19 (2) of the Act, directed that

[1] Town and Country Planning Act, 1947, s. 19 (as amended): "(1) "Where permission to develop any "land is refused, whether by the local "planning authority or by the "Minister, on an application in that "behalf made under this Part of this "Act, . . . then if any owner of the "land claims—(*a*) that the land has "become incapable of reasonably "beneficial use in its existing state; "and . . . (*c*) . . . that the land cannot "be rendered capable of reasonably "beneficial use by the carrying out "of any other development for which "permission has been or is deemed to "be granted under this Part of this "Act, or for which the local planning "authority or the Minister have "undertaken to grant such permission, "he may, . . . serve on the council of "the county borough or county district in which the land is situated a "notice (hereinafter referred to as a "'purchase notice') requiring that "council to purchase his interest in "the land in accordance with the provisions of this section.

"(2) Where a purchase notice is "served on any council under this "section, that council shall forthwith "transmit a copy of the notice to the "Minister, and subject to the following provisions of this section the "Minister shall, if he is satisfied that "the conditions specified in paragraphs (*a*) to (*c*) of the foregoing "subsection are fulfilled, confirm the "notice. . . .

"Provided that—(*a*) if it appears "to the Minister to be expedient so "to do, he may, in lieu of confirming "the purchase notice, grant permission for the development in respect "of which the application was "made . . . ; (*b*) if it appears to the "Minister that the land, or any part "of the land, could be rendered "capable of reasonably beneficial use "within a reasonable time by the "carrying out of any other development for which permission ought to "be granted, he may, in lieu of confirming the notice . . . direct that "such permission shall be so granted "in the event of an application "being made in that behalf; . . .

"(2A) In considering, for the purposes of the last foregoing subsection, whether or not the use of land "in any particular state is or would "be reasonably beneficial, the "Minister shall not take account of "the possibility of any development, "whether of that or any other land, "of any class not specified in the "Third Schedule to this Act."

1958

REGINA
v.
MINISTER OF HOUSING AND LOCAL GOVERNMENT.
Ex parte
RANK ORGANIZATION LTD.

planning permission for residential development (development of a class not specified in the Third Schedule to the Act) would be granted if application were made.

On an application by the owners of the site for an order of certiorari to quash the Minister's decision on the ground that he had no jurisdiction to direct such development having regard to the terms of subsection (2A) of section 19:—

Held, that subsection (2A) applied to the whole of the preceding subsection including proviso (*b*) and, accordingly, the power of the Minister to consider under that proviso whether the land "could "be rendered capable of reasonably beneficial use . . ." was limited by subsection (2A) to the consideration of the classes of development which came within the Third Schedule to the Act. Accordingly, the Minister's order was invalid and must be quashed.

APPLICATION for order of certiorari.

The applicants, the Rank Organization Ltd., were the lessees under a 99 years' lease of a piece of land situated at Ilford, Essex, which adjoined Eastern Avenue, a main trunk road, and had a frontage of some 150 yards and a depth of some 35 yards. The land had originally been agricultural land, and had remained a vacant and undeveloped site, although the land surrounding it had been built on by shops and dwelling-houses.

On March 4, 1957, the applicant applied to the local planning authority under section 14 of the Town and Country Planning Act, 1947, for permission to develop the site by building thereon shops with living accommodation over, but permission was refused on the ground that the carrying out of such development would impede the flow of traffic on the trunk road; that adequate shopping facilities existed; and that the site was allocated for residential purposes in the County of Essex Development Plan. In the meantime, part of the land became subject to compulsory purchase by the Minister of Transport and Civil Aviation for purposes connected with a subway under the trunk road. In respect of the remainder the applicants served notice on the appropriate local authority, Ilford Borough Council, pursuant to section 19 of the Act of 1947 (as amended by section 70 of the Town and Country Planning Act, 1954), requiring that authority to purchase their interest in the land. The notice was duly transmitted to the Minister of Housing and Local Government who in due course, in accordance with section 19 (5) of the Act, gave notice of the action he proposed to take on the purchase notice. He took the view that the land had become incapable of reasonably beneficial use in its existing state; he did not consider that he would be justified in reversing the local planning authority's decision not to permit the erection of shops with living accommodation over, but considered that the land could be rendered capable of reasonably beneficial use by the carrying out of residential development upon it. He, accordingly, proposed to exercise his powers under proviso (*b*) of section 19 (2) of the Act, and to direct that planning permission for the residential development of the site should be granted in the event of the application

being made subject to certain conditions as to the type, design, etc., of the dwellings. After an inquiry held by the Minister at the request of the applicants in pursuance of their rights under section 19 (5) the Minister, on December 19, 1957, intimated that he was satisfied that the land could be rendered capable of reasonably beneficial use and affirmed his decision to exercise the powers conferred on him by proviso (*b*), and to direct that permission for residential development should be granted if application were made.

The applicants moved for an order of certiorari to quash the Minister's decision on the ground that he had no jurisdiction to make it having regard to the terms of section 19 of the Act of 1947 (as amended). They also sought an order of mandamus directing the Minister to confirm the purchase notice. They claimed that the land was, and at all material times had been, a vacant site with no building of any description upon it, and could not be developed by carrying out development of any class specified in the Third Schedule to the Act of 1947; that under subsection (2A) added to section 19 of the Act of 1947 by section 70 of the Town and Country Planning Act, 1954, when considering whether or not the use of the land in any particular state was or would be reasonably beneficial, the Minister should not take into account the possibility of any development of any class not specified in the Third Schedule; that the Minister had expressly stated that he was satisfied that the condition specified in paragraph (*a*) of section 19 (1) was fulfilled, and although he did not expressly state whether or not he was satisfied that the condition specified in paragraph (*c*) of section 19 (1) was fulfilled, it was implicit in his decision that he was so satisfied; that residential development of the land was not development of a class specified in the Third Schedule; and that the Minister was precluded from taking the action he had and had wrongly construed the provisions of section 19 (1) and (2) of the Act of 1947 as amended. Accordingly, by directing that planning permission should be granted for development as residential accommodation he was acting without, or in excess of, his jurisdiction.

Roy Wilson Q.C. and *Desmond Neligan* for the applicants.

Rodger Winn for the Minister of Housing and Local Government.

No cases were cited in argument.

LORD PARKER C.J. This is a troublesome case involving the construction of what are obscure provisions in the Town and Country Planning Acts. It is an application for an order of certiorari on behalf of the Rank Organization Ltd. to quash a decision of the Minister of Housing and Local Government dated December 19, 1957, made under section 19 of the Town and Country Planning Act, 1947. [His Lordship stated the facts and continued:]

1958

REGINA
v.
MINISTER
OF HOUSING
AND LOCAL
GOVERNMENT.
Ex parte
RANK
ORGANIZATION
LTD.

Lord Parker
C.J.

There is provision made in section 19 that if planning permission has been refused and the applicants can satisfy the Minister of certain conditions the local authority will have to buy the land. An applicant who thinks he can fulfil the conditions of section 19 (1) serves a purchase notice on the local planning authority and the local planning authority then transmit that notice to the Minister. If the Minister is satisfied that the conditions are fulfilled he must confirm the notice subject to two provisos which are relevant here. He may say that the applicants, notwithstanding the refusal of the local planning authority, can develop as they wish, or he can say that some other development which he, the Minister, has in mind, is the development which should take place, and direct that, if an application is made, permission shall be granted. In the present case, the Minister by his decision has said: "I will not allow the building of shops "with accommodation over. I will not confirm the purchase "notice but I will allow residential development," and it is said that that decision was not within the powers of the Minister and that the court should quash it.

The question turns on section 19 of the Town and Country Planning Act, 1947, as amended by section 70 of the Town and Country Planning Act, 1954. So far as it is relevant section 19 is in these terms: [His Lordship read the relevant provisions of section 19 (1) and (2) of the Act and continued:]

It is clear in the present case that the Minister was satisfied that section 19 (1) (*a*) was fulfilled, namely, that the land had become incapable of reasonably beneficial use in its existing state. It is also clear, though not expressly stated in his decision, that he must have been satisfied in regard to the condition in section 19 (1) (*c*), namely, that the land could not be "rendered "capable of reasonably beneficial use by the carrying out of any "other development for which permission has been or is deemed "to be granted under this Part of this Act, or for which the "local planning authority or the Minister have undertaken to "grant such permission." That being so, prima facie he had to confirm the purchase notice subject to the proviso. He did not think it expedient to exercise his powers under proviso (*a*), but he did say that under proviso (*b*) he would permit development for residential buildings, and that if an application for that purpose was made permission ought to be granted. If the matter rested there, there would be no question but that his decision was fully within the powers of section 19. But in the Act of 1954 it was provided by section 70 that a new subsection should be inserted after subsection (2) in section 19 of the Act of 1947, and the new subsection, (2A), is in these terms: "In considering, for the "purposes of the last foregoing subsection, whether or not the "use of land in any particular state is or would be reasonably "beneficial, the Minister shall not take account of the possibility "of any development, whether of that or any other land, of any "class not specified in the Third Schedule to this Act."

It is said that that new subsection prohibits the Minister under proviso (*b*) of section 19 (2) from considering any other development than that set out in the Third Schedule. That schedule sets out certain types of development for which permission has to be obtained, but they are excepted classes of development for certain purposes. It is sufficient for the present purpose to say that there are a number of developments provided for in the Third Schedule. They are developments of the two types to which the word "development" refers throughout these Acts, and it is important to bear in mind that under these Acts "development" includes not merely physical development, such as erecting buildings, but a change of use, whether buildings are erected or not. The Third Schedule deals with both types of development and, in particular, by paragraph 6 provides for the making of an order by the Minister whereby the use of buildings may be changed, and a number of uses have indeed been prescribed by order under that paragraph.

Returning to the new subsection (2A), it is clear that by its words it applies to the whole of the preceding subsection (viz., subsection (2)). It applies, first, to the consideration by the Minister as to whether he is satisfied that the condition in section 19 (1) (*a*) has been fulfilled, namely, "that the land has become incapable of "reasonably beneficial use in its existing state." That is clear because the new subsection (2A) says "whether or not the use of "land in any particular state is reasonably beneficial," referring quite clearly to the existing state referred to in section 19 (1) (*a*). It also quite clearly applies, by its wording, to a consideration whether section 19 (1) (*c*) has been fulfilled, namely, whether the land can be rendered capable of reasonably beneficial use in the future. Again, by its words, it applies directly to proviso (*b*) of subsection (2), the consideration as to whether the land could be rendered capable of reasonably beneficial use. Prima facie, therefore, subsection (2A) does bite on and limit the powers of the Minister under proviso (*b*), and if that is the true view it is quite clear and admitted that the Minister here has exceeded his powers because the development of this land by the erection of residential buildings would be a development outside the developments set out in the Third Schedule.

Mr. Winn has been forced to admit that prima facie the words of the new subsection (2A) do apply to the Minister's power, but he seeks to contend that really, on analysis, it only applies and was only intended to apply to a consideration as to whether conditions (*a*) and (*c*) in section 19 (1) have been fulfilled. I think it may well have been that only this was in mind, but the words plainly refer to proviso (*b*). Mr. Winn contended that the effect of the applicants' argument was that the Minister would have no powers under proviso (*b*). It being admitted that Third Schedule development falls to be considered in determining whether condition (*a*) of section 19 (1) has been fulfilled, then if the Minister is satisfied that no Third Schedule development will make the land

1958

REGINA v. MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* RANK ORGANIZATION LTD.

Lord Parker C.J.

reasonably of beneficial use, he cannot, when he comes to proviso (*b*), prescribe any development that will be of beneficial use because he has, in effect, already determined the question. Mr. Wilson, on the other hand, points out, and I think it is right, that that argument overlooks what I have already referred to as the two meanings of "development" throughout this Act. True, he says, that the new subsection (2A) does apply to the consideration of condition (*a*), but quite clearly only in regard to change of use; in other words, the Minister can consider Third Schedule change of use in determining whether land has become incapable of reasonably beneficial use in its existing state; but, quite clearly, he cannot consider development of the other class, namely, the erection of buildings, because the very condition is directed to an existing state. Accordingly, even though he has considered change of use under (*a*) and determined that no change of use will make the land of reasonably beneficial use, yet when he comes to proviso (*b*), he can consider development in the other sense, and the wording supports that—"could be rendered capable . . ."—that is, by the erection of buildings or the like. When he comes to that the Minister can consider whether development of the physical kind could make the land of beneficial use, and he is entitled to do so provided he only considers development within the Third Schedule. Accordingly, there is room still for proviso (*b*) to operate. The words of subsection (2A) plainly apply to that proviso, and I can see no reason for limiting the words of the new subsection in such a way as not to apply to it. Accordingly, for my part, I think this application succeeds and the order should go.

CASSELS J. I agree.

STREATFEILD J. I also agree.

Order of certiorari.

Solicitors: *Richards, Butler & Co.; Solicitor, Ministry of Housing and Local Government.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

1958 *Oct.* 22.

Lord Parker C.J., Streatfeild and Diplock JJ.

* RAYMOND *v.* COOK.

Nuisance—Noise—Byelaw—Using noisy instrument in street "so as to "cause annoyance" to inhabitants—Whether musical instrument capable of being "noisy"—Proof of annoyance.

By a byelaw of the county of Southampton it was provided: "No person shall for the purpose of hawking, selling, distributing, "or advertising any article, shout or use any bell, gong, or other "noisy instrument in any street or public place so as to cause "annoyance to the inhabitants of the neighbourhood."

The defendant was convicted on two informations charging him with offences against the byelaw arising out of the use on March 6, 1958, of an electrical musical box and amplifier on an ice-cream van for the purpose of selling. Two local inhabitants made complaints, one in respect of each occasion charged, both alleging that they had been disturbed not only on that occasion but on other occasions by this van. The justices found that the instrument was a noisy instrument, and had caused annoyance to the complainants. On appeal:—

Held, dismissing the appeal, that an instrument might be a noisy instrument whether or not it was a musical instrument; that the justices had merely to satisfy themselves that the instrument was such as was calculated to annoy; that the facts might speak for themselves or it might be necessary to call evidence, albeit only of one person, and that it was quite unnecessary to have any evidence as to who was, or how many were, in fact annoyed.

CASE STATED by the Hampshire justices sitting at Havant.

Two informations were preferred by H. B. Cook under the county of Southampton Good Rule and Government Byelaws, made July 26, 1926,[1] No. 8, against Ronald John Raymond that, on March 6, 1958, at Horsebridge Road, Westleigh, Havant, Hampshire, for the purpose of selling he used a noisy instrument so as to cause annoyance to the inhabitants of the neighbourhood, and that in Crossland Drive, Westleigh, Havant, he similarly for the purpose of selling used a noisy instrument so as to cause

[1] Good Rule and Government Byelaws (Southampton): "*Music near houses*: 3.—No person shall sound or play upon any musical or noisy instrument or sing in any street or public place within 100 yards of any dwelling-house or office, after being requested to desist by any inmate or occupant thereof, either personally or through a servant, or through a constable, on account of the interruption of the ordinary occupations or pursuits of any such inmate or occupant or for other reasonable and sufficient cause . . . 4.—Any person singing, or sounding or playing any musical or noisy instrument in any street or public place, shall at once stop playing when any horse is passing if requested to do so by the person in charge of the horse."

"*Steam organs, etc.*: 5.—No person shall in any street or public place or on any land adjoining or near to any street or public place use or play, or cause to be used or played, any steam organ or other musical instrument worked by mechanical means to the annoyance or disturbance of residents or passengers."

"*Music near places of public assembly*: 6.—No person shall sound or play upon any musical or noisy instrument or sing in any street or public place within 100 yards of any place of public worship or public entertainment or other place of public assembly in which persons are for the time being assembled, to the annoyance or disturbance of any person or persons so assembled, after being requested to desist by any constable, or by any person so annoyed or disturbed, or by any person acting on his behalf."

"*Music near hospitals*: 7.—No person shall sound or play upon any musical or noisy instrument or sing in any street or public place within 100 yards of any hospital, infirmary, convalescent home, or other place used for the reception or treatment of the sick, after being requested to desist by any constable, or by any inmate or officer of such hospital or other place, or by any person acting on his behalf."

"*Noisy hawking*: 8.—No person shall for the purpose of hawking, selling, distributing, or advertising any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood, or to persons assembled in any place of public worship, or public entertainment, or other place of public assembly."

1958

RAYMOND
v.
COOK.

annoyance to the inhabitants of the neighbourhood. The informations were heard on April 22, 1958, when the defendant was convicted and fined £1 on each information.

The justices found the following facts:

At about 12.11 p.m. on March 6, 1958, Douglas Reginald Rock, a night-worker of 28, Horsebridge Road, Westleigh, Havant, was disturbed by a persistent loud noise like a set of bells amplified from a gramophone record. He was in bed trying to sleep. He looked out of the window and saw that the noise appeared to come from an ice-cream van standing about three doors away down the road. The series of notes was sounded at intervals and he heard them seven or eight times including that outside his house. This disturbance had occurred on other days and on one occasion (not March 6) he had complained to the driver, but found him unco-operative.

At about 11.50 a.m. on the same day John James Bowden of 1, Crossland Drive, Westleigh, also a night-worker, was asleep and he was awakened by musical bells. He looked out of the window and saw that the noise appeared to come from an ice-cream van next door. He did not complain to the driver as it was part of the ice-cream owners' trade to ring the bells, although there was a prominent notice on the van asking people to make complaints if they were disturbed. He had never asked his wife to speak to the driver for him. He went to the police as "he had "taken just about enough of it."

On March 9, 1958, the defendant was interviewed by a police constable, who told him of the complaints that had been made, and the defendant admitted that he had been using the ice-cream van on the occasions referred to. He also said that if the aggrieved persons had complained in accordance with a notice on the van, he would have co-operated with them. The police officer had himself heard the amplified bells on a number of occasions; they were produced by an electrical musical box playing a tune which he recognized but could not name, with an amplifier the volume of which could be adjusted by the van driver.

The van was one of a number belonging to Toni's Cream Ices (Portsmouth) Ltd., which hired them out to salesmen selling Toni's ice-cream on their own account. The type of musical box and amplifier used on this van was selected after tests to determine which noise was least annoying. The vans had been operated in the area for three years and the company had received no complaints about the musical boxes; it had received at least five or six complaints from residents that they could not hear the van.

Five residents living close to Rock and Bowden were called on behalf of the defendant. They all said that the musical instrument on this van had never annoyed them or their families. Three of these witnesses had young children, none of whom had been awakened by the bells from the van. One of the witnesses sometimes failed to hear them at all when he had his wireless on.

which he did not have on too loudly because of his children. Another of the witnesses was sometimes on night work but he had never been awakened by the van when sleeping during the day. These witnesses welcomed the sound from the bells because it indicated to them that the ice-cream van was outside, and for this reason they would have minded if it stopped.

In the summer the defendant sold about 60,000 ice-creams per week on this round, which he did twice a day. He had had only two complaints about the bells but at least ten times as many that they were not loud enough.

On the part of the defendant it was contended that on a proper construction of the relevant byelaws, the musical box in question was not a "noisy instrument"; that on a proper construction of the relevant byelaws, it was not enough, in order to obtain a conviction, merely to prove that one, possibly entirely unreasonable, resident had been annoyed; that the prosecution had to go further and show in respect of each alleged offence that the inhabitants generally of the neighbourhood, or alternatively at least two of such inhabitants, had been reasonably annoyed; and that on the aforesaid facts the justices could not properly convict the defendant.

On behalf of the prosecutor it was submitted that the said instrument was a noisy instrument within the byelaw, and that proof that one inhabitant had been annoyed on each occasion was sufficient.

The justices were of the opinion that the instrument was a noisy instrument within the words of byelaw 8 and that its use by the defendant in a street on each of the occasions was likely to cause annoyance to the inhabitants of the neighbourhood and had, in fact, caused annoyance to Douglas Reginald Rock and John James Bowden, whom they found to be reasonable persons; further, that it was not necessary in order to prove a breach of byelaw 8 to call evidence that on each occasion either the inhabitants generally had been annoyed, or that more than one of the inhabitants had been annoyed and, accordingly, they found the charges proved. The defendant appealed.

John May for the defendant.
D. A. Grant for the prosecutor.

All cases cited in argument are referred to in the judgment.

LORD PARKER C.J. This is an appeal by way of case stated from a decision of the justices of the peace sitting at Havant, before whom the defendant was charged and convicted of two offences against the Good Rule and Government Byelaws of the county of Southampton. He was charged with two offences, one in regard to Horsebridge Road, and another in regard to Crossland Drive, the allegation being that he used a noisy instrument so as to cause annoyance to the inhabitants of the neighbourhood.

The short facts are these: Apparently Toni's Cream Ices

1958

RAYMOND
v.
COOK.

Lord Parker
C.J.

(Portsmouth) Ltd. hire out vans for the sale of ice-cream, and the defendant was one of those who hired one of these vans and took it out selling ice-cream on his own account. On the van was an electrical musical box with an electrical amplifier whose volume could be adjusted by the van driver. There were a number of witnesses called. Two witnesses made complaints, one in respect of each occasion charged. They were both night workers who were sleeping during the daytime, and both said they had been disturbed not only on that occasion but on other occasions by this van. On the other side, there was a body of evidence from persons who said they had no complaint whatsoever of the noise, and indeed there was evidence that some inhabitants had asked the salesman to increase the volume of the amplifier, no doubt because their children who wanted to buy ice-cream could not hear when he was there.

The justices in the end, having heard all the evidence, said: "We being of opinion that the said instrument was a noisy "instrument within the words of the said byelaw, and that its "use by the defendant in a street on each of the said occasions "was likely to cause annoyance to the inhabitants of the neigh-"bourhood and had, in fact, caused annoyance to the said" two witnesses to whom I have referred—"whom we found to be "reasonable persons, and further, being of opinion that it was "not necessary in order to prove a breach of the said byelaw to "call evidence that on each occasion either the said inhabitants "generally had been annoyed or that more than one of the said "inhabitants had been annoyed, found the charges proved and "convicted the defendant and fined him £1 on each charge."

This byelaw is one of many similar byelaws which have come before this court. The byelaw in question here, No. 8, reads in this way: "No person shall, for the purpose of hawking, selling, "distributing, or advertising any article, shout or use any bell, "gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood."

Mr. May, in his careful argument, has taken two points. He says, first, that if one looks at other of these byelaws, one will see that reference is made not only to noisy instruments but to musical instruments, and, accordingly, he says in this byelaw a noisy instrument, which is alone referred to, is to be contrasted with musical instruments, and that this instrument used on this van was a musical instrument. In other words, provided it is a musical instrument it matters not how noisy it is and what disturbance is caused. I must entirely reject that argument. An instrument may be a noisy instrument whether or not it is a musical instrument.

Secondly, he says that on the wording of this byelaw no case is made out unless the prosecution prove that at least two of the inhabitants, because the word is used in the plural, have in fact been annoyed. He says that in this case, which is undoubtedly true, only one witness was called in regard to each offence to say

he was annoyed. The wording no doubt varies in these byelaws. Sometimes it is, as here, "use any . . . noisy instrument . . . so as "to cause annoyance," and sometimes it is "shout or use a noisy "instrument to the annoyance." It has been held by this court [1] only this week that if the words are "shout to the annoyance," the sole question is whether the shouting was such as was calculated to annoy and, if that be the question, then the justices might be satisfied that the offence was made out even though no evidence was called that any particular person was annoyed. They may from the rest of the evidence and the evidence of the police constable be satisfied that the noise in question was noise calculated to be an annoyance, but here the words are "use any ". . . noisy instrument so as to cause annoyance." I read those words in the same sense and as meaning a noisy instrument such as was calculated to cause annoyance. Indeed, in a case heard earlier this year, *John* v. *Heath*,[2] which also concerned the sale of ice-cream, this court held that the words "so as to cause annoy- "ance" really meant "as were calculated to cause annoyance," and further held that it would be unnecessary in certain cases to call any evidence that any particular people were annoyed. It seems to me that the proper approach to these cases is for the justices to ask themselves first: Was the noisy instrument so noisy as calculated to annoy? On that, the facts may speak for themselves, or it may be necessary for them to hear evidence, albeit of only one inhabitant, but once they have come to the conclusion that the noise was calculated to annoy, then it is quite unnecessary for them to have any evidence as to who and how many people were in fact annoyed. In the present case the evidence was both ways, but having heard all the evidence, the justices were satisfied that this instrument was likely to cause annoyance to the inhabitants and, having got to that stage, it seems quite unnecessary to have had evidence that any or even more than one inhabitant was in fact annoyed. I think the justices approached the matter in a perfectly correct way, and I would dismiss this appeal.

I think I ought to add that the court has had drawn to its attention and has considered *Booth* v. *Howell*,[3] and also *Innes* v. *Newman*.[4]

STREATFEILD J. I agree and have nothing to add.

DIPLOCK J. I also agree.

Appeal dismissed.

Solicitors: *John Emmerson & Co., Edgware; Theodore Goddard & Co. for G. A. Wheatley, Winchester.*

J. D. P.

[1] *Griffin* v. *Haywood*, Oct. 21, 1958, unreported.

[2] The Times, April 24, 1958.

[3] (1899) 53 J.P. 678.

[4] [1894] 2 Q.B. 292; 10 T.L.R. 479.

[BIRMINGHAM ASSIZES.]

1958
July 8, 9.

Karminski J.

* GREEN *v.* GREEN AND PARTRIDGE.

[1956 D. No. 165.]

Husband and Wife—Practice—Service of charges on woman named—Allegations by wife of associations by husband with married women—Associations not adulterous but discreditable.

Where in a divorce suit a wife makes allegations of associations between her husband and named women which, though not adulterous, are nevertheless improper, such charges should be served on the women named to afford them the opportunity of seeking leave to intervene.

DEFENDED PETITION by the husband for divorce on the ground of adultery.

In answer to her husband's petition alleging her adultery with the co-respondent, the wife denied adultery and cross-prayed for divorce on the ground of the husband's condoned adultery revived by, inter alia, his improper, but not adulterous, associations with various named women. The associations were alleged to be of an affectionate nature and particular instances included the following: Items of correspondence, to which the husband was a party, conducted in terms of tenderness and endearment which, though arousing suspicion of adultery, did not expressly disclose it; an incident in the summer of 1954 when the husband returned home bearing marks of lipstick and with straw adhering to his clothing and admitted having been to a farm yard; repeated statements by the husband that when the wife left he would bring one of the named women into the matrimonial home, coupled with an incident when he in fact brought that woman to the matrimonial home late at night after the wife had retired to bed. This report is concerned solely with the ruling of the court concerning service of such charges on the women named.

P. J. Cox for the husband.
D. E. Roberts for the wife.
The co-respondent appeared in person.

KARMINSKI J. The wife has always denied, and still denies, that she has ever committed adultery with the co-respondent. She says, about the husband's conduct, that he undoubtedly committed adultery in 1944 or 1945. She got to know of that adultery, persuaded (I think with difficulty) her husband to admit it, and thereafter forgave him and lived with him until they separated in 1956. But she says that the husband has revived the condoned adultery by his subsequent conduct. First she relies

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

on an association with a number of other women; they are five in succession starting in 1948 or thereabouts. I do not propose to give the names of these women in the course of my judgment and for this reason: In this case (as I think, unfortunately), no effort has been made to find out and to serve these women, who might, if served with notice of these charges, have applied for and have obtained leave to intervene. It is right to say that one or two of them seem to have disappeared, but I deplore the introduction of people in charges of this kind (admittedly short of adultery, but discreditable) without some effort to find them. I want to make it as clear as I can that, if I thought that the justice of the case had required it, I should have adjourned this matter for the service on the women who have been named in the answer, with possibly certain consequences as to costs as against the person alleging, but not serving these charges. For that reason I propose to refer to these women, when necessary, by their Christian names.

. . . . .

Solicitors: *Blythe, Owen George & Co., Coventry; H. T. Cooper, Coventry.*

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (MATRIMONIAL CAUSES ON CIRCUIT).

1958
Oct. 23.

Husband and Wife — Practice — Cause list — Matrimonial causes on circuit—Remission between assizes—Order of entry in list.

The President, after consulting the Lord Chief Justice, has directed that matrimonial causes remitted for trial from one divorce town to another are to be entered in the list at the later town in order of setting down and are, unless a judge in person otherwise directs, to come on for trial accordingly, a cause originally set down for trial at the later town taking precedence over a remitted cause set down elsewhere on the same date.

B. LONG,
Senior Registrar.

October 23, 1958.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 23.

Lord Parker C.J., Streatfeild and Diplock JJ.

* GRIFFIN *v.* SQUIRES.

Road Traffic—"Road"—Meaning—Car park—Driving in car park without licence—Whether car park "to which the public has access" road—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 4 (1), 121.

Two informations were preferred by the police against the defendant alleging that she drove a motor-vehicle in a car park owned and maintained by a local authority, not being the holder of a driving licence and there not being in force third party insurance in respect of the vehicle. On the question whether the car park constituted a road within the meaning of sections 4 (1) and 121 of the Road Traffic Act, 1930 [1]:—

Held, that although the car park was a place to which the public generally had access and which they habitually used, it was a question for the magistrates to decide as a matter of fact whether the particular car park could be treated as a road in the ordinary sense; and that as the magistrates had decided that it was not a road, no offence had been committed.

Heath v. *Pearson* [1957] Crim.L.R. 195 applied.

CASE STATED by the Ashby-de-la-Zouch justices sitting at Coalville.

On June 4, 1955, informations were preferred by the prosecutor against the defendant, Judith Ann Squires, alleging that on May 11, 1958, at Coalville, Leicestershire, she drove a motor-vehicle on a certain road when she was not the holder of a licence, contrary to section 4 (1) of the Road Traffic Act, 1930, and used a motor-vehicle on a certain road, namely, the car park adjoining London Road, when there was not in force third party insurance in respect of the vehicle contrary to section 35 of the Road Traffic Act, 1930.

The magistrates found the following facts:

On May 11, 1958, the defendant drove a saloon motor-car from a stationary position on the car park adjoining London Road, Coalville, with the permission of the owner, for a distance of approximately 10 yards, during the course of which the motor-car crossed through a privet hedge adjoining the car park before coming to rest on the lawn outside the municipal buildings.

The car park had a frontage to London Road of 123 feet and was approximately 80 feet deep. It was bounded on the east by a wall, on the west by a privet hedge and railings, on the north by a fence, but at the north-west corner there was an opening of

[1] Road Traffic Act, 1930, s. 4 (1): "A person shall not drive a motor "vehicle on a road unless he is the "holder of a licence, and a person "shall not employ any person to drive "a motor vehicle on a road unless "the person so employed is the holder "of a licence, and if any person acts "in contravention of this provision, "he shall be guilty of an offence."

S. 121 (1): "'Road' means any "highway and any other road to "which the public has access, and "includes bridges over which a road "passes."

15 feet abutting a private footpath leading to the Coalville Bowling Club premises and council allotment gardens. On the south side, it was abutted by the pavement of London Road but in the middle was a flower bed 66 feet long and 11 feet wide leaving entrances at either side 21 feet long and 36 feet long respectively.

The car park was owned and maintained by the Coalville Urban District Council at the public expense, and all members of the public were allowed to use it at all times for the purpose of parking vehicles without payment. The footpath was a private path belonging to the urban district council but was used by some members of the bowling club to get to their premises, and by certain gardeners to get to their allotment gardens which are owned by the council. These members must cross the car park to get to the footpath but the club premises could be reached by an alternative route.

It was contended by the prosecutor that the car park constituted a road within the meaning of sections 4 (1) and 121 of the Road Traffic Act, 1930, and that, accordingly, the defendant was guilty of a contravention of sections 4 (1) and 35 of the Act. It was contended by the defendant that the car park was not a road within the meaning of the section, and that, accordingly, she was not guilty on either of the charges.

The magistrates were of the opinion that although the private footpath was a road, it was not one to which the public had access and, therefore, the fact that certain club members and allotment holders used the car park to reach the footpath was within *Thomas* v. *Dando* [2] and did not make the car park a road. They further decided that the car park on its own was a place to which the public had access but were not satisfied that it was a road; that although it had two entrances and there was room for vehicles to move from one side of the car park to the other, they were not satisfied that it was a line of communication for the use of foot passengers and vehicles, that being the definition of the word "road" in the Oxford Concise Dictionary, and, accordingly, they dismissed the informations.

The prosecutor appealed.

Mrs. E. K. Lane for the prosecutor.

The defendant did not appear and was not represented.

The following cases were cited in argument: *Bugge* v. *Taylor* [3]; *Thomas* v. *Dando* [4]; *Bryant* v. *Marx* [5]; *Buchanan* v. *Motor Insurers' Bureau* [6] and *Heath* v. *Pearson*.[7]

[2] [1951] 2 K.B. 620; [1951] 1 All E.R. 1010.

[3] [1941] 1 K.B. 198; 164 L.T. 312; 104 J.P. 467.

[4] [1951] 2 K.B. 620; 115 J.P. 344; [1951] 1 All E.R. 1010.

[5] (1883) 48 T.L.R. 624.

[6] [1955] 1 W.L.R. 488, 490; 219 L.T. 129; [1955] 1 All E.R. 607.

[7] [1957] Crim.L.R. 195.

1958

GRIFFIN
v.
SQUIRES.

LORD PARKER C.J. stated the facts and continued: The magistrates have found that the general public did not habitually use the car park and the footpath to the bowling green and the council allotments but only the club members and the allotment holders. Accordingly, they came to the conclusion, with which I entirely agree, that it is impossible to say that this car park as a part of this footpath leading to the bowling green was a road. It was said in *Harrison* v. *Hill* [1] by the Lord Justice General (Lord Clyde), that, as is quite clear, "road" means something other than a highway; in other words, it is intended to include a wider class of road. He said [2]: "It is plain, from the terms of the definition, "that the class of the road intended is wider than the class of "public roads to which the public has access in virtue of a positive "right belonging to the public, and flowing either from statute or "from prescriptive user. A road may therefore be within the "definition (1) although it belongs to the class of private roads, "and (2) although all that can be said with regard to its "availability to the public is that the public 'has access' to it. . . . "I think that, when the statute speaks of 'the public' in this "connexion, what is meant is the public generally, and not the "special class of members of the public who have occasion for "business or social purposes to go to the" premises in that case. Everything that Lord Clyde said there applies absolutely to the car park as part of the footpath leading to the bowling green and allotments, and I think the magistrates were perfectly right.

The second question is whether the car park as a car park is a road within the definition. One thing is perfectly clear, that it is a place at any rate to which the public generally, to which Lord Clyde referred, have access and which they habitually use. Therefore, that part of the definition is amply fulfilled in this case. The question is whether anything else remains to be fulfilled, in other words, is it enough that it is a place to which the general public have access, or must there be something which as a matter of common sense and ordinary meaning is a road? A number of cases have been referred to. I do not propose to go through them. It has been said many times that it is eminently a question of fact for the magistrates to say whether a certain space is a road. Having decided that the general public have access to it they must then go further and ask whether this place to which the public have access is a road, and for that purpose I need only refer to *Heath* v. *Pearson*.[3] The facts are quite immaterial, but it was "*Held*, "dismissing the appeal, that although"—the yard in question—"might well be a place to which the public had access, that was "not enough to bring it within the definition of 'road' in the Act "for it also had to be a road; the justices had found that Brunswick Yard was not a road and, since the question whether or "not a place was a road was primarily a question of fact, the

[1] 1932 S.C.(J.) 13.
[2] Ibid. 16.
[3] [1957] Crim.L.R. 195.

"court had no right, even if they had not agreed with it, to "interfere with the justices' decision."

I think it was a matter for the magistrates to decide as a matter of fact whether this car park in the ordinary sense could be treated as a road. It seems to me that there must be a limitation of that sort, otherwise any place to which the general public have access could be said to be a road within the definition. I think there was evidence on which the magistrates could come to that conclusion. It was eminently a matter for them, and I do not think that this court should interfere. I would dismiss the appeal.

STREATFEILD J. I agree, but I confess that I have experienced some reluctance in so doing because it would, as a matter of common sense, be intolerable if ill-advised owners of motor-cars parked on public car parks were to feel at liberty to let irresponsible young people with no licences try to drive their motor-cars in a place where many other cars are collected, in the course of which they might do great damage to a number of other vehicles; and, by reason of the fact that they are uninsured, the policy of insurance would become vitiated and the insurance company repudiate liability to the owners maybe of a number of other vehicles which have suffered damage. If the definition of the word "road" was in line with that in the Oxford Dictionary and described as a line of communication, I should have no doubt at all, because whatever may be the position with regard to the private footpath leading from this public car park towards the bowling green and allotments, as to which I think the magistrates were quite right, I have no doubt whatever that a public car park adjoining a public highway, there being two entrances from the highway on to the car park, is in fact a line of communication from either entrance to and from any point in that car park. If that was the sole test I should undoubtedly come to the conclusion myself that the magistrates were wrong; but, as it is, I have to give the proper effect to the words in the Act of Parliament where the offence consists of the act complained of performed upon "a road" and, by section 121 of the Road Traffic Act, that means "any highway and any other road to which the public has "access." Although a car park is, in my opinion, a line of communication, I do not think anybody in the ordinary acceptance of the word "road" would think of a car park as a road, and if we were to hold that this was a road it would also be a road if it was a piece of waste land by the side of the road to which the public could resort for picnics, and nobody would call that a road either. I am, I think, a little confirmed in this view when I look at section 15 of the Road Traffic Act dealing with the punishment of persons for driving motor-vehicles when under the influence of drink or drugs, where the phrase is: "Any person "who when driving or attempting to drive, or when in charge of "a motor-vehicle on a road or other public place is under the

1958

GRIFFIN v. SQUIRES.

Streatfeild J.

"influence of drink. . . ." There, clearly, the words "or other "public place" are wide enough to embrace a car park such as we have had described in this case. If it had been simply on the road it may be a public car park would not be embraced by that word, but as it is in section 15 there is that distinction between a road and another public place. Unfortunately it may be, under this particular section 4, the word is simply "road" and nothing else, and so in interpreting the word "road" in accordance with the definition in section 121 I have, albeit with reluctance, come to the conclusion that it was open to the magistrates here to find that this public car park was not a road. For that reason I agree that this appeal must fail.

DIPLOCK J. I agree that this appeal should be dismissed and have nothing to add.

Appeal dismissed.

Solicitors: *Alfred Neale & Co. for H. V. Jackson & Co., Leicester.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 27.

Lord Parker C.J., Streatfeild and Diplock JJ.

* REGINA *v.* LLOYD-JONES AND ANOTHER. *Ex parte* THOMAS.

Justices — Warrant — Bench warrant — Jurisdiction to issue — Prisoner committed on bail to quarter sessions for sentence—Failure to appear—Jurisdiction of recorder to issue warrant—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29 (3).

P. was convicted by justices of larceny and committed to quarter sessions under section 29 of the Criminal Justice Act, 1948, for sentence. Having been granted bail pending appeal, he failed to appear before quarter sessions and an application was made to the recorder to issue a bench warrant for his arrest. The recorder refused to issue a warrant, being of opinion that he had no power to do so because P. had not been committed to quarter sessions on indictment:—

Held, that it was clear from the provisions of section 29 (3) of the Act of 1948 that when an offender was committed to quarter sessions for sentence, quarter sessions was put in the same position as if the offender had just been convicted before them on indictment and, accordingly, the recorder had power to issue a bench warrant.

Rex v. *Browes* [1949] W.N. 343; 65 T.L.R. 502; [1949] 2 All E.R. 449 and *Rex* v. *Grant* [1951] 1 K.B. 500; [1951] 1 All E.R. 28 applied.

Semble. Any court seized of the matter would have power to issue the warrant.

APPLICATION for mandamus.

On April 18, 1958, John Charles Platt was convicted by the Cardiff justices on three charges of larceny and was committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948. Having given notice of appeal, on June 25, Ashworth J. granted him bail on condition that he should report daily to the police, bail being in his own recognizance in the sum of £20. Platt did not report to the police and did not appear before quarter sessions, and on August 14, 1958, his appeal against conviction was dismissed by Mr. Elwyn Jones Q.C., the assistant recorder. The assistant recorder refused to issue a bench warrant for Platt's arrest for the purpose of sentence, expressing the view that as Platt had not been committed to quarter sessions on indictment the court had no power to issue a warrant. On September 16, Edmund Davies J., sitting as vacation judge, refused to make an order for the issue of a warrant, not being satisfied that he had power to do so.

The applicant, William Francis Thomas, applied for mandamus directed to the recorder, Mr. H. V. Lloyd-Jones Q.C. or, alternatively, the assistant recorder, requiring him to issue a warrant.

J. F. E. Stephenson for the applicant.

The respondents did not appear and were not represented.

The following case, in addition to those referred to in the judgment, was cited in argument: *In re Whitehouse.*[1]

LORD PARKER C.J. Mr. Stephenson moves on behalf of the Chief Constable of the Cardiff City Police Force for an order of mandamus directed to the Recorder of the City of Cardiff to issue a bench warrant for the arrest of John Charles Platt. [His Lordship stated the facts and continued:] It is clear that somebody ought to have power to issue a warrant and, indeed, that person should be the person seized of the matter before whose court the case has come, namely, the recorder of the city of Cardiff, but the question is whether he has such power. I do not at the moment see why any court seized of the matter should not have power to issue a warrant in circumstances such as these, where a prisoner fails to surrender to his bail. One would think that the position was that every court would have inherent power to do so, but as far as I can see the matter has not quite proceeded on those lines. Thus, Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 71, speaks of the practice "that any court of record "before which an indictment is preferred and signed may "forthwith issue a bench warrant," and it goes on: "Where "a party against whom the indictment has been preferred "and signed is already under recognizance to appear and answer

[1] [1951] 1 K.B. 673; [1951] T.L.R. 405; [1951] 1 All E.R. 353.

1958

REGINA v. LLOYD-JONES. *Ex parte* THOMAS.

Lord Parker C.J.

"any indictment that may be preferred against him, and he does "not appear, the prosecutor may bespeak a bench warrant, which "will be signed by the justices at the close of the sessions," and the form of bench warrant calls upon "AB who stands indicted "before us" to appear "to answer the said indictment." Apparently there was doubt for a considerable time whether magistrates' courts had power to issue a warrant, and by section 67 of the Criminal Justice Act, 1948, they were given express power to do so, that being now replaced by section 97 of the Magistrates' Courts Act, 1952. Still, whatever the position may be with regard to inherent powers, in my judgment there is sufficient ground to be found in the Act of 1948 itself to show that the recorder in such circumstances has power. It will be observed that by section 29 (3) it is provided: "Where an offender is so "committed for sentence as aforesaid, the following provisions "shall have effect, that is to say:—(*a*) the appeal committee or "court of quarter sessions shall inquire into the circumstances "of the case, and shall have power to deal with the offender in "any manner in which he could be dealt with by a court of "quarter sessions before which he had just been convicted of "the offence on indictment." It is clear from that that when quarter sessions began to inquire into the matter with a view to dealing with the offender, they are put in the same position as if the offender had just been convicted before them on indictment. Indeed, in two cases to which we have been referred, *Rex* v. *Browes* [1] and *Rex* v. *Grant*,[2] the Court of Criminal Appeal said that where section 29 (3) (*a*) speaks of the prisoner being treated as if he had just been convicted on indictment, that would be so for the purposes of making an order under section 22 for supervision, which can only be made on indictment and, also, for the purposes of the service of notices of intention to prove previous conviction under section 23, which provides that the notice must be served at least three days before the trial, and the court held that three days before the trial in circumstances such as these meant three days before the hearing at which quarter sessions would be dealing with the matter as if they had just tried the man. Finally, it is to be observed that by section 21 (6), a person, who has been convicted by a court of summary jurisdiction of an indictable offence and then sentenced by a court of quarter sessions, is to be treated as if he had been convicted of that offence on indictment. I think that is enough for us to say that in a case such as this the recorder has power to issue a bench warrant. After all, he is to be treated as if he had just tried the prisoner, and that prisoner had been convicted on indictment, and if, for example, after the mid-day adjournment the prisoner had absconded, the recorder could, before sentencing him, on those very words, have him brought up on a bench warrant. I think

[1] [1949] W.N. 343; 65 T.L.R. 502; [1949] 2 All E.R. 449.

[2] [1951] 1 K.B. 500; [1951] 1 All E.R. 28.

the recorder had power, and that this order of mandamus should issue.

1958

REGINA v. LLOYD-JONES. *Ex parte* THOMAS.

STREATFEILD J. I agree.

DIPLOCK J. I agree.

Application allowed.

Solicitors: *Theodore Goddard & Co. for Town Clerk, Cardiff.*

J. D. P.

[CHANCERY DIVISION.]

* *In re* TOBACCO TRADE BENEVOLENT ASSOCIATION CHARITABLE TRUSTS.

1958 *July* 1.

Harman J.

[1957 T. No. 1182.]

Charity—Rules—Alteration—Unincorporated association—No power in original rules to alter rules—Subsequent purported alterations to rules—Whether effective.

Charity—Investments—Rules—Scope of power to invest outside trustee securities.

An unincorporated trade benevolent association by a resolution passed in general meeting in 1956 introduced a new rule purporting to widen the range of its permitted investments. The association's original rules of 1860 contained no power to alter the rules, but in 1871 a rule had been passed at an annual meeting purporting to regulate its method of altering its rules. That rule has been acted on and the association had made alterations in its rules, in particular, in those relating to investments:—

Held, that as the original rules conferred on the association no power to alter its rules, the alteration of 1871, and all prior or subsequent alterations, were invalid; a charity without power to alter its rules could not by a mere resolution confer on itself the power to alter them, the proper course was to apply to the Charity Commission for a scheme.

Quaere whether a charity with power to alter its rules can alter its investment clause.

ADJOURNED SUMMONS.

The trustees of a trade benevolent association by this summons asked the court to determine the validity of a resolution by which the association proposed to extend their investment clause, which was restricted to investments permitted by the Trustee Act, 1925. The facts are stated in the judgment.

1958

TOBACCO TRADE BENEVOLENT ASSOCIATION CHARITABLE TRUSTS, *In re.*

L. H. L. Cohen for the trustees of the Tobacco Trade Benevolent Association.

J. E. Vinelott for Finlay & Co., one of the donors to the association.

Denys Buckley for the Attorney-General.

Case cited in argument not referred to in the judgment: *Ho Tung* v. *Man On Insurance Co. Ltd.*[1]

HARMAN J. A body called the Tobacco Trade Benevolent Association has been in existence since the year 1860. It is and always has been an unincorporated body, and I find in its minute book a print of the rules, printed in the year 1860. The rules are divided into two parts, one of them called rules and the other by-laws and regulations, but nothing, I think, turns on the dichotomy. The objects of the association, as originally stated, were to relieve the necessitous honest members of the trade, their widows and orphans, by pensions, temporary relief or otherwise, and there was provision as to who should be members of the association. No rule provides for any alteration of the rules; nor is there any provision about investment until that in No. VII in the by-laws and regulations which provides: "No "part of the capital investments made in the name of the "trustees shall be expended except with the concurrence of the "majority of shareholders assembled in a public general "meeting." There is thus a body of rules and a by-law which assumes that there will be or may be invested funds of the association. They could be of two sorts, either savings or surplus moneys, or funds given to the association by way of endowment so that the capital could not be spent. Which of the funds of this association are of the one sort and which of the other does not appear, and perhaps could not now be ascertained.

The association started life apparently in the belief that it could alter its rules as it chose, and as early as 1861 alterations were proposed and passed in general meeting, apparently by a simple majority of the attending subscribers. Matters went on thus until 1871, when it occurred to somebody that the rules were being altered rather too casually. The eleventh annual report contains proposals for further alterations of the rules and for an additional rule in these terms: "That previous to the alterations of or "additions to the existing rules, by-laws and regulations, one "month's notice in writing shall be given to the secretary of such "intended alteration or addition prior to the annual meeting to "be held in April, to be then decided by a majority of the "subscribers and donors present." The ensuing annual meeting purported to adopt this additional rule which was then styled rule No. 24.

The surplus funds and endowments of the association continued to be invested in 2¾ per cent. annuities until the year 1894, when

[1] [1902] A.C. 232.

it was apparently the desire of the then governing body of the charity to extend the range of its investments. The desire was to invest in colonial securities to bring in 3½ per cent. instead of the 2¾ per cent., and the association, being advised by its counsel that it was probably restricted to investments authorized by the then recent Trustee Act of 1893, determined to have recourse to its assumed power to alter its rules and widen its investment range. At the meeting on April 5, 1894, a rule was passed that "Investments of any capital not required for the "immediate purpose of the association may be in or upon any of "the securities authorized by the Trustee Act, 1893, or upon such "securities as shall be approved by the committee provided "always that at each annual general meeting the approval of the "donors be asked." Various minor alterations were made between 1894 and 1956. By that time the investment power had been somewhat cut down. Securities must be those authorized by the Trustee Act, 1925, except in cases of endowments given with special directions for investment. Under the modern rule 60 there is the same reference to alterations as existed in 1871.

At the meeting in 1956 it was proposed to the subscribers and donors that the investment range of the trustees should be altogether wider. The proposal put before the meeting and passed at it was that rule 49, which deals with investments, should be rescinded, and that a new rule should be substituted for it providing that the committee might invest in any securities quoted on the London or New York Stock Exchange, whether or not authorized by the Trustee Act. It is suggested that the association had power so to do by virtue of its right to alter its rules.

The present summons starts by asking the court the question whether that was a valid alteration. In my opinion, it plainly was not. This body started with no power to alter its rules, and such a body cannot alter its rules by its own motion except possibly by the concurrence of every member of the body. There never was any pretence that anything of that sort was obtained here. In 1860, those who had control of this body thought they could alter their rules as they pleased. The alteration made in 1871 did not purport to confer a power of alteration, but to curb a power of alteration which was presumed to exist. In my judgment it did not exist and, therefore, the new rule adopted in 1871 is a mere nullity.

It is said that the rule has been so long acted upon and must have been known to those who subscribed and those who gave legacies over so many years, that it ought now to be considered as a rule of the society. In my judgment that is not so. Those in control wrongly assumed that there was power to alter when there was no such power and, therefore, the alterations have always been invalid. If that is awkward for the governing body of the association, they have an easy remedy in their hands. They can go to the Charity Commission and get a proper scheme setting their house in order. I do not suppose any harm has been done, but a charity,

1958

TOBACCO TRADE BENEVOLENT ASSOCIATION CHARITABLE TRUSTS, *In re.*

Harman J.

unless empowered by its rules, cannot go outside investments authorized by law. In that respect the Court of Chancery used to follow the rule as to funds lodged in court, which were always put into 3 per cent. bank annuities because the Court of Chancery considered that they were the only proper investments in which a trustee might invest without loss. Ever since Lord St. Leonards' Act in 1859, statutes, ending with the Trustee Act, 1925, have enlarged the rights of trustees to invest, so that trustee investments now cover quite a wide range. But any charity which has not specific powers to invest outside that range cannot invest funds outside it, and it certainly cannot, in my view, confer upon itself by a mere resolution a power, first to alter its own rules, and secondly, to widen the terms of an investment clause. Whether, if in the beginning the rules had provided a power to alter them, the body could then make use of that power to widen its investment capacity, is a wider and larger question on which it is not necessary here to embark. My impression is that no such alteration can be made, but I do not so decide here because it is not necessary for me to do so. This society started with no power to alter its rules and, therefore, has no such power and never has had, and that being so, to purport to pass a resolution empowering the body to invest outside the trustee range is ultra vires and invalid.

Declaration accordingly.

Solicitors: *Birkbeck Julius Coburn & Broad; Treasury Solicitor.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1958 *Oct.* 29, 30, 31.

Hodson, Morris and Ormerod L.JJ.

* RICHARDS *v.* RICHARDS.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*House purchased for home of two families—Purchase in name of wife and her father without husband's knowledge—Husband serving abroad at date of purchase —Purchase-money and subsequent mortgage instalments partly provided out of voluntary naval allotments made by husband to wife—Presumption of advancement in respect of allotments—Husband's claim to share in house and certain chattels not sustainable—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

The wife of a serving naval officer, who had made her matrimonial home with her parents, purchased a house in 1949 for the two families in the names of her father and herself, while her husband was serving abroad. The initial deposit on the price and expenses incidental to the transaction—some £1,300—were paid out of moneys standing to the wife's credit in her bank account; and the balance of the price was furnished by a building society,

monthly mortgage instalments being paid thereafter out of the wife's bank account.

The wife had had some savings at the time of her marriage and her parents made some contribution to the purchase price, but the greater part of the sum of £1,300 consisted of moneys transferred by the wife from time to time from her bank account to a savings account in her name; and the main payments into her bank account from the date of the marriage in 1943 consisted in monthly sums by way of naval allotments which her husband caused to be credited to her out of his service pay.

The husband had made no plan with his wife to buy a house and made no specific provision for such purpose at the date of the purchase. He knew nothing about it until his wife informed him of it by letter, whereupon he expressed gratitude to her parents and undertook to, and did, increase the monthly naval allotments to meet the new commitments.

In 1958 the wife obtained a divorce from her husband, who took out this summons under section 17 of the Married Women's Property Act, 1882, to determine whether he was beneficially entitled to an equal share with his wife in the house:—

Held, that the husband was not originally entitled to a share in the beneficial interest in the house on the ground that it was partly paid for by money provided by him, because the reasonable inference was that the amount of naval allotments was paid to the wife in such a way as to be beyond recall by him.

Blackwell v. *Blackwell* [1943] 2 All E.R. 579; *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863; and *Silver* v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523 distinguished.

Nor did the husband acquire a beneficial interest in the house after its purchase by reason of the increased allotments to meet the mortgage payments, for he was doing no more than maintain his wife with the knowledge of her additional commitments in respect of a home acquired by her and her father for the benefit of the two families.

Silver v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523 applied on this part of the case.

APPEAL from Mr. Registrar Russell dismissing a husband's summons under section 17 of the Married Women's Property Act, 1882, to determine as between his wife and himself the question whether he was entitled to a share or interest in a house, 3, Makepeace Avenue, Highgate, London, and in two chattels, a rotary iron and a vacuum cleaner.

The parties were married in 1943, when the husband was serving as a sub-lieutenant in the Royal Navy, and the wife in the Air Raid Precautions service. The parties made their matrimonial home with the wife's parents in a rented house in Highgate. In 1944 the wife gave up her employment on the birth of a child, and continued to live with her parents, the husband spending his leave with them from time to time. In 1946 he was demobilized, but he rejoined the Navy, and in 1948 was appointed to a shore-based position at Singapore. In the early part of 1949, while at Singapore, he was informed by his wife of the purchase of the house in question, 3, Makepeace Avenue, in the names of the wife and of her father. The wife, her daughter and her

C. A.
1958
RICHARDS
v.
RICHARDS.

parents all moved to the house. In May, 1951, the husband came home from Singapore and went to live with his wife at the new home, and thereafter spent his periods of leave there with his wife and family. In October, 1954, the wife's father died. In April, 1956, the husband concluded his service at sea and returned home. Differences and difficulties arose, and on February 1, 1957, the wife presented a petition for divorce. The husband took out his summons under the Act of 1882 on March 19, 1957; and on February 11, 1958, the wife was granted a decree nisi of divorce, which was made absolute on March 31, 1958.

The financial positions of the husband and wife at and after the marriage were as follows: Before her marriage the wife had a Post Office savings bank account into which she paid her savings and other of her own moneys. Shortly after her marriage she transferred all the money in that account, some £288, to an account in her name at Barclays Bank. From April, 1943, onwards her bank account was credited month by month with sums, starting at £12 and rising by the early part of 1949 to £28; those sums, called "naval allotments," were caused to be credited to her by her husband out of his service pay, as voluntary allotments.

In July, 1945, the wife opened a new Post Office savings bank account by transferring to it £100 from her bank account, and in February, 1946, and November, 1947, she transferred further sums of £300 and £100. The husband had a separate Post Office savings bank account. In June, 1948, he withdrew sums of £150 and £30 from his account and transferred them to his wife's Post Office savings bank account, which, by April, 1949, was nearly £870 in credit.

The wife's father did not have a separate bank account. When the new house was bought in 1949, the wife's bank account showed various entries related to the purchase. The price of the house was £4,100, and of that £1,000 was paid by way of initial deposit, the balance of £3,100 being furnished by a building society, mortgage payments of £18 19s. 9d. being payable monthly thereafter on the loan. Cheques totalling something over £1,300 were drawn on the wife's bank account to meet the amount of the deposit, legal and other charges, and expenses in connexion with the purchase of fixtures and fittings. The wife had withdrawn £717 from her Post Office account and that was credited to her bank account; in addition a further £200, probably from her mother, was credited to that account. But no specific sums came into her bank account at that time, in reference to the purchase of the house, from her husband. After the new house was bought, the wife received payments from lodgers and some financial help from her parents. There were certain outgoings, and in addition to the monthly payments to the building society there were necessary payments for repairs. Those payments were made by the wife by cheques drawn on her bank account.

When the house was purchased in the name of the wife and her father, the husband was informed of it by letter. He had not

been consulted about its purchase and it came as a joyful surprise to him. He wrote on April 10, 1949, to his wife to express his delight. In the course of that letter he said: "I am deeply "moved by Gran and Pop's generosity towards us. . . . I will do "all in my power to repay them in future for this great kindness. ". . . Their offer to pay £2 10s. a week to help us with the "mortgage is . . . fantastic in its generosity. . . ." He continued: "This big change in our lives has given me something "to strive for now, and I am going to save every penny I "possibly can. . . . I am going to have paid into your account "another £6 each month as from May 1. This is not much . . . "but it will possibly help a little to keep our heads above water. "I will continue to save all I can . . . and I am more determined "now to do this, for every penny saved will help us. The £150, "if you will accept it, I would like you to accept as a small "contribution, for your capital must have been knocked for an "awful six, and may I suggest that it provide a Hoover and lawn "mower which you say would be a help to you." The £150 referred to was the sum transferred from his Post Office savings bank account to that of his wife in June, 1948, and the "Hoover" referred to was one of the two chattels now in issue.

The monthly sums by way of naval allotment were credited continuously to the wife's bank account; the rate was increased from £28 to £34 after the husband had been informed of the purchase of the house. In November, 1950, they were increased to £38 and to £42 in April, 1952, as the husband's rate of pay increased. The naval allotments ceased after he left the service in 1956. The mortgage payments continued to be payable monthly, and were still payable and being paid at the date of the present proceedings.

The registrar in a note of his judgment (based on recollection) held as follows: "I accepted the wife's evidence that in her "letters she was saying that she and her father were buying the "house and I rejected the husband's evidence that the wife had "said in her letters that it was a gift to them. I found that "the husband's letters at that time were presumptuous, and that "he was intentionally putting a false interpretation on his wife's "letters to him. In my view, his contention that he thought "that the wife's father was acting as his 'proxy' in the purchase, "a matter which he never mentioned to him on his return to "England, was quite untenable. I was satisfied that the husband "was well pleased with the arrangement by which this home "was being provided at small cost to himself. Throughout his "service in the Navy the husband had been making a monthly "allotment to the wife, small at first but increasing with his "promotion. There was, however, never any plan between "husband and wife for saving for a home; and I felt that he was "largely indifferent as to exactly how she spent his money, or "how much of his wife's own savings or how much of the money "he had sent home was used in the purchase. . . . As a matter

C. A.
1958
RICHARDS
v.
RICHARDS.

"of family convenience the wife acted as banker both for her "husband and her father, and this led to difficulties in tracing "precise payments through her accounts. I was, however, fully "satisfied that the house was purchased with money provided "by the wife and her father as joint tenants; and that in so far "as any of the money provided by the wife originated from the "husband there was no evidence to rebut the inevitable pre-"sumption of advancement. . . . I gave considerable attention "to the husband's contentions arising from payments un-"doubtedly made out of his money for mortgage interest and "repairs and improvements. In my view, there was nothing "in the character of this expenditure to take it out of the scope "of what might reasonably be expected of the husband in "maintaining his wife; and it did not create any beneficial interest "or right to repayment."

On the two chattels, the registrar found that the rotary iron was paid for in equal shares by husband and wife, and that it was a parting present by the husband to the wife; and that the vacuum cleaner was purchased by the wife out of money provided by the husband in replacement of money expended by her from her own savings at the time of the purchase of the house. He dismissed the husband's summons accordingly.

The husband appealed.

Anthony Lincoln for the husband.
R. Graham Dow for the wife.

The following cases were referred to in the argument: *Silver* v. *Silver* [1]; *Rimmer* v. *Rimmer* [2]; *Fribance* v. *Fribance (No. 2)* [3]; *Blackwell* v. *Blackwell* [4]; *MacDonald* v. *MacDonald* [5]; *In re Roger's Question* [6]; *Hichens* v. *Hichens.* [7]

MORRIS L.J., giving the first judgment, said: The husband, who brings this appeal, asks that it should be adjudged that he and his wife are beneficially entitled to the house and the two chattels in equal proportions. The issue in regard to the house is manifestly of greater importance than that in regard to the two articles, which consist of a rotary iron and a vacuum cleaner.

[His Lordship stated the facts set out above and continued:] Whatever may have been the husband's understanding of the matter at the time, it is quite clear that the purchase of the house was made without any reference to him and that it was in the names of the wife and her father. There was no evidence of any

[1] [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523.
[2] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.
[3] [1956] P. 99; [1955] 3 W.L.R. 890; [1955] 3 All E.R. 787 (D.C.); (No. 2) [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357 (C.A.).
[4] [1943] 2 All E.R. 579.
[5] [1957] 2 All E.R. 690.
[6] [1948] 1 All E.R. 328.
[7] [1945] P. 23; 61 T.L.R. 302; [1945] 1 All E.R. 451.

discussion between her and her husband as to the purchase of a matrimonial home. There had never been any plan or arrangement pursuant to which any fund of money should be created or built up in order that a matrimonial home should be purchased. The evidence points to the conclusion that the wife was to continue to live with her parents. The husband had rejoined the Navy after being demobilized, and then in 1948 had been appointed to a shore-based position in Singapore.

In these circumstances the present case is not one where, as in *Silver* v. *Silver*,[1] arrangements at the time of purchasing a house in the name of a wife were made with the concurrence of a husband. Nor is it a case where, as in *Rimmer* v. *Rimmer*,[2] both husband and wife had a part in arrangements made when a house was bought in the name of the husband, which house was to serve as their matrimonial home. Here the husband knew nothing about the purchase until it had been made and it was not made pursuant to any prearranged plan.

[His Lordship read the registrar's note of his judgment set out above, said that Mr. Lincoln for the husband had submitted that if the wife was banker for her husband, the money remained his, and that there was no presumption of advancement. His Lordship then considered the evidence in relation to the two chattels in dispute and said that on that evidence the decision of the registrar that the vacuum cleaner belonged to the wife and the rotary iron was a parting present from husband to wife could not be disturbed. He continued:] I now come to consider the really important issues which relate to the beneficial interest in the house. It is, I think, necessary to consider how the matter stood when the purchase was first made and then to consider whether the position is affected by later events. Inasmuch as at the time when the house was bought the husband knew nothing about it and had no part at all in it, there is no room for any suggestion of a gift being made by him to his wife. It is said, however, that payments made by the wife when the house was bought were partly made out of money which had been provided by the husband. It is said that as a result the husband is entitled to a share in the beneficial interest. But, in regard to this contention, there are two observations to be made. In the first place, the present is not a case where parties to a marriage have by their joint efforts saved money in order to buy a house. In the second place, it does not seem to me to be shown that any of the money expended when the house was bought was money which then belonged to the husband. I leave out of account for the moment the question as to exactly what payments were made by the wife's mother and father. The facts are not clear, but it appears that the mother probably contributed £200 and that

[1] [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523.

[2] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

C. A.
1958
RICHARDS
v.
RICHARDS.
Morris L.J.

the father may have contributed something. If they did contribute, and if there is no assertion of a beneficial interest having belonged to them (as to which we are not called on to adjudicate), then any gifts made by them would in all probability have been made to their daughter rather than to their son-in-law. But one of the chief questions is whether the money in the wife's bank account belonged to her, or whether any part of it was held by her either for her husband or for them both jointly. I consider that the approach to this matter and its determination depend on a consideration of the facts and of such inferences as can properly and reasonably be drawn from them.

It seems to me that the reasonable inference in this case is that the amount of the naval allotment was paid by the husband to the wife in such a way as to be beyond recall by him and as not to require any accounting by her. The husband was far away from home. The amounts were for the wife to spend as she should decide. The wife had to depend on them for all her needs. They were not payments by way of housekeeping allowance, and the decision in *Blackwell* v. *Blackwell* [3] does not seem to be applicable. The situation was not one in which husband and wife were able from day to day to lead joint lives. The husband did not expect to be asked for more money nor would he demand to know how the money had been spent, or whether it had all been spent. It would, I think, have been irrational in the circumstances in which the parties were placed, and in the absence of some specific arrangement, if the husband had regarded the sums as being other than absolutely for the wife's disposition and keeping. If she were frugal and self-denying, the surplus would be hers. It is to be remembered also that the bank account was opened with money which was her own. Some small part of that money came from wedding presents, and even if there is any doubt about that part of it, the bulk of the money was unquestionably the wife's own money. There was no plan made for the building up of some joint financial reserve. Even though the husband may have felt that the amounts of the naval allotments exceeded the wife's probable needs, I cannot think that it would have been in tune with or in accord with their common understanding if the husband had asked for an account of expenditure or a measuring of outgoings against the totals of the naval allotments.

This view is, I think, borne out by the reference in the letter of April 10, 1949, to the wife's capital. The words were: "The £150, if you will accept it, I would like you to accept "as a small contribution, for your capital must have been "knocked for an awful six." It seems to me, therefore, that it cannot be said that any money of the husband's was expended

[3] [1943] 2 All E.R. 579.

in paying the deposit on the house. There was some money that had become the wife's money because she had saved it out of what was hers to spend. Some of her money had come from her husband, but there were no conditions, express or implied, which limited or restricted her rights in it. It seems to me, therefore, that, when the house was first bought, the husband did not have any beneficial interest in it.

The next question is whether this position was later altered in any way. So far as the legal title is concerned, no change was made. It is, however, true that the husband increased the amount of his allotment when he knew of the purchase and knew that mortgage payments had to be made. Referring again to the letter of April 10, 1949, there are the phrases "Gran and Pop's generosity towards us," "to help us with "the mortgage," and the reference to the husband's endeavour to save as much money as he could. Coupled with that reference to saving is, of course, a reference to his own separate bank account, namely, his Post Office savings bank account. All that happened after the purchase of the house was that the husband made payments to his wife in the same manner as before, and it is difficult to accept that at the later stage he became introduced into beneficial ownership. He came to know that the house had been bought in the name of his wife and her father, but the registrar did not accept his evidence that he thought that the father had signed as some sort of proxy for him.

The husband, I think, behaved very well in increasing his payments: indeed he behaved well at all times in the fixing of his payments. But what he did was to give more to his wife because she had additional commitments. He knew that the new home was intended to be the home of all of them, that is to say, of his parents-in-law as well as of his wife and of himself and of their daughter. It was not like the case where a husband and wife arrange for a home for themselves, and where they contemplate acquiring what might be regarded as a matrimonial asset. Nevertheless, everything here was going to enure for his benefit because there would be the security for all of them of having a home.

Though the payments by way of naval allotment continued until 1956, there was some friction in the later period and at the end of 1954 the husband wrote a letter which included the following passages: "I trust I have made it perfectly clear "that I have no intention of returning home under the present "arrangements. Quite frankly I am a little tired of hearing "what you and yours have done to put a 'roof over our heads.' "The house is, I understand, in your name so there should "be no legal snags. You have always, with regard to the house, "and most other mutual points, shown complete independence "by making decisions without consulting me so you won't be "put out unduly by my absence. It has become increasingly "obvious to me that my presence at home causes considerable

C. A.
1958
RICHARDS
v.
RICHARDS.
Morris L.J.

"unrest and embarrassment to yourself and Gran, so this is "the primary reason for making my decision to pack up and "clear out. I never want to experience another leave such as "this last one."

The decision in *Silver* v. *Silver*[4] has relevance in regard to this part of the case. In *Silver* v. *Silver*[4] the facts were that originally a house was purchased in the name of a wife, whose parents provided £90 of the purchase price in cash, the rest (£805) being borrowed on the security of a mortgage granted by a building society. The husband joined as a party to the mortgage deed as guarantor, and deposited with the building society a policy of insurance as security. The mortgage repayments were provided out of a sum of money which the husband paid each week to the wife for household and other expenses. In 1944 the house was sold for £1,700, and another house was bought in the wife's name for £2,000, of which £1,500 was borrowed on the security of a mortgage. In 1948 that house was sold for £4,500, and another house was bought. Again part of the proceeds of sale of the house sold was used in the purchase of the new house, the rest being borrowed on a mortgage. Later that house also was sold, and another purchased in the wife's name, part of the purchase-money being raised by means of a mortgage. In the case of each house purchased, the mortgage arrangements were similar to those adopted in the purchase of the house bought in 1933, namely, the husband joined as guarantor and provided for the repayments of the money borrowed. Each house was successively the matrimonial home. It was conceded by the wife that if she was entitled to the house, her interest would be charged with the mortgage instalments, falling due after the date when the parties separated, which were paid by the husband as guarantor, he being subrogated to the mortgagee's rights. It was held that the wife was entitled to the house, subject always to the mortgage instalments falling due after the date of separation, because there was a presumption that the mortgage moneys repaid by the husband were gifts to the wife, as the houses had been bought successively in the wife's name, and the decision of the county court judge that the presumption of advancement was not rebutted was not disturbed.

In his judgment, Lord Evershed M.R. said[5]: "On the face "of it, it was plainly the wife's property. But over this long "period the husband paid the mortgage interest and instalments, "and the matter which the judge had to determine was, what "was the proper inference from that long-continuing conduct? "His conclusion was that in so far as he made these contribu-"tions, he must be taken to have been advancing them to the "wife, since they were to the benefit of the equity of redemption, "which belonged to the wife." Parker L.J. said[6]: "I think that "in the case of a family asset, such as the home or the furniture, "acquired for their" [the spouses'] "joint use, the presumption

[4] [1958] 1 W.L.R. 259.
[5] Ibid. 263.
[6] Ibid. 265.

"of advancement can be easily rebutted. It is different from a "case where what is acquired is, for instance, for the wife's "personal use."

But, in the present case, it must always be remembered that the new house was really being bought for two families, the wife's father and mother, and the wife with her husband and daughter. There is further in the present case the fact that the wife's father and mother made contributions at the time that the house was bought. I have already stated that the exact measure of that contribution has not been precisely ascertained, but the wife said in her evidence: "I can only say in all sincerity that my father "and mother did help me." There is also in the present case the circumstance that there was some help from the father in regard to money payable by way of mortgage instalments, although the measure of it was not ascertained. But the husband (as his original letter shows) certainly thought that there was to be a considerable contribution.

In all the circumstances, it does not seem to me that the continuance of naval allotments, even at an increased rate after the house had been bought, had any other effect than making provision for the wife to enable her to discharge obligations which were hers. It is not suggested that the husband was placed in the position of having a charge on his wife's property. What is said is that in some way the husband became introduced into and joined in the beneficial ownership. He was, however, merely maintaining his wife with the knowledge that she, with her father, had acquired a home for them all, and that in consequence she had financial burdens.

In my judgment, therefore, the husband had no beneficial interest in the house when it was first bought and did not subsequently acquire any such interest. I would, therefore, dismiss the appeal.

ORMEROD L.J. I am in full agreement with the views which have been expressed by Morris L.J. and there is nothing that I wish to add.

HODSON L.J. I also agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Trott & Gentry; W. A. L. Osborn.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 16, 17.

Diplock J.

*McDOUGALL *v.* AEROMARINE OF EMSWORTH LTD.

[1958 M. No. 1049.]

Sale of Goods—Property, when passing—Shipbuilding contract—Yacht to be constructed—Property to pass on payment of first instalment of price—Yacht found to be unseaworthy—Whether property passed before completion—Whether right to reject precluded by passing of property.

Sale of Goods—Time of delivery—Whether warranty or condition—Shipbuilding contract—Pleasure yacht.

The defendants agreed to build a pleasure yacht for the plaintiff and to deliver a completed craft on May 1, 1957. Payment of the price was to be made by instalments, the first instalment being payable upon the signing of the contract and the remaining instalments as various stages of the work proceeded. Clause 8 of the contract provided that, upon the payment of the first instalment, the property in the yacht together with all materials, equipment, fittings, and machinery purchased by the defendants specifically for the yacht's construction should become the absolute property of the plaintiff. The yacht, when launched in June, 1957, was found to possess defects, which made it unseaworthy, and these defects had not been satisfactorily remedied, when it was relaunched in July, 1957. In September and October, 1957, the defendants offered to execute certain repairs to the yacht on terms that constituted a variation of the original contract, alternatively, to give a discount. The plaintiff, rejecting both these offers, claimed the return of the price and extras paid under the contract as money paid for a consideration that had wholly failed, and also claimed damages for loss of the yacht's use and minor expenses agreed at £88 4s. 7d.:—

Held, (1) that the right to reject the yacht had not been divested by the passing of the property in it because the property in the yacht and in all materials purchased specifically for its construction did not pass on the payment of the first instalment, there being then nothing physically in existence.

(2) That even if the property in the yacht and the materials used in its construction passed as construction proceeded, it only passed defeasibly, subject to the completed craft being in a deliverable state when completed.

Colonial Insurance Company of New Zealand v. *Adelaide Marine Insurance Co.* (1886) 12 App.Cas. 128; 3 T.L.R. 252, and dictum of Lord Dundas in *Nelson* v. *William Chalmers & Co. Ltd.*, 1913 S.C. 441, 453 applied.

(3) That a stipulation as to the time of the delivery of a pleasure yacht did not differ from stipulations as to time in mercantile contracts, so that failure to deliver within a reasonable time was a breach of a condition entitling the buyer to repudiate the contract.

(4) That the plaintiff's rejection of the offers of September and October, 1957, did not constitute a wrongful repudiation of the contract, because the offers were themselves variations of the contracts, and were made after a reasonable time for delivery had elapsed. Accordingly, the plaintiff's claim succeeded.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

Action.

The following facts are taken from the judgment: By a contract which was in a standard form sponsored by the Ship and Boat Builders National Federation, and made on November 6, 1956, the defendants, Aeromarine of Emsworth Ltd. agreed to construct for the plaintiff, Ronald James Richard McDougall, a four-ton Thames measurement yacht of a standard type known as a Tiger V cruiser/racer with certain modifications for use in the 1957 yachting season at a price of £1,523 17s. Payment was to be made by five instalments, the first instalment being payable on the signing of the contract, and the remaining four instalments as various stages of the work were completed. Clause 3 of the contract provided: "The builders will use "their best endeavours to complete the construction and fitting "out by May 1, 1957, but owing to the effect of delays and "shortages, such delivery date cannot be guaranteed." Clause 5 provided: "Upon completion of the craft, the builders will notify "the buyer in writing that the craft is ready for acceptance trials "to be run and the buyer or his authorized agent will present "himself within twenty-eight days of the date of such notice to "accompany the builders or their representative upon a trial run "of not less than one hour's duration." The remainder of clause 5 dealt with what happened should the buyer fail to turn up for trials. Clause 6 provided: "The builders shall be deemed "to have completed the construction and fitting out of the craft "in accordance with the requirements of the annexed specifica-"tion at the conclusion of the trial run provided that the per-"formance of the craft during such trial run is to the reasonable "satisfaction of the buyer, such satisfaction to be indicated by "the signature of the buyer to the memorandum endorsed on "the back hereof." By clause 8: "The said craft together "with all materials equipment fittings and machinery purchased "by the builders specifically for the construction thereof whether "in their building yard workshops water or elsewhere shall become "the absolute property of the buyer upon the first instalment "being paid hereunder provided that the builders shall have a "lien upon the craft materials equipment fittings and machinery "for recovery of all sums due whether invoiced or not under the "terms of this agreement or any variation or modification "thereof." Clause 9 provided: "If any defective workmanship "of the builders and/or materials shall be discovered in the "hull machinery sails or rigging (except as hereinafter provided) "of the craft within six months after the acceptance trials, fair "wear and tear excepted, and notice in writing of the same be "at once given to the builders, the builders shall either repair "and make good the same or pay to the buyer a sum equal to "the cost which they would have incurred in repairing or making "good the same at their yard, but the builders shall in no case "be liable for detention consequential or other damage for any "defects in either original or substituted work which shall appear

1958

McDougall v. Aeromarine of Emsworth Ltd.

"after the said period of six months nor shall the builders be "liable for the failure of any proprietary articles or subcontracted "work which shall bear only the customary guarantee of the "manufacturers where applicable nor shall the builders be "responsible for any fault or failure consequent upon the design "of the craft should such design not be the work of the builders "or any naval architect appointed by them upon their own "responsibility. Every guarantee and/or warranty and/or "condition implied by statute or common law is expressly "excluded from this contract."

The plaintiff ordered certain additional modifications and extras, which necessitated the postponement of the launching trials until June 3, 1957, when the plaintiff noticed certain gaps in the seams of the yacht which made her unseaworthy. As a result the defendants undertook to respline the seams in the topsides, but on July 11, 1957, when the yacht was due to be relaunched, she still had a number of defects that made her unseaworthy. On September 5, 1957, the defendants offered to execute certain repairs to the yacht which would remedy the defects, to the satisfaction of the respective surveyors. The offer was a variation of the contract, for under clause 6 of the contract the work had to be completed to the satisfaction of the buyer. The plaintiff rejected this offer on September 19, 1957, as being impracticable and because it did not provide the equivalent of a new vessel. On October 30, 1957, the defendants offered to do certain work suggested by their surveyor provided the buyer accepted the yacht on completion of the work, or, alternatively, that the yacht be accepted in its then state at a discount of 50 guineas. The plaintiff rejected this offer.

By a specially indorsed writ, the plaintiff claimed £1,735 15s. 6d., being the sums that he had paid under the contract for instalments of the original price and extras, as money paid for a consideration that had wholly failed; alternatively, he claimed damages for breach of contract. He also claimed damages for loss of the yacht during the 1957 yachting season and other minor expenses, which were agreed at £88 4s. 7d. By their defence the defendants denied that they were at any time in breach of their contract, and relied on the plaintiff's rejection of their offers of September 5 and October 30, 1957, as a wrongful repudiation of the contract. They counterclaimed £180 17s. 7d. due in respect of the yacht and unpaid.

W. A. Fearnley-Whittingstall Q.C. and *J. R. Bickford-Smith* for the plaintiff.

R. D. Stewart-Brown Q.C. and *C. R. Beddington* for the defendants.

The following cases were cited in argument, in addition to the cases referred to in the judgment: *Vigers Brothers* v. *Sanderson*

Brothers *; *In re Blyth Shipbuilding and Dry Docks Co.*†; *Sir James Laing & Sons Ltd.* v. *Barclay, Curle & Co. Ltd.*‡; *Hoenig* v. *Isaacs* §; *Charles Rickards Ltd.* v. *Oppenheim.*||

Diplock J. stated the facts and continued: The plaintiff's claim for £1,735 15s. 6d. is a claim for money paid upon a consideration which has wholly failed. In order to succeed, it is necessary for him to say that at the date of the issue of his writ he had no property in the vessel. He is then confronted at the outset with clause 8 of the contract, which purports to vest in him the absolute property in the craft and all equipment, materials, fittings and machinery purchased specifically for the construction thereof on payment of the first instalment. This was in fact paid on about November 12, 1956. Does the presence of this clause divest him of his right to reject the yacht and disclaim any property in it, if there be a breach of condition by the defendants, which in the case of an ordinary contract for the sale of goods would entitle him to do so? I say "a contract "for the sale of goods" because it seems well settled by authority that, although a shipbuilding contract is in form a contract for the construction of the vessel, it is in law a contract for the sale of goods. (See, for example, *Reid* v. *Macbeth & Gray.*[1])

It is rather remarkable that although a clause of the nature of clause 8 has been common form in shipbuilding contracts for more than 50 years, there is no reported English decision as to its effect on the buyer's right of rejection. There is one Scots decision, *Nelson* v. *William Chalmers & Co. Ltd.*,[2] in which the matter has been discussed. There is, however, a danger in applying Scots decisions to English cases, since it appears that under Scots law property in chattels passes only on delivery, except as otherwise provided by statute in the Sale of Goods Act, 1893. Consequently, it appears to me that the opinions of Lords Kinnear[3] and Mackenzie[4] in the above-mentioned Scottish case turn largely upon considerations peculiar to Scots law, and only the opinion of Lord Dundas[5] deals with it on principles which are common to the laws of England and Scotland.

There is no evidence that by November 12, on which date a receipt was given for the first instalment, the construction of the craft had been started, or that any equipment, materials, fittings or machinery had been purchased by the defendants specifically for the construction of the craft. There is, therefore, no evidence that any goods became the property of the plaintiff on the first instalment being paid, and it does not seem to me that on its

* [1901] 1 Q.B. 608; 17 T.L.R. 316.
† [1926] Ch. 494.
‡ [1908] A.C. 35.
§ [1952] 1 T.L.R. 1360; [1952] 2 All E.R. 176.
|| [1950] 1 K.B. 616; 66 T.L.R. (Pt. 1) 435; [1950] 1 All E.R. 420.
[1] [1904] A.C. 223.
[2] 1913 S.C. 441.
[3] Ibid. 448.
[4] Ibid. 454.
[5] Ibid. 452.

1958

McDOUGALL v. AEROMARINE OF EMSWORTH LTD.

Diplock J.

true construction clause 8 provides for the passing to the plaintiff of the property in the craft, if it came into being after that date, or in any equipment, materials, fittings or machinery purchased by the defendants specifically for the construction of the craft after that date. The clause, which was no doubt designed for the protection of the purchaser in the event of the insolvency of the builders, thus seems to me to be quite inept for that purpose.

But, even if I were wrong in this and the clause was effective to transfer to the buyer the property in the craft as production proceeded and in the equipment, materials, etc., as they were purchased by the builders specifically for the construction of the craft, it does not follow that the property therein passed to the purchaser indefeasibly. It is not an unfamiliar conception in contracts for the sale of goods that the property should pass defeasibly. To this effect is the decision of the Privy Council in *Colonial Insurance Company of New Zealand* v. *Adelaide Marine Insurance Co.*,[6] in which it was held that where delivery of goods is made by instalments under an entire contract, the property passes in each instalment on delivery and acceptance, but the buyer's right of property so acquired is defeasible at his option if the seller fails to deliver the total quantity contracted to be sold. In *Nelson* v. *William Chalmers & Co. Ltd.*[7] Lord Dundas applied the same principle to a shipbuilding contract containing a clause similar to clause 8.

Although neither of these decisions is binding on an English court, they seem to me right in principle and in accordance with common sense. I do not think that a clause providing for the transfer of property, whether qualified by the adjective "absolute" or not, in incomplete goods or their components of itself irrevocably deprives the buyer of any right to reject the goods when completed, and to divest himself of his property therein. The question seems to me to depend on the construction of the contract as a whole, and to that I now turn.

The contract places upon the seller the duty to complete the construction and fitting out of the craft, and to deliver it to the buyer at the seller's premises or on the water adjacent thereto. These stipulations seem to me to be plainly conditions of the contract, and if the seller refuses or fails to complete, the buyer is entitled, in my view, to refuse to accept an incomplete craft, and if he does so, any right of property in the incomplete craft which he may have acquired under clause 8 is determined and the property therein revests in the seller.

Clause 6 of the contract defines what is meant by "completion of the craft" for the purposes of the present contract, that is, that the performance of the craft during the trial run is to be "to the reasonable satisfaction" of the buyer. The word

[6] (1886) 12 App.Cas. 128; 3 T.L.R. 252.

[7] 1913 S.C. 441, 453.

"provided" in clause 6 does not, as Mr. Stewart-Brown contends, introduce a proviso in the legal sense of that term, and the clause places upon the buyer the obligation to sign the memorandum of satisfaction if he is, or ought as a reasonable man to be, satisfied by the craft's performance on its trial run. If he is not, and ought not as a reasonable man to be so satisfied, he is not bound to accept delivery.

It is to be observed that the first sentence of clause 9 gives him no remedy against the seller in respect of defects discovered before or during the acceptance trials, while the second sentence purports to exclude any guarantee, warranty or condition implied by statute or common law. For such defects, the buyer's only remedy is to refuse to accept delivery, on the ground that the sellers have not completed their contract.

Mr. Fearnley-Whittingstall has argued that the second sentence in clause 9 should be construed, in the context in which it appears, as limited to excluding conditions or warranties implied by statute or common law in respect of defects discovered after the trial run, and it is in the light of this contention that he claims that the buyer can rely upon the breaches of the implied conditions as to merchantable quality and fitness for the purpose of use as a racing/cruising yacht in respect of the defects which were discovered at the time of the first trial run on June 3, 1957, and had not been adequately remedied when the craft was relaunched on July 11, 1957, although in the result there was no subsequent trial run.

If I thought that the other clauses of the contract gave to the buyer no remedy in respect of defects discovered before or during the trial run, I should be tempted to give to the second sentence of clause 9 the limited meaning contended for by Mr. Fearnley-Whittingstall, despite the plain words of that sentence that every guarantee and/or warranty and/or condition implied by statute or common law is expressly excluded from this contract, but as the contract read as a whole seems to me to give the buyer an adequate alternative remedy for such defects, I see no reason for cutting down the literal meaning of the words, despite the fact that they appear in a clause of which the first part deals only with defects discovered after the acceptance trials. I do not think, therefore, that the plaintiff could rely upon any implied condition as to merchantable quality or fitness for a purpose.

He is, however, protected in a different manner by clauses 5 and 6. In my view, the effect of clauses 5 and 6 of the contract is to entitle the buyer to refuse delivery if he is not reasonably satisfied of the performance of the craft when tendered by the seller for delivery at the conclusion of the acceptance trials; and in the context of clause 6 I construe the expression "perform-"ance" widely, and as including the standard of workmanship and materials and the compliance of the craft with the specification. To read the words "performance of the craft" in a narrower sense would result in the seller being deemed to have

1958

McDougall v. Aeromarine of Emsworth Ltd.

Diplock J.

fulfilled his contract even if the interior fittings were incomplete or different from those specified, so long as the vessel sailed well.

But it does not follow that because, when the vessel is first tendered by the seller for acceptance trials, the buyer is reasonably dissatisfied with her, he is entitled to treat the defects then existing as a breach of condition, so as to enable him to treat the contract as repudiated and to revest in the seller any property in the craft or any part thereof which may have been vested in the buyer by virtue of clause 8. The buyer is entitled to refuse to accept delivery of the vessel in its existing state, but if the defect is one that can be remedied, and remedied within a time which will still enable the seller to deliver within the period of delivery permitted by the contract, the buyer is not, in my view, entitled to treat the contract as repudiated by the seller by reason of the existence of such defects at the time when the vessel is first tendered for acceptance.

It thus becomes relevant to decide what is the period for delivery permitted by the contract. Clause 3 states a specific date for delivery, namely, May 1, 1957, but expressly states that such delivery date cannot be guaranteed. A clause in this form, in my view, places upon the seller a duty to deliver within a reasonable time of the specified date. What is a reasonable time from the specified date is a question of fact depending upon all the circumstances of the case as they exist up to the time when delivery is or ought to be made. In my opinion, in the circumstances of the present case, which relates to the sale of a pleasure yacht built in accordance with the buyer's special requirements, for use by him in the 1957 yachting season, and where delays in completion after June 3, 1957, were due solely to the prior bad workmanship or the prior incorporation of defective materials by the defendants, a reasonable time had certainly expired by the beginning of September, 1957, that is three months after June 3, and at a time when four-fifths of the 1957 yachting season had passed.

By section 10 of the Sale of Goods Act, 1893, whether this stipulation as to time of delivery is a condition or a warranty depends on the terms of the contract. In my view, the obligation to deliver within a reasonable time of May 1, 1957, is a condition. It is conceded by Mr. Stewart-Brown that this is so as a general rule in mercantile transactions, but he contends that this does not apply to the sale of a vessel not for commercial use or for resale, but for use by the purchaser solely for his own pleasure. I am not impressed by this argument. Where a purchaser buys a yacht for use for his own pleasure from the beginning of a particular yachting season, I think it must, as a matter of common sense, be of the essence of the contract that he should receive delivery in time to make substantial use of it during that season. It may be that he expects to use it also in subsequent seasons, but he cannot foretell whether he will be able to do so, and in any event it will have deteriorated in some degree by the

time the next season comes round. Where, as was contemplated in this case, the yacht incorporates modifications to suit the buyer's personal taste, its value on sale by him is likely to be less than the price which he paid. Furthermore, it does not seem to me that he can be adequately compensated in damages for any breach of the stipulation, since although it was suggested in *The Mediana*,[8] that real and not merely nominal damages may be given for the loss of a chattel which has amenity, but not a commercial value, there is little assistance in the cases as to how such damages are to be assessed, and indeed it is impossible adequately to equate loss of some amenity or pleasure to pounds, shillings and pence.

For these reasons, I am of opinion that it was a condition of the contract and not a mere warranty that the seller should deliver the yacht within a reasonable time of May 1, 1957, which time had, as I have held, expired by the beginning of September, 1957.

Applying these principles as to the construction and effect of the contract to the facts as I have found them, it follows that the plaintiff was entitled to refuse to accept delivery of the vessel when it was first tendered for acceptance on June 3, 1957. He was not then entitled and did not purport to treat the contract as repudiated by the defendants, but he was entitled to and did require the defendants to complete their contract and to remedy the defects and to re-tender for acceptance within a reasonable time. The defendants then resplined the topsides with the object of remedying the defects, but were unsuccessful in doing so. They did not formally tender the vessel for further acceptance trials, but on the facts formal tender for acceptance trials was, I think, waived by both parties, since it was evident at a meeting on July 27 that the plaintiff would not be satisfied with the performance of the vessel at further acceptance trials, and on the facts that I have found, his dissatisfaction was reasonable.

In these circumstances, I do not think that either party can rely on the absence of any formal acceptance trials at the end of July, and neither has sought to do so. I think that their legal position is the same as if there had been further formal acceptance trials on July 27, 1957, and the plaintiff had refused to accept delivery of the vessel. He would have been entitled to do so. Furthermore, since the defects could not be remedied (if they could be remedied at all) in less than four or five weeks, and probably could not be remedied in less than two months, by which time the 1957 yachting season would be nearly finished or completely finished, I am inclined to think that the plaintiff was entitled to regard the contract as repudiated by the defendants on July 27, since by then it was impossible that it could be performed by them within a reasonable time. But on the facts I am not satisfied that he then elected to treat the contract as rescinded.

[8] [1900] A.C. 113; 16 T.L.R. 194.

1958

McDougall v. Aeromarine of Emsworth Ltd.

Diplock J.

The defendants, therefore, had a tempus poenitentiae in which they could endeavour to continue to perform their contract, but despite their own surveyor's confirmation of the plaintiff's complaints, they took no steps whatever to remedy the defects and perform their contract, but allowed five more of the remaining weeks of the yachting season to pass, till on September 5 they wrote, offering to remedy the defects, but only upon terms which involved a variation of the contract. The work, which they offered to do, could not in any event be completed until after the end of the yachting season.

The defendants' failure to tender the yacht for delivery in accordance with the contract by September 5 was itself, I think, a breach of condition which the plaintiff was entitled to treat as rescinding the contract. Their intimation, for that was what their offer amounted to, that they could not complete it before the end of the 1957 yachting season was a fortiori, in my opinion, a wrongful repudiation of the contract by the defendants, as was their intimation that they would only complete the contract upon terms different from those of the original contract. The plaintiff by his letter of September 19 elected to treat the defendants' wrongful repudiation of the contract as rescinding it.

I hold that, in all the circumstances of the case, he was entitled to do so; but even if he were not, the defendants cannot rely on the plaintiff's purported rescission of the contract of September 19 as a wrongful repudiation on his part of the contract, thus relieving them from any further obligation to perform it, because they did not accept his repudiation but continued to hold him to the contract; and on October 30 they informed the plaintiff that they would insist either on completing the vessel on terms inconsistent with and less favourable to the plaintiff than those in the original contract, or those that they had offered in their letter of September 5, or upon delivering the vessel in its defective state with an allowance of 50 guineas off the contract price. This was, I think, yet another wrongful repudiation by the defendants of the contract, which the plaintiff was entitled to and did accept. Such part of the property, if any, in the vessel or any portion thereof as had previously vested in him under clause 8 of the contract accordingly revested then in the defendants.

I hold, therefore, that by September 5, 1957, on the grounds that I have indicated, the plaintiff was entitled to treat the contract as rescinded by the defendants and elected to do so on September 19. I hold, further, that by October 30, 1957, he had (although I do not think any were necessary) additional grounds for doing so, and that after these grounds were available, he reiterated his election to treat the contract as rescinded.

The plaintiff is, accordingly, entitled to judgment for the sum of £1,735 15s. 6d. as money paid for a consideration that has wholly failed. He is also entitled to recover £88 4s. 7d. for

surveyor's fees and other expenses and damages for the loss of use of the yacht during part at least of the 1957 season.

Although, as I have already said, there are passages in the speeches in *The Mediana*[9] which suggest (I respectfully think correctly) that more than nominal damages could be recoverable under this head, Mr. Fearnley-Whittingstall has abandoned any claim to more than nominal damages, which I accordingly fix at 40s., with some regret that I have been deprived of the pleasure of hearing what would have been an interesting argument as to how such damages ought to be assessed, but with great relief that I have not been obliged to try to assess them.

1958

McDougall v. Aeromarine of Emsworth Ltd.

Diplock J

Judgment for the plaintiff.

Solicitors: *William A. Crump & Son; Howard Smith & Harston.*

[9] [1900] A.C. 113; 16 T.L.R. 194.

[QUEEN'S BENCH DIVISION.]

* WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

1958 *Oct.* 16, 17.

Lord Parker C.J., Cassels and Streatfeild JJ.

Rates and Rating—"Social welfare"—Working men's clubs union—Convalescent home—Union formed to encourage working men to form clubs—Rating relief claimed for Union's convalescent home—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

An organization (the Union) was formed in 1862 to encourage working men to band together and form working men's clubs. The members of the Union were distinguished patrons whose aim was that the working men should be raised by their own endeavours. In 1890, 384 clubs were members of the Union; in 1925 the number had risen to 2,469 and in 1955 to 3,420. The objects of the Union as set out in rule 2 of the Union's rules were: "To carry on the "business of general advisors, teachers of the doctrine of associa-"tion for social or ameliorative purposes. . . ." At the present time the main activity of the Union consisted of helping clubs which had already been formed and become members. The Union owned a number of convalescent homes used by the members of the member clubs. The Union appealed against the rating assessment in respect of one of their convalescent homes claiming that they were entitled to relief under section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as "an "organization . . . which is not established or conducted for profit "and whose main objects . . . are . . . concerned with the advance-"ment of . . . social welfare":—

Held, (1) that the Union was not an organization established or conducted for profit.

Dictum of Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1958] 3 W.L.R. 172, 187; [1958] 2 All E.R. 601 applied.

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

(2) (Cassels J. dissenting) that although the member clubs themselves could not come within the words of section 8 (1) (*a*) to qualify for relief, the Union did. In considering whether an organization was concerned with the advancement of social welfare the proper approach was to consider the written constitution and the objects therein laid down; and the objects as set out in rule 2 came within the words of section 8 (1) (*a*) and were concerned with the advancement of social welfare. If one were entitled to go outside the rules to discover the objects of the Union, one had to consider the Union at its inception when its main object of encouraging working men to form their own clubs was clearly social welfare, and, since that original object had persisted throughout, although the Union's main activity now consisted of helping clubs already formed, the Union was entitled to the relief claimed.

Berry v. *St. Marylebone Borough Council* [1958] 1 Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677 applied.

CASE STATED by Roderic Bowen Q.C., Deputy Recorder at Swansea Borough Quarter Sessions.

The appellants, the Working Men's Club and Institute Union Ltd., by notice dated June 11, 1956, to the respondents, the Swansea County Borough Council, appealed under section 4 of the Poor Relief Act, 1743, against the amount of rates assessed to be paid in respect of the appellants' convalescent home at Langland Bay, Swansea.

The following facts were proved or admitted before the deputy recorder. The hereditament, the subject-matter of the appeal, was the convalescent home of the Working Men's Club and Institute Union Ltd., Langland Bay, Swansea, owned and occupied by the Union. The home had been conducted by the Union since 1922 and had accommodation for approximately 60 to 70 people. Since its institution, approximately 26,000 patients had taken advantage of the facilities offered by it. The Union had been in existence since 1862 and at present some 3,420 clubs were members of the Union and the clubs themselves had a total membership of approximately two million. The Union was a separate and distinct organization having its own staff and premises with finances provided by the clubs which were members of the Union. Of those member clubs only a minority had political affiliations—about 10 per cent. The overwhelming majority were normal social clubs providing the usual facilities. No proprietary clubs were allowed to become members of the Union. The following paragraphs from the Union's Annual Report for 1955 (at pp. 15, 16) accurately set out the position with regard to the type of clubs which were members of the Union. "He wished "to stress this particular point, that clubs provided social inter-"course and relaxation so necessary during leisure hours to "working men and women and those who were engaged in "business and other activities. Clubs also provided extensively "the means for all kinds of indoor games and outdoor sports, "as well as educational activities which were sponsored par-"ticularly by the Club Union. The deputation recognized and "frankly admitted that the income from the supply of intoxicants

"to their members, mainly beer, enabled these social and recrea-
"tional activities to be carried on. When there was a decrease
"in consumption that naturally resulted in a reduction in the
"Clubs' surplus income, which necessitated a curtailment of the
"social, recreational and educational activities which clubs pro-
"vided for their members." The member clubs were typically social clubs of a type one saw throughout the country, catering for working men and women who chose to join them in their respective areas. The declared objects of the Union were to be found in the Rules of the Union which by rule 2 provided: "The "objects of the Union are: To carry on the business of general "advisors, teachers of the doctrine of association for social or "ameliorative purposes, publishers, stationers and booksellers, "general traders, agents and manufacturers, both wholesale and "retail, of any article which may assist the development of clubs "or their members. To provide and maintain convalescent "homes, or other institutions for the benefit of the members "or wives or children or dependants of the members of clubs "which are members of the Union. The Union shall have full "power to do all things necessary, expedient, or considered by "it desirable for the welfare and protection or assistance of, or "helpful in any manner to its members, and for the accomplish-
"ment of all objects specified in its rules." Rule 27 provided for the manner in which any profits which accrued should be applied. The declared objects were also to be found in a leaflet issued by the Union to prospective members, explaining what the Union did and the advantages of membership and further in: "A Short History of the Working Men's Club and Institute Union "1862–1926," which, at p. 68, states: "Briefly to state these "ideals and beliefs. The first aim and ideal of the Union is to "secure for the workman a higher and wider level of happiness "in his leisure hours and in his daily personal and civic life. And "the principal belief of the Union is that this can best be achieved "by the workman himself, free from assistance, interference, or "dictation by others." The activities in which the Union was at present engaged could be summarised as follows:—The first activity consisted in giving advice and guidance to members of the Union, that was to say to the 3,420 clubs which were within the Union; advice on legal and administrative matters; guidance as to how members should conduct their clubs so that they were carried on according to the law and gave the best possible service to their members. The Union saw that the member clubs were fully acquainted with their rights and with their duties in relation to the usual social activities associated with clubs of that kind. The second activity consisted in the main in running day schools and special courses; holding examinations in respect of club management, diplomas, courses in postal tuition, also the providing of scholarships and making provision for sending persons to Ruskin College and similar institutes for courses. Of that second activity, the major part was really part and parcel of the

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

first activity, that was to say, ancillary to advice and guidance. The second activity could not really be described as amounting to "education" in the general sense of the term. The education was largely for the training of club officers for the carrying out of their duties. Any activity of a general educational nature was of a relatively minor character. The third activity was "Recreational Activities" described in the Annual Report. The union sponsored championships in different sports, presenting trophies. There were contests between clubs in the Union of a considerable character involving expenditure of a substantial amount of money. The fourth activity was the provision of convalescent homes described in the Annual Report. At the moment the Union had four convalescent homes in use; another one was at the moment empty. The first home was opened in 1894 and the Langland Bay Home was opened in 1922. The four homes at present in use had been operated since 1922. Those homes were for persons who were members of clubs within the Union. Eligibility for application for residence was described in a Booklet Guide (at p. 5) issued by the Union as follows: "Only members "who hold a Union Associate Card and have held a Pass Card "for the six months immediately preceding date of application "are eligible to make application for residence." The fifth activity might be described as "trading activity" and consisted in supplying to member clubs material such as stationery, publications, fittings for the club premises, equipment in connexion with sports activities such as dartboards, billiards tables, etc.

In respect of the Langland Bay Convalescent Home the rate, against which the appeal was made, levied by the Swansea County Borough Council as the rating authority in 1956–57 amounted to £1,524; the rate levied in the previous year was £305 6s. 8d. The convalescent homes' account showed a substantial credit balance. The Union as a whole had substantial reserves. The existence of those balances was due simply to the building up of benefits to meet any future contingencies. The "trading "activities" referred to above were part of the first activity referred to and were not conducted with a profit motive. The Union had only one main object, namely the carrying on of the first activity. The "recreational activities" referred to above were entirely secondary to the advice and guidance work and could not be described as a main object. The provision and running of the convalescent homes was not the main object of the Union, but was secondary and subsidiary to the main object.

On behalf of the Union it was contended that the Langland Bay Convalescent Home was a hereditament to which section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied. On behalf of the respondents it was contended that section 8 (1) (*a*) did not so apply.

On that issue the deputy recorder decided as follows: (a) The Union was not established for profit nor conducted for profit. (b) The main object of the Union as found above (namely the

carrying on of the first activity) was not charitable. (c) The main object was not otherwise concerned with the advancement of education. (d) The main object was not otherwise concerned with the advancement of social welfare. The reasons for that decision were:—(i) counsel for the Union conceded that the member clubs could not claim the relief granted in section 8 (1) (*a*) in respect of their premises; (ii) a main object, if it were to be concerned with the advancement of social welfare, had to have a substantial element of benevolence, philanthropy, some form of humanitarianism, altruism and a disposition to do good, not merely a desire to promote social pleasure and social activities as a whole; (iii) the main object of the Union, although social in character and directed towards providing pleasure and comfort for the members of the member clubs, was not concerned with "the "advancement of social welfare." (e) Consequently section 8 (1) (*a*) did not apply to the Langland Bay Convalescent Home.

The question before the court was whether on the above statement of facts, the deputy recorder came to a correct decision in point of law.

The Union appealed.

J. T. Molony Q.C. and *Malcolm Milne* for the Union.
G. D. Squibb Q.C. and Breuan Rees for the borough council.

The following cases were cited in argument: *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[1]; *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council*[2]; *Brighton College* v. *Marriott*[3]; *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*[4]; *Berry* v. *St. Marylebone Borough Council.*[5]

LORD PARKER C.J. This is another of those difficult cases arising out of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the relevant words of which are as follows: "(1) This section applies to the following hereditaments, "that is to say:—(*a*) any hereditament occupied for the purposes "of an organisation (whether corporate or unincorporate) which "is not established or conducted for profit and whose main "objects are charitable or are otherwise concerned with the "advancement of religion, education or social welfare."

This case comes before the court on a case stated by the deputy recorder of Swansea Borough Quarter Sessions, before whom the appellants, the Working Men's Club and Institute Union Ltd., appealed against an amount of rates assessed upon them in respect of their convalescent home at Langland Bay,

[1] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.
[2] [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; [1957] 3 All E.R. 692.
[3] [1926] A.C. 192.
[4] [1958] Ch. 421; [1957] 1 W.L.R. 941; [1957] 2 All E.R. 791.
[5] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Lord Parker C.J.

Swansea, claiming that they were entitled to relief under section 8 of the Act of 1955.

The deputy recorder held that they were not entitled to such relief, and the only issues on the section which come before this court are two: first, whether the appellants are an organization which is not established or conducted for profit—and as to that the appellants have a finding by the deputy recorder in their favour—and, secondly, whether their main object or objects are otherwise concerned with the advancement of social welfare. As to that, the deputy recorder held that their main objects were not of such a character.

Quite shortly, the history of the appellants is as follows: In 1862 there was formed what was called the Working Men's Club and Institute Union. It did not then have the word "Limited" as part of its name. It was formed, I think, clearly at that stage in order to encourage what was referred to as the working men to band together in working men's clubs. If I might refer to a few passages out of the Short History of the Union, it appears (at p. 4) that the Union owed its beginning "to a Unitarian "Clergyman, the Reverend Henry Solly, a passionate soul, "keenly conscious of the low level of working-class life, keen and "eager to raise its habit and character, who saw in the establish-"ment of Working Men's Clubs an instrument to his purpose."

It goes on to refer to a meeting in 1862, presided over by Lord Brougham, who was Lord Chancellor at the time, and the Union carried on with very eminent vice-presidents thereafter. I can pass then, I think, to 1875, when (on p. 13) is set out the speech of Lord Rosebery, who was presiding. He said this: "The principle upon which the Working Men's Club and Institute "Union is based is that the working men are to be raised by "their own endeavours, and are not to be patronised and fostered "and dandled. All that is to be done for the working men is to "be done by themselves. What man does for himself is worth "ten times as much as what can be done for him by anyone "else." Then he goes on: "This Union is a central authority "which guides and supports the spontaneous endeavours of the "working men living in provincial towns. It lets fall the good "seed in places where it has not hitherto fallen, and what is "even of more importance than this, it embodies the entire "experience of the movement from its very foundation, and is, "therefore, able to give the best advice to all clubs which may "need it. The influence of this central authority is felt all over "the country." Then, in setting out various of the considerations, he says, a little further down (p. 14): "Thirdly, they ought "to set before their members some object higher than the mere "social object of getting a comfortable place in which to meet."

That was in 1875, and the Union prospered. It got more and more clubs formed, and those clubs became its members, and it appears (on p. 18) that, from 1875 onwards the distinguished

patrons gradually faded away as the era of democratic government and self-support dawned and developed.

By 1888 the Union was very nearly self-supporting, and on April 18, 1889, the Union was registered under the Industrial and Provident Societies Act, 1876. The History (at p. 21) says that the Union was registered, as are almost all co-operative societies, under the Industrial and Provident Societies Act, and rules were drafted with the assistance of certain gentlemen and adopted. "So complete were they that although they have been subject to "slight subsequent amendment, principally to give effect to the "more complete representation of the Provinces on what is now "really truly a national executive (though often misnamed 'the "'London Executive'), this constitution of the Union, com-"pletely democratic, remains almost as first drafted."

Then (on p. 25) there appears a table showing the progress of the Union between 1887 and 1925. By 1890, that is to say, the time of registration, the number of clubs who were members of the Union was some 384; by 1925 it had risen to 2,469, and by 1955, the relevant year that is under consideration, the organization had some 3,420 clubs as members, and those 3,420 clubs themselves had a total membership of just under two millions.

In the chapter headed "The Union's Aim," in the History (at p. 68), there appears this: "Briefly to state these ideals and "beliefs. The first aim and ideal of the Union is to secure for the "workman a higher and wider level of happiness in his leisure "hours and in his daily personal and civic life. And the principal "belief of the Union is that this can best be achieved by the "workman himself, free from assistance, interference, or dicta-"tion by others. Supplementary to this, or part of this task, is "to afford guidance and assistance in every amplification and "ramification of all that is comprised within it. To make its club "members self-reliant, through common effort, to train them in "skill in self-government individual as well as corporate, to "assure that their efforts 'for themselves and by themselves' "shall be fruitful, both in individual, domestic and the common "good, that both the member, his dependants and the community "shall be the better because of the clubs' establishment, those "were the ideals of the founders, they are the ideals of the Union "now."

The History (p. 70) says: "Whilst it would desire every "bona fide club to be within its ranks, it asks no club to join, "and very closely scrutinises the character of any club which "seeks membership. There are publications issued by the "Union which advocate the establishment of working-class "clubs, and, if any group of men get together in spontaneous "local effort, with the object of forming a club, or call a "meeting to consider the subject, the Union will send a speaker "and adviser. This is the whole of its propaganda. It has no "paid organisers, no peripatetic proselytising preachers." A little lower down (on p. 71) it goes on: "And if at the very

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Lord Parker C.J.

"beginning the men who think of promoting a club find contact "with the Union, then from the beginning all is well with the "child. And here can be set out just what the Union does. "Its aim is that every club born shall grow up to health and "usefulness. To that end it must be reared upon a basis of "legality and right conduct, moral and material. The Union "secures that it shall begin on right lines and makes the path "straight." On p. 74 it sets out the legal advice it gives and, indeed, boasts that it has never been found wrong on a point of law. That appears from the short history.

So far as the registration is concerned, as I have said, it was registered under the Industrial and Provident Societies Act, 1876, and, under that Act, rules had to be registered and the only rules before the court are the recent Rules—the copy I have is dated 1956, but I take it, from what I have read in the history that, at any rate as far as its objects are concerned, they are the same to all intents and purposes as they were in 1889 when registration took place.

They are in these terms: Under "Name": "The Society "shall be called the Working Men's Club and Institute Union, "Ltd.," and that is because, under the Act, it becomes incorporated. Then under paragraph 2: "The objects of the Union "are: To carry on the business of general advisers, teachers of "the doctrine of association for social or ameliorative purposes" —I pause there for a reason I will state in a moment; and then it goes on: "publishers"—that is, to carry on the business of publishers—"stationers and booksellers, general traders, agents "and manufacturers, both wholesale and retail, of any article "which may assist the development of clubs or their members. "To provide and maintain convalescent homes, or other institu- "tions for the benefit of the members or wives or children or "dependants of the members of clubs which are members of "the Union. The Union shall have full power to do all things "necessary, expedient, or considered by it desirable for the "welfare and protection or assistance of, or helpful in any "manner to, its members, and for the accomplishment of all "objects specified in its rules." I shall have to come back to the rules in a moment, but, in my view, properly read that objects clause is setting out a main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes, and under the name of the Working Men's Club and Institute Union Ltd. All that follows, in my view, although stated as objects are really the means whereby the object stated in the first three lines is going to be carried out.

The first question is whether this organisation, to use the words of the Act, is established or conducted for profit. That it makes profits which are profits for the purposes of taxation is perfectly clear. It owns very considerable securities, which earn interest, and properties and, to take the position of the

general fund in the Annual Report of 1955, it shows that the interest on certain securities alone amounted to £4,445 12s. 7d., and in addition there was bank interest and interest on Co-Operative Wholesale Society Bank Deposit Account, so that they clearly make profits in that sense.

Their receipts, apart from the interest on securities, are the annual payments of the member clubs, who I think pay a maximum of £2 a year—it is 10s. for each 100 members, with a maximum of £2. But in addition they get a very large sum by way of receipts from what are called associate and pass cards, which enable a member of any member club to be an honorary member of other member clubs.

It has been said more than once that the fact that an organization makes profits is, of course, not the question to be considered. The question is, is it established or conducted for profit? The matter was referred to by Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[1] where, in dealing with the Friendly Society in that case he said: "Looking at the way in which the society has conducted "its affairs, I am of the opinion it has made profits. It has not "distributed those profits like a commercial company. Nor has "it returned them to members. It has used them to build up "large and accumulating reserve funds. But the fact that the "society has made profits does not mean that it is 'conducted "'for profit,' which I take to mean 'conducted for the purpose "'of making profit.' Many charitable bodies, such as colleges "and religious foundations, have large funds which they invest "at interest in stocks and shares, or purchase land which they let "at a profit. Yet they are not established or conducted for "profit." Everything that Lord Denning said there, as it seems to me, applies in the circumstances of this case. I agree with the deputy recorder's finding that here this organization was not established or conducted for profit.

The next question is whether its main object is the advancement of social welfare. Those words have given rise to great difficulty and nobody has yet, perhaps wisely, laid down what is considered an exhaustive definition of those words. Indeed, it has been said that the words "social welfare" alone, leaving out their context in that section, and the words "advancement of" which precede them, are of the very widest character. The question here is, was the main object for the advancement of social welfare?

It is perfectly clear that the member clubs themselves could not come within those words and qualify for relief. The individual clubs are members banding together for their own advantage and benefit, and there is not there the public element which all, I think, now agree, must be present if an organization is going to fall within the section.

[1] [1958] 3 W.L.R. 172, 187; [1958] 2 All E.R. 601.

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Lord Parker C.J.

But the question remains: what is the position of the Union, the appellants, the central organization? I confess it is a matter which has given me considerable doubt. If, of course, member clubs which had formed over a period of years decided to band together for their own advantage and form a central organization or union which would assist them and benefit them and to which they paid contributions, I think the matter would fall directly within the *Friendly Society* case [2] and that the central body could not qualify for relief.

But that is not, in my view, this case. This, as it seems to me, is the case of an organization originally, in 1862, setting out to encourage the working man to form these working men's clubs, and I think that the encouragement of men to do that would fall fairly and squarely within the words "advancement of social "welfare." Indeed, if the matter rested there I do not think Mr. Squibb would deny that result.

But, of course, the matter does not rest quite there, because a time came, as I have already said, when this organization became self-supporting: when it had become so successful that the activity of encouraging working men directly to band together had rather fallen into the background, and when the main activity consisted of helping the clubs which had already been formed and which had become members.

I think the proper approach, as in all these cases, is to consider, first, the written constitution and the objects there laid down. It is only in two events, as I understand it, that one is entitled to go outside those objects. One is that if, on a reading of the constitution, it is impossible to see which are the main objects out of a series of objects, then one is entitled to look at the activities; secondly, even if one can find what appears to be a main object in the constitution but it is ambiguous, one would be entitled to look to the way in which the organization has acted.

Accordingly, I would look, first, at rule 2, which I assume was to all intents and purposes the same rule as in 1889 and it seems to me on a reading of that rule, that one arrives at one main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes.

Those very wide words describe, I think, an object which is an object for the advancement of social welfare, and I doubt very much if one is entitled to go any further. I would add that it seems to me that the deputy recorder has not followed that course: indeed, he barely refers to the construction of rule 2, but looks directly at the present activities of the organization and comes to the conclusion that the first activity, which he holds to be the main object, was, to put it quite generally, to benefit the member clubs and their members.

[2] [1958] 3 W.L.R. 172.

It seems to me, even if one is entitled to go outside rule 2, there is no reason for beginning the consideration at the year 1889, when this organization was incorporated. Of course, there might have been completely new objects upon that incorporation, but that is not this case. From the very beginning the object here has not been to benefit the members; the main object has not been to benefit such clubs as become members, but to encourage the working men to band together to form clubs, and then, incidentally, to assist those clubs which are formed and which do become members and, if only by example, to encourage the working men to form further clubs.

This is certainly not a case, in my view, where that object has been exhausted. It is true that there is a very large membership, but it is noticeable that, between 1925 and 1955, we are told no fewer than 1,000 new member clubs have joined, and it is said that the working man himself is the best missionary: that he goes, it may be, from his own district to another preaching the benefits of his local working men's club. I am satisfied that the original object has persisted throughout, and, although it may be today that the chief beneficiaries, if I may put it in that way, are the member clubs, nevertheless the original object remains. If I may repeat again, this is not a case of clubs which have banded together into a central organization for their own benefit, but of a central organization beginning to encourage the growth of clubs and, when those clubs are formed, incidentally to benefit those clubs.

Accordingly, I take the view, not without considerable doubt, that this organization has shown that it comes within the section, and I would allow this appeal.

CASSELS J. It is with no little diffidence that I find myself unable to agree with the conclusion at which my Lord has arrived.

The working men's club movement of course goes back into history, and doubtless in its early days one finds that men of eminence have come together at meetings to encourage working men to form themselves into clubs, which in fact they had at that time in some instances formed, and to encourage further the increase or the wider spreading of the movement whereby the working men themselves had made their own places where they could have recreation and the advantages of association and, incidentally, the advantages of beer to be drunk in pleasant surroundings and to meet their fellows while they were so enjoying themselves. It is a movement which, of course, has spread.

This appeal, by way of case stated, comes before this court because the Working Men's Club and Institute Union Ltd., which, indeed, has a very long history, desires to succeed in an appeal against the rating of one of its convalescent homes, and among the advantages of belonging to a working men's club is

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Cassels J.

that not only can the members get reasonable and cheap recreation and refreshment, but also that the members, by reason of a contribution which is made by the individual club to the Union, can obtain the advantage of attending a convalescent home.

This home at one time was rated at a certain figure, and, under this recent valuation for rating purposes, that figure has been multiplied by, I think, five times, and the very natural course for the Union to adopt is to carry this case to higher courts in order to see whether they do or do not come within the partial relief—indeed, I think I may say the temporary relief—which is granted under section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which provides that relief shall be given to this extent: "any hereditament "occupied for the purposes of an organization (whether cor-"porate or unincorporate) which is not established or conducted "for profit and whose main objects are charitable or are other-"wise concerned with the advancement of religion, education or "social welfare." So often will that subsection of that section be read out to courts exercising appellate jurisdiction that it will soon be unnecessary to look at the actual print of it because it will become so very well known. I agree with my Lord, if I may say so with respect, and I am satisfied that the appellants here have not a business which was established or conducted for profit. I think it would be difficult to say that they do not come within that part of the section.

What we are mostly concerned with here is whether they come within the words "social welfare." For that purpose I am prepared to go to the objects of the Union, which are, as I read here: "To carry on the business of general advisers, "teachers of the doctrine of association for social or ameliorative "purposes, publishers, stationers and booksellers, general "traders, agents and manufacturers, both wholesale and retail, "of any article which may assist the development of clubs or "their members." Then there is a further passage which seems to divide these objects a little bit: "To provide and "maintain convalescent homes or other institutions for the "benefit of the members or wives or children"—incidentally, that is where one finds that the wives of members can obtain the benefit, but according to counsel appearing for the respondents here wives and children, I understand, do not get these benefits—"or dependants of the members of clubs which are "members of the Union. The Union shall have full power to "do all things necessary, expedient, or considered by it desirable "for the welfare and protection or assistance of, or helpful in "any manner to, its members, and for the accomplishment of "all objects specified in its rules."

Clubs can become, as clubs, members of this Union by the payment of 10s. per 100 members, and the total payment they make is limited to the sum of £2. Then in addition to that the

Union obtains from the clubs a payment, I think it is, of one penny on each card which is sold to the members of the club; which gives them the benefit of associate membership of all other clubs, so anyone who joins the one club and travels anywhere in the country and finds another club which belongs to the Union can get the advantages of that club.

But that is not the only thing the Union does. It exercises, in my view, a considerable control over these clubs. The clubs can be disbanded if they do not comply with certain rules. One rule I have observed is rule 6 (*c*): "A club which supplies "intoxicating liquor shall not be admitted, or, if admitted, shall "not continue as a member unless it adopts the following rule, "or a rule to similar purpose or effect: 'Should any visitor pay "'for intoxicating liquor served to him he shall at once be "'removed from the club premises, and the member intro-"'ducing such visitor may be expelled from membership on the "'fact being duly proved: and it shall be the duty of any officer "'or member of the club, becoming aware of such breach of the "'rules, to report it at once to the secretary or committee.' "(*d*) A club which supplies intoxicating liquor shall not be "admitted or, if admitted, shall not continue as a member which "shall have bound or shall bind itself to deal with any brewer, "distiller or other tradesman." There is that control which is exercised over individual clubs. Further, if any visitor to a club should go in and pay for drink, then it comes under the castigation of the Union. It seems to my mind, speaking entirely for myself, that this Union, admirable though its objects may be and worthy as the movement is, does exercise a considerable control over the management of the individual clubs.

In addition to that, they provide assistance to clubs, helping with their accounts and advising them what they should do. True it is that they have arrangements whereby speakers may go to any body of men who have banded themselves together and expressly desire to form a working men's club to address them and indicate, doubtless in well-selected phrases, the great advantage of forming a working men's club in that particular neighbourhood. This undoubtedly is of more importance during these times in which we live because new towns are being created and it may well be that in those new towns people will be wanting to form a working men's club.

That is all very well, but the real issue in this case is: is that social welfare? What is it these people band themselves together for? I can see no other reason than their own social benefit, their own recreation and their own enjoyment, and this Union, exercising this control, giving them advice and helping them where they can, is doubtless serving a most useful purpose, but is it doing what the Act requires it should do, namely, promoting the advancement of social welfare? The banding together of individuals into a social club is not, in my view, social welfare, and when the recorder came to the conclusion that the main object

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Cassels J.

was not otherwise concerned with the advancement of social welfare, speaking for myself I have come to the conclusion that he was right.

I will read the paragraph in the case: "The reasons for this "decision were: (i) counsel for the organization conceded that "the member clubs could not claim the relief granted in section "8 (1) (*a*) in respect of their premises," so perhaps we would have not an impossible situation but we would have this, that the units of this Union would not be able to claim this relief but the Union itself could. "(ii) A main object must, if it is to be "'concerned with the advancement of social welfare,' have a "substantial element of benevolence, philanthropy, some form of "humanitarianism, altruism and a disposition to do good, not "merely a desire to promote social pleasure and social activities "as a whole."

The altruism point is one which has emerged in the course of the cases which have reached the higher courts, and I quote from Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[3] where he says: "The words "'social welfare' themselves also connote, to my mind, the "concept of public benefit. These words comprehend many "objects which are beneficial to the community but are not "charitable according to the somewhat limited interpretation "given in the charity cases. A person is commonly said to be "engaged in 'social welfare' when he is engaged in doing good "for others who are in need—in the sense that he does it, not for "personal or private reasons—not because they are relatives or "friends of his—but because they are members of the community "or of a portion of it who need help." Then I go to the end of that paragraph: "The difference between the two is that the "main objects of the one are directed to the public benefit, "whereas the others are not."

It is said when you look at it that this is for the public benefit because this membership of 3,400 clubs is affiliated, if I may use the word, to the Union: who have become members of the Union and have reached the enormous figure of two millions, but I do not think that makes any difference, in my view. I do not see why, if a thing is not social welfare for 500, it becomes social welfare when it goes over two millions. This is a limited movement as far as the population is concerned. Any club cannot become a member of this Union unless it conforms to certain requirements, and, indeed, the record of the Union shows that some clubs have left the Union, and, of course, others are perhaps coming in. But the mere fact that this is a union of working men's clubs does not make them entitled to come under the social welfare part of the Act of 1955. The recorder, in his concluding paragraph, said: "The main object of the organiza-"tion, although social in character and directed towards providing

[3] [1958] 3 W.L.R. 172, 190.

" pleasure and comfort for the members of the member clubs, is " not concerned with ' the advancement of social welfare.' " I venture to agree with the conclusion at which the recorder arrived and I would dismiss this appeal.

STREATFEILD J. In my turn, I also have diffidence in differing from Cassels J., and in saying that I agree with Lord Parker C.J., and I also share the doubt which he expressed.

It is not by any means an easy case. There are two main points for consideration. The first one is, I think, quite simple: whether this organization, the Working Men's Club and Institute Union Ltd., was an organization which was then established or conducted for profit. It was said that, because it was registered under the Industrial and Provident Societies Act, 1876, as a business, that automatically pointed to it being established or conducted for profit.

In order to attract or qualify for registration under that Act an organization must be either an industry or business or trade. This one was clearly neither an industry nor a trade. So, if it were to qualify, it had to call itself a business.

It does not follow, in my view, that because the Act contains certain provisions for the distribution of any surplus assets which may exist on the winding up of the institution amongst the members, that means it is established for profit.

Suffice it to say that I follow the language of Lord Denning which Lord Parker C.J. has already read in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[4] and, for the reasons stated by Lord Denning, which appear to me exactly to fit the present case, I have no hesitation in saying that, although there may be profits which attract tax, this organization was not established or conducted for profit.

The next point is whether, not being charitable, it was otherwise concerned with the advancement of social welfare, and it is quite correct, and I agree, that there must be an altruistic basis for the objects of this organization.

I agree with Lord Parker C.J. that one must go back in order to ascertain the main objects of the business to its history, to its inception, and in the early days it seems to be quite clear that this was an organization of, it was said, titled and benevolent gentlemen who desired, within the ideals of the organization, to foster, if not the promotion of working men's clubs, at any rate their betterment by giving them advice. Had this been a formation or organization of existing members' clubs who united together in a union for the betterment of themselves in the first instance, I should have agreed that this could not be for the altruistic social benefit, but this was, in its inception, organized by others for the benefit of working men, and I would also stress the passage (on p. 68) from the History of the Union, as to the

[4] [1958] 3 W.L.R. 172, 187.

1958

WORKING MEN'S CLUB AND INSTITUTE UNION LTD. v. SWANSEA CORPORATION.

Streatfeild J.

ideals, in its inception, of this organization. Lord Parker C.J. has read it, but I would stress that the idea behind this very laudable organization is not only to secure a higher and wider level of happiness in the leisure hours and daily personal and civic life of the working man, but it was also thought that that could "best be achieved by the workman himself, free from "assistance, interference, or dictation by others." The whole object of this association was to encourage the running of working men's clubs, to improve them, and gradually, by the example of one set to another, to spread the gospel right through the working community and right through the nation quite unrestricted as to trades and quite unrestricted as to area. And the fact that it was at all times the goal of this organization that eventually the Union might become self-supporting, that it should be free from assistance, that it should be for themselves and by themselves, does not, to my mind, detract from the main object of the organization in its inception, that it was for the benefit of working men and was organized and, in the first instance, financed by titled and benevolent gentlemen.

That, to my mind, was the basis of the forming, the foundation, of this Union, and it finds expression in rule 2, which we have to construe, and it is only in the event of there being any doubt as to which is the main object or as to whether there is any ambiguity in expression that we are entitled, on the authorities, to look at the actual activities of the Union, and for that this court is bound by the judgment of the Court of Appeal in *Berry* v. *St. Marylebone Borough Council.*[5]

What, then, are the expressed objects of this Union: "To "carry on the business of general advisers, teachers of the doctrine "of association for social or ameliorative purposes." I agree with Cassels J. that in those three lines is really the expression of the object of this Union. The other matters which follow in the objects are in effect the means of achieving the main object of being "general advisers, teachers of the doctrine of association "for social or ameliorative purposes."

Now, as it seems to me, those words quite clearly are the main object of this Union, and I do not think they are ambiguous so as to entitle us to look at the actual activities of the Union as it is now carried on. But, even if it did, I should find difficulty in holding that, by reason of the success of this Union in increasing the membership from something very small to the present 3,300 clubs and over two million members, and because one can draw a line about 1890 when the financial position was such that the organization became self-supporting—that being at all times the object of the original founders, to make it self-supporting—because that successful stage had been reached that made this organization, although started as social welfare, cease to be social welfare from the moment when it

[5] [1958] Ch. 406, 416, 417; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

became self-supporting. I find difficulty in accepting Mr. Squibb's submission that, from that moment at any rate this became an organization of workmen to help themselves. I do not think the main object changed when the organization achieved the success it had always intended of making itself self-supporting.

For those reasons I have come to the conclusion that this case is not like a mutual insurance benefit case. It is not, as my Lord said, a case of existing clubs uniting and riding on the back of a central organization in order to improve themselves and encourage other workmen. Indeed, it started at the instance of others to help those others who at that time were not able to help themselves and eventually to bring them to the self-supporting stage I have indicated. But looking at the rule and construing it as best I can, I have come to the conclusion that the main object of this organization was an object which was concerned with the advancement of social welfare. Undoubtedly it started as such, and I do not think that anything that happened subsequently prevented it from remaining the advancement of social welfare.

I do not think, with respect to Cassels J., that the test is as to how much control the organization had over any individual clubs if, indeed, it had any control. The fact that it laid down certain conditions of membership such as the observance of licensing laws and not being tied to any particular brewers and matters of that sort, to my mind is only part and parcel of the object of teaching and advising clubs as to the proper way of bettering their own clubs. I do not think that control prevents this organization from being one for the advancement of social welfare.

For those reasons, therefore, I have come to the conclusion for myself that the Working Men's Club and Institute Union Ltd. brought itself within the terms of section 8 (1) (*a*) of the Rating and Valuation Act, 1955, and, for my part, too, I would therefore allow this appeal.

Appeal allowed.

Solicitors: *Wrentmore & Son for Edward T. Davies, Pontyclun; Kenneth Brown, Baker, Baker.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

* GODDARD *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

1958
Oct. 30.

Lord Parker C.J.

Compulsory Purchase — Declaration of clearance area — Validity — Condition precedent—Whether council can be "satisfied" acting through their committees—"Resources"—Housing Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 56), *ss.* 42 (1), 43 (1) (2).

1958

GODDARD
v.
MINISTER
OF
HOUSING
AND LOCAL
GOVERNMENT.

Pursuant to its powers under section 42 of the Housing Act, 1957, a borough council declared a certain site owned by the applicant to be a "clearance area." The council had had before it the reports of the housing and finance committees, although no actual figures of the probable cost involved, and had merely passed a resolution adopting the reports as minutes of the council meeting. The applicant challenged the subsequent compulsory purchase order on the ground that the condition precedent to the making of a clearance order, namely, that the council should be satisfied that its resources were sufficient for the purpose of carrying the resolution into effect, had not been satisfied:—

Held, that the council had, acting through its authorised committees, considered the question of the sufficiency of its resources; and that it was competent for a council, without having specific figures before it, to decide with the assistance of its experts, that its resources were sufficient, bearing in mind that "resources" meant, not merely cash resources, but also the council's credit in the world, its ability to borrow, and like matters.

In re Bowman [1932] 2 K.B. 621 applied.

APPLICATION to quash a compulsory purchase order.

Pursuant to their powers under section 42 of the Housing Act, 1957,[1] Brentford and Chiswick Borough Council by two declarations of clearance areas, one in April and one in July, 1957, declared a site in Brentford bounded by High Street, Albany Road, Alexandra Road and Ealing Road, to be a clearance area. In each case the council had the reports of the housing and

[1] Housing Act, 1957, s. 42 (1): "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(*a*) that the houses in that area are unfit for human habitation . . . the authority shall . . . pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act: Provided that, before passing any such resolution, the authority shall satisfy themselves . . . (ii) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect."

S. 43 (1): "So soon as may be after a local authority have declared any area to be a clearance area, they shall, subject to and in accordance with the provisions of this Part of this Act, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say—(*a*) by making one or more orders . . . for the demolition of the buildings in the area; or (*b*) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings on that land. (2) Where the local authority determine to purchase any land comprised in the area declared by them to be a clearance area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development of the area cleared."

Sched. 4: "2. If any person aggrieved by [a compulsory purchase order] or by the Minister's approval of a re-development plan or of a new plan, desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation of the order, or of the approval of the plan, make an application for the purpose to the High Court, and where any such application is duly made the court . . . (ii) if satisfied upon the hear-

finance committees before them and merely passed a resolution adopting the reports as minutes of the council meeting. Five compulsory purchase orders were drafted, one of which included 266 and 267, High Street, Brentford, which were owned by the applicant, Wilton Joseph Goddard, and used by him for the purpose of carrying on business as a retail electrician and electrical engineer. On April 22, 1958, the compulsory purchase orders were confirmed by the Minister of Housing and Local Government, and on May 9, 1958, they were published. In an application to the High Court under the Fourth Schedule to the Housing Act, 1957, the applicant challenged the validity of the compulsory purchase order on the ground that the condition precedent to the making of a declaration of a clearance area under section 42 of the Act had not been fulfilled.

W. G. Wingate and *Q. T. Edwards* for the applicants.
Rodger Winn for the Minister and the council.

LORD PARKER C.J. stated the facts, referred to the Act of 1957, and continued: The grounds of challenge of the validity of the order concerned the question whether a condition in section 42 (1) of the Act of 1957 precedent to the making of the declaration of a clearance area was fulfilled. It is convenient to say at the outset that if it was not, it is admitted by Mr. Winn that the compulsory purchase order as confirmed was not within the powers of the Act, and would accordingly fall to be quashed. The condition is this: "Provided that, before passing any such resolu-"tion"—that is, declaring an area to be a clearance area—"the "authority shall satisfy themselves . . . (ii) that the resources of "the authority are sufficient for the purpose of carrying the "resolution into effect."

Mr. Wingate puts forward broadly two contentions in this case. He says that the council, who are the authority in question, never did apply their minds to the question at all; secondly, he says, if they did, they either had no sufficient evidence which entitled them to be satisfied, or no evidence at all, or they in some way misdirected themselves in consideration of the matter. The words are "Provided . . . the authority shall satisfy them-"selves," and, of course, it is not for this court to consider what decision the court might have come to themselves if faced with the question. This court is merely charged with the duty of seeing that the council has not acted arbitrarily, and that it has acted bona fide.

I would adopt the words of Swift J. in *In re Bowman*,[1] in which, having stated the general proposition that this court will

"ing of the application that the order, "or the approval of the plan, is not "within the powers of this Act or "that the interests of the applicant "have been substantially prejudiced "by any requirement of this Act not "having been complied with, may "quash the order, or the approval of "the plan, either generally or in so "far as it affects any property of the "applicant."

[1] [1932] 2 K.B. 621, 634.

1958

GODDARD v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Lord Parker C.J.

not interfere, he said: "There may some day arise a case, which "is certainly not this case, in which it may be said that there "was no material, no information and no representation before "the local authority upon which they could, as reasonable people, "possibly be satisfied that a clearance order ought to be made." Mr. Wingate says that this is a case which comes within that principle.

The first way he puts it is this. He says that the council did not apply their minds to the question at all, and he bases that contention on the form of the internal documents which ultimately recorded the resolution. There were two resolutions for the declaration of a clearance area, one in April and one in July. For this purpose it is enough to take one of those resolutions, because the other is to all intents and purposes the same. The resolution of the council of July 30, 1957, merely stated: "Committee "reports: Reports of meetings of the under-mentioned commit-"tees, held on the dates indicated, were considered and it was "resolved that, where necessary, such reports, as varied by the "adopted amendments and corrections, be approved and adopted "as minutes of the council." Underneath is "Name of com-"mittee: Housing. Date of meeting: July 16, 1957." Further down in the same document, under "Name of committee," is "Finance, rating and valuation. Date of meeting: July 23, "1957." So, says Mr. Wingate, the council were merely, as it were, rubber-stamping something which the committee or committees had said. If one then turns to the housing committee's report, one finds: "After consideration thereof"—that is, of the reports of the medical officer of health and of the town clerk—"we recommend that the council, being satisfied in respect of "the areas above mentioned . . . respectively being areas within "the borough that . . . (*d*) the resources of the council are "sufficient for the purposes of carrying this resolution into effect "the same be and are hereby declared clearance areas within the "meaning of the Housing Act, 1936, and that the common seal of "the council be affixed to such declarations and maps."

On the next page is set out a record of the meeting of the finance committee on July 23, which stated: "We considered the "financial effect of the following recommendations by other com-"mittees and concur with the proposals," and the relevant one is: "Housing committee . . . (4)," that the areas in question "be declared clearance areas within the meaning of the Housing "Act."

The wording of the recommendation of the housing committee to which I have referred is, to say the least, poor; it does not read. It is, I think, purporting to put forward a recommendation of a draft resolution to be carried by the council, and it does not say specifically that the committee has considered whether the resources of the council are sufficient. Mr. Wingate makes the point that if that committee has not considered it, then

the council, having merely adopted and rubber-stamped what the housing committee has done, have not themselves considered it.

I think that the wording of the housing committee's recommendation is rather unfortunate, but I am quite satisfied that they and the finance committee intended to, and did, consider the matter themselves, and that the council, being faced with recommendations by two of their specific committees who had considered it, adopted the recommendation.

If that be the true position, I think it is clear that the council, quite properly acting through its authorized committees, was satisfied. I think that must be the true view of the minutes themselves, but if there were any doubt, it is to my mind put beyond peradventure by the evidence of the chairman of the housing committee, who says in his affidavit that before making the recommendations to the council, his committee "considered and were satisfied on all the matters recited under "paragraph 4 (2) (*a*) to (*d*) of the reports of the meetings of "that committee." As I have already said, (*d*) covers the question as to the resources of the council being adequate. In his draft statement of proof which was put in at the public hearing, the assistant borough treasurer said: "Prior to the "passing of the resolutions declaring the three clearance areas, "the council were advised that their financial resources were "such as would enable them to deal with these areas." I cannot accede to Mr. Wingate's first point.

His second point is that if the council did consider this matter, they had no, or no sufficient, evidence on which they could be satisfied. Before considering that submission in more detail, I think it is necessary to consider what they have to be satisfied about. They have to be satisfied that the resources of the authority are sufficient for the purpose of carrying the resolution into effect. At that stage, before the resolution is passed, they may not have made up their minds whether they will proceed thereafter by clearance order or by compulsory purchase order, and it is a possible view that they are only concerned to see whether the resources of the authority are sufficient to cover the less onerous way of performing the next step, in which case they might only have to be satisfied as to such matters as rehousing, the cost of compensation to displaced persons and, possibly, any cost that they would be put to if an owner who had been called upon to demolish failed to do so.

I think that is putting too narrow a construction on that proviso. It seems to me that where, as here, the authority have determined which of the two steps they will take, in this case to proceed by compulsory purchase order, they must consider whether the resources of the authority are sufficient for that purpose. After all, although it is a second and alternative step, it is one that has to be taken "so soon as may be" after the area has been declared a clearance area, and I think must be

1958

GODDARD
v.
MINISTER
OF
HOUSING
AND LOCAL
GOVERNMENT.

Lord Parker
C.J.

looked upon as part and parcel of carrying the resolution into effect.

But Mr. Wingate argues further that where the authority are thereafter planning to redevelop the area themselves, and not to let it to other people for redevelopment, then what the council must consider is whether their resources are sufficient, not only to buy the land and pay compensation, but to carry out the proposed development. I cannot accept that contention. At a later stage it is perfectly open to the authority to change its mind; it is perfectly possible also, as indeed I think the evidence was in this case, that development may be carried out by degrees, and what is developed first may pay for later development. I do not think that in deciding whether to declare an area to be a clearance area, the council are in any way concerned to satisfy themselves of their resources if they do redevelop.

The resolution of the council adopting the recommendation of the housing committee quoted the exact words of the Act: "satisfied that the resources of the council are sufficient for the "purposes of carrying this resolution into effect." If the matter rested there, I do not think one could go behind those words, but Mr. Wingate relies on various answers that were given under cross-examination by the borough engineer and the borough treasurer at the public hearing.

Without going into detail, it was elicited that very large sums were involved in the total purchase and redevelopment, not merely of the land the subject of this compulsory purchase order, but the total land covered by other compulsory purchase orders in the area. One witness went so far as to say that in the end it might cost £550,000, and he did say that no specific figures were before the council or the housing committee when they made the resolution and the recommendation respectively. On that, Mr. Wingate says, they could not have been satisfied; and that there ought to have been evidence before them of the actual figures of expenditure involved under this scheme, and also evidence as to how the money was to be found if the resources were not cash resources. He says that as there was no evidence as to either of those matters, this case falls within the sort of case which Swift J. contemplated in *In re Bowman*,[2] and that this order should be quashed.

I would only accede to that argument in a very clear case. It seems to me that here I am faced with the resolution which states that this matter has been considered. The chairman of the housing committee said that it was considered by that committee, and that the council, in passing the resolution, were so advised. True, they may not have had specific figures, but it is very difficult in cases such as this to believe that they could have specific figures with any accuracy. Nobody knows what the compensation payable is going to amount to, especially when

[2] [1932] 2 K.B. 621.

one considers questions such as disturbance; and even if redevelopment costs are going to be considered, nobody knows what they are likely to be in this era of rising prices.

It seems to me that it is perfectly competent for a council, without having specific figures, but with the assistance of its experts, to say: this, quite clearly from our own knowledge, is a matter which plainly comes within the resources of this council; and "the resources" there clearly means not merely cash resources, but their credit in the world, their ability to borrow, and all such matters.

I am not satisfied that it has been shown in this case that the council acted on no evidence; that they were mala fide is certainly not suggested. In these circumstances, this application fails, and must be refused.

Application refused.

Solicitors: *P. H. Berry & Co.; Ministry of Housing and Local Government.*

J. D. P.

[CHANCERY DIVISION.]

* *In re* TARNPOLSK, DECD.
BARCLAYS BANK LTD. *v.* HYER AND OTHERS.

1958
Oct. 23.
Danckwerts J.

Will—Construction—Uncertainty—Condition precedent—Bequests on marriage with "a person of the Jewish race"—Whether void for uncertainty.

A testator by his will made bequests to his grandchildren on their "marriage." He defined "marry" as meaning "marry "according to the rites of the Jewish faith a person of the Jewish "race and religion . . ."—

Held, that it was impossible to give sufficient meaning to the phrase "a person of the Jewish race" so as to be able to say that it had in any given case been fulfilled, and such a condition raised the same difficulty, whether it occurred in a condition precedent or in a condition subsequent; accordingly, the bequests were void for uncertainty.

Clayton v. *Ramsden* [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16 applied.

In re Allen [1953] Ch. 810; [1953] 2 All E.R. 898 considered.

ADJOURNED SUMMONS.

Israel Tarnpolsk made his will and a codicil thereto on June 17, 1942, and a second codicil thereto dated October 14, 1942.

The only provision in the will material on this summons was clause 12 by which he gave directions in respect of his residuary estate. That clause provided that the trustees of his will should "stand possessed of the trust fund and the accumulations "thereof and the income of the same respectively In trust in the

1958

TARNPOLSK, DECD., *In re.*

"first place to pay to each of my children who may be in need "of pecuniary assistance from time to time" certain sums subject to certain conditions. "And in the second place to pay to or "apply for the benefit of each grandson of mine on my death "if married if unmarried on his marriage within twenty-one years "of my death the sum of two hundred and fifty pounds and to "pay to or apply for the benefit of each grand-daughter of mine "on my death if married if unmarried on her marriage within "twenty-one years of my death the sum of five hundred pounds "as an extra wedding present and in the third place to stand "possessed of the residue of the said trust fund and accumula-"tions and the income thereof Upon trust for such of my grand-"children as shall be living at the expiration of twenty-one years "from my death and the children or child then living of any "then deceased grandchild of mine who respectively being male "attains the age of twenty-one years or being female attain that "age or marry under that age and if more than one in equal "shares." There was a further provision about the children of a deceased grandchild, which was not material.

The testator then continued: "For the purposes of this my "will the expression 'marry' shall mean marry according to the "rites of the Jewish faith a person of Jewish race and religion "and the word 'marriage' has a corresponding meaning. . . ."

By this summons the court was asked to determine whether on the true construction of the will of the testator the legacies bequeathed in clause 12 thereof to the testator's grandchildren on marriage according to the rites of the Jewish faith to a person of Jewish race and religion were valid bequests or were void for uncertainty.

Mark Cockle for the plaintiffs, trustees of the will.

Kenneth Elphinstone for the first two defendants, grandchildren of the testator who were already married.

A. J. Balcombe for the fifth, sixth and seventh defendants, grandchildren of the testator who were not yet married.

The third and fourth defendants were not represented and did not appear.

Cases cited in argument not referred to in the judgment: *In re Samuel* [1]; *In re Blaiberg.* [2]

DANCKWERTS J. In this case the testator, who was evidently enthusiastic towards the Jewish race and religion, has once more created difficulty by the terms of his will.

[His Lordship stated the material provisions of the will and continued]: The question is whether those provisions, which are plainly either conditions precedent or qualifications on which

[1] [1942] Ch. 1; [1941] 3 All E.R. 196.

[2] [1940] Ch. 385; 56 T.L.R. 487; [1940] 1 All E.R. 632.

certain sums of money may be payable to grandsons or granddaughters, are valid and effective.

It is argued that the matter is really decided by *In re Allen.*[1] The terms of the will in that case were: "A testator devised "certain freeholds, after life interests, to the eldest of the sons "of his nephew F 'who shall be a member of the Church of "'England and an adherent to the doctrine of that Church,' "with a gift over." Vaisey J. held that the terms of the gift were void for uncertainty, and it was held by a majority in the Court of Appeal, Romer L.J. dissenting, that the gift was not void for uncertainty. It was held: "The formula was not "a condition subsequent, where the clarity had to be such that "the exact event which would cause the gift to be divested "had to be apparent from the outset. This was a condition "precedent, or a qualification and, to satisfy it, it was not "necessary that its scope should be capable of exact definition. "All that a claimant had to show was that he, at least, was "within the requirement. Membership of the Church of "England comprised wide differences of degree, but it was an "intelligible qualification of the class of intended beneficiaries, "and though it might be difficult to say of some persons whether "they were or were not members, that did not of necessity "render it impossible for a particular individual to establish "that he was a member, and he ought not to be debarred from "attempting to show that he fulfilled the qualification." Then there was a similar discussion in regard to the meaning of the words "an adherent to the doctrine of the Church of England." It was argued that that depends really upon saying that it is a matter of degree.

In my view, however, the qualification laid down by the Court of Appeal is to be considered with regard to the words "of necessity." In the present case there seems to me to be a difficulty which renders it impossible for a possible candidate to show with reasonable certainty that he satisfies the test which the testator has attempted to lay down. It seems to me that "religion" and "faith" are really interchangeable words, but that the words which cause a difficulty here are "a person of Jewish race."

I find great difficulty in seeing what exactly "a person of "Jewish race" is and the passage in the speech of Lord Romer in *Clayton* and *Ramsden*[2] shows the difficulties with which anybody is faced in trying to decide whether that qualification has been satisfied. Lord Romer said[3]: "What then did "the testator mean by the stipulation that the daughter's hus-"band was to be of Jewish race or descent? It cannot "reasonably be supposed that the husband was to show an "unbroken line of descent from the patriarch Jacob. If the

[1] [1953] Ch. 810; [1953] 2 All E.R. 898.

[2] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[3] [1943] A.C. 333.

1958

TARNPOLSK, DECD., *In re.*

Danckwerts J.

"daughter were compelled to wait for such a husband she would "remain a spinster all her life, and the condition would be "void as amounting to a total restraint on marriage. It seems "far more probable that the testator meant no more than that "the husband should be of Hebraic blood. But what degree "of Hebraic blood would a permissible husband have to possess? "Would it be sufficient if one only of his parents were of "Hebraic blood? If not, would it be sufficient if both were? "If not, would it be sufficient if, in addition, it were shown "that one grandparent was of Hebraic blood or must it be "shown that this was true of all his grandparents? Or must "the husband trace his Hebraic blood still further back? These "are questions to which no answer has been furnished by the "testator. It was, therefore, impossible for the court to see "from the beginning precisely or distinctly on the happening "of what event it was that Mrs. Clayton's vested interests "under the will were to determine, and the condition is void "for uncertainty."

The last sentence was, of course, referring to the condition subsequent which was to be found in the will in *Clayton* and *Ramsden*,[4] but it seems to me that the same difficulties apply where there is a qualification and one cannot say what is the qualification. It was a difficulty to which I referred in my decision in *In re Sonn*[5] and it is the difficulty which was apparent to Harman J. in *In re Wolffe*.[6]

In that situation sufficient meaning cannot be given to the words used by the testator so as to say that here is a qualification which in any given case has been fulfilled, and the result of that must, in my view, be that the qualification is void and that nobody can satisfy the terms of the gift. I declare that the bequests in clause 12 of the testator's will are void for uncertainty.

Declaration accordingly.

Solicitors: *Teff & Teff; Bulcraig & Davis; M. Landy.*

I. G. R. M.

[4] [1943] A.C. 320.
[5] October 16, 1958 (unreported).
[6] [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697.

[CHANCERY DIVISION.]

* FAWCETT PROPERTIES LTD. *v.* BUCKINGHAM COUNTY COUNCIL.

1958
Oct. 23, 24, 27, 28, 29.

Roxburgh J.

[1958 F. 82.]

Town and Country Planning — Development — Planning permission — Condition—Relation of conditions to local planning considerations— Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 36.

On December 5, 1952, the Buckingham County Council, acting under section 14 [1] of the Town and Country Planning Act, 1947, granted to the plaintiffs' predecessor in title permission to develop an area at Chalfont St. Giles by building thereon a pair of semi-detached cottages subject to a condition that: "The occupation of "the houses shall be limited to persons whose employment or latest "employment is or was employment in agriculture as defined by "section 119 (1) of the Town and Country Planning Act, 1947, or "in forestry, or in an industry mainly dependent upon agriculture "and including also the dependants of such persons as aforesaid." The document added [2]: "The reasons for imposing the said condi- "tions are because the council would not be prepared to permit the "erection of dwelling-houses on this site unconnected with the use "of the adjoining land for agriculture or similar purposes." The

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

[1] Town and Country Planning Act, 1947, s. 14: "(1) Subject to the "provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop "land, that authority may grant per- "mission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such "application the local planning "authority shall have regard to the "provisions of the development plan, "so far as material thereto, and to "any other material considerations. "(2) Without prejudice to the gener- "ality of the foregoing subsection, "conditions may be imposed on the "grant of permission to develop land "thereunder—(*a*) for regulating the "development or use of any land "under the control of the applicant "(whether or not it is land in respect "of which the application was made) "or requiring the carrying out of "works on any such land, so far as "appears to the local planning autho- "rity to be expedient for the pur- "poses of or in connection with the "development authorised by the per- "mission; . . ."

S. 36: "Where, under the fore- "going provisions of this Part of this "Act, a local planning authority are "required to have regard to the pro- "visions of the development plan in "relation to the exercise of any of "their functions, then, in relation to "the exercise of those functions "during any period before such a "plan has become operative with res- "pect to the area of that authority, "that authority shall have regard to "any directions which may be given "to them by the Minister as to the "provisions to be included in such a "plan, and subject to any such "directions shall have regard to the "provisions which in their opinion "will be required to be so included "for securing the proper planning of "the said area."

[2] Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728), art. 5 (9): "Every such notice [of the local "planning authority's decision] shall "be in writing and (*a*) in the case "of an application for planning per- "mission or approval, where the local "planning authority decide to grant "such permission or approval subject "to conditions or to refuse it, they "shall state their reasons in writing ". . ."

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

approval was registered as a local land charge. The property was within the metropolitan green belt, but there was no development plan yet in operation, although one was being prepared.

At first the cottages were occupied by persons whose employment was covered by the terms of the condition, but the plaintiffs, who acquired the freehold in 1956, wished to put in occupation persons whose employment was not so covered. They therefore sought a declaration that the condition was ultra vires the county council, and alternatively that it was void for uncertainty:—

Held, (1) that "such conditions as they think fit" in section 14 (1) must be such conditions as a local planning authority should think fit to impose, having regard to their statutory duties and to local planning considerations.

Observations of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 applied.

(2) That the prescribed categories of permissible occupants of the houses were wider than those which could be properly related to local planning conditions, so that the condition was ultra vires and of no effect.

Semble, that, having regard to the local circumstances, the imposition of a condition securing the cottages for agricultural workers, so long as there were any who wished to inhabit them, would have been a proper exercise of power under the Act.

Quaere, whether the condition was not also void for uncertainty.

ACTION.

On December 5, 1952, in response to an application under the Town and Country Planning Act, 1947, by one D. D. Clark, the plaintiffs' predecessor in title, the Buckingham County Council issued through the clerk to the Amersham Rural District Council the following document: "In pursuance of their powers under "the above-mentioned Act and Order the Bucks County Council "as local planning authority hereby permit erection of pair of "farmworker's cottages at Dibden Hill Lane, Chalfont St. Giles, "in accordance with your application dated November 22, 1952, "and the plans and particulars accompanying it subject to the "following conditions—The occupation of the houses shall be "limited to persons whose employment or latest employment is "or was employment in agriculture as defined by section 119 (1) "of the Town and Country Planning Act, 1947, or in forestry, or "in an industry mainly dependent upon agriculture and including "also the dependants of such persons as aforesaid. The reasons "for imposing the said conditions are because the council would "not be prepared to permit the erection of dwelling-houses on this "site unconnected with the use of the adjoining land for agricul-"ture or similar purposes." The wording of the condition had been adapted from the Housing Act, 1936, s. 115 (2), a section dealing with contributions by county councils towards housing expenses in rural districts.

The approval was registered as a local land charge in the register of town planning prohibitions or restrictions and Clark had the cottages erected. Chalfont St. Giles was within the metropolitan and local green belt but the plan under which it

was proposed that the development of the community "should "be restricted to infilling and rounding off of existing develop- "ment" was not yet in operation, so that section 36 of the Act applied.

After erection the cottages were first occupied by persons whose employment was covered by the terms of the condition, but on December 31, 1956, the Chalfont and District Permanent Building Society, Clark's mortgagees, conveyed the fee simple in the cottages to the plaintiffs, who were anxious to put in occupation persons whose employment was not within the terms of the condition. The plaintiffs claimed a declaration (1) that the condition was ultra vires the powers of the county council, and (2) alternatively that it was void for uncertainty, and that the cottages might be occupied without regard to the nature of the employment of the occupants. They also sought rectification of the local land charges register.

R. E. Megarry Q.C. and *C. F. Fletcher-Cooke Q.C.* for the plaintiffs.

J. P. Widgery Q.C. and *Alan Fletcher* for the defendants.

The following cases, in addition to the case referred to in the judgment, were cited in argument: *Sifton* v. *Sifton*[3]; *In re Ball*[4]; *In re Sayer*[5]; *In re Gape*[6]; *Kruse* v. *Johnson*[7]; *Reg.* v. *Saddlers' Company*[8]; *Dearden* v. *Townsend*[9]; *Leyton Urban District Council* v. *Chew*[10]; *London County Council* v. *Bermondsey Bioscope Co.*[11]; *Crisp from the Fens Ltd.* v. *Rutland County Council.*[12]

ROXBURGH J. This case raises difficult and complicated questions under the Town and Country Planning Act, 1947, which I shall hereafter call the Act. It has been necessary to canvass an even greater number of difficult and important questions which in the result I have managed to evade for the time being. [His Lordship stated the facts and continued:]

Section 36 of the Act, which deals with a minor point which I should like to dispose of in a preliminary manner, is as follows: [His Lordship read section 36 of the Act and continued:]

At the material date, December 5, 1952, there was no development plan, and as far as I am aware the Minister had given no direction. Accordingly, what the planning authority had to do was to "have regard to the provisions which in their opinion will "be required to be so included"—that is to say, included in the

[3] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[4] [1947] Ch. 228; 63 T.L.R. 94; [1947] 1 All E.R. 458.

[5] [1957] Ch. 423; [1957] 2 W.L.R. 261; [1956] 3 All E.R. 600.

[6] [1952] Ch. 743; [1952] 2 W.L.R. 477; [1952] 2 All E.R. 579.

[7] [1898] 2 Q.B. 91; 14 T.L.R. 416.

[8] (1863) 9 L.T. 60.

[9] (1865) L.R. 1 Q.B. 10.

[10] [1907] 2 K.B. 283.

[11] [1911] 1 K.B. 445; 27 T.L.R. 141.

[12] (1950) 1 P. & C.R. 48.

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

Roxburgh J.

plans—"for securing the proper planning of the said area." I draw attention to those words, "securing the proper planning of "the said area," because although they may not be directly relevant, they are entirely consistent with the view I have of the scope of the powers of a local planning authority.

Their powers in regard to the matter of granting permission are to be found mainly, if not exclusively, in section 14. I say that because I do not find it necessary to discuss the ambit of section 18 (3). It is unnecessary, and I think it would be dangerous in view of the serious problems involved in it, to discuss the meaning of that subsection, because, on the view that I take of the true construction of the Act, this condition would be void, for reasons which I am going to give, whether the condition purported to be made under section 18, which I do not think was ever intended, or whether it was made under section 14. Section 14 seems to me (and in this respect I cannot accept the whole of Mr. Megarry's argument) to enable a proper condition to be imposed to achieve the purpose which I have no doubt this council had in mind. However, may I say at once, in order to avoid any danger of misunderstanding, that there is no suggestion whatever of bad faith in this case.

[His Lordship read section 14, stating that he had earlier found it necessary to refer to section 36 as it provided for a situation where there was no development plan, and continued:]

That there is some limitation upon the words "such con-"ditions as they think fit" is plain upon authority binding upon me, and from which I should never wish to differ if I possibly could. But I am not prepared to accept the limitation which Mr. Megarry sought to place upon the local planning authority. He submitted that it was possible for them to impose a condition that the building that was being permitted could be used as a dwelling-house or as an industrial establishment or similar class of definition, but that it was not permissible to prescribe categories of persons by whom alone the building could be used as a dwelling-house.

It is contrary to my instinct to write glosses into an Act of Parliament unless either that has been done by authority already binding on me, or there is a context to be found in the Act, when read as a whole, which makes it logically impossible to believe that Parliament intended the language it used to be applied with all the generalities it appears to possess. If the language which Parliament has used is clear, and if there is not any context to control it, then in my view, if it leads to unexpected consequences, Parliament is the body to reform the provision and not any of us. I do not find anywhere in the Act anything which to me seems a sufficient reason for reframing the language of Parliament in the manner suggested by Mr. Megarry.

That, of course, is by no means the end of the case. I should say at once that, though there was no development plan at the material date, I am quite prepared to believe that the council,

when minded to consider what provisions would be required to be included in the development plan for securing the proper planning of the said area, were entitled to envisage that the site in question might, when there was a development plan in due course, be found to be included in a green belt area, using that term more popularly than legally. I think that the thing has been in contemplation, and I want it made quite plain that any intention the council may have had, and I think they had an intention to preserve this site as a rural area, was bona fide and in a proper performance of their duties. That being so, though this may be to some extent an obiter dictum, I think it is necessary for me to say it in order to explain why I reach the conclusion which I am going to reach. I think that some condition, designed to keep these cottages available for agricultural workers so long as they were required for the housing of agricultural workers, would have been entirely consistent with proper planning, and I do not say that the condition may have extended further than I have just mentioned. I am certainly not going to say, on the other hand, whether the restriction could have been as narrow as the reason given in the document which I have read, because, again, no attempt to impose such a condition was made. All I have said is that some condition, for the general purposes of securing these cottages for agricultural workers so long as there were any who wished to inhabit them, would, in my opinion, have been a proper exercise of power under this Act. The reason has to be stated under the Town and Country Planning (General Development) Order, 1950, art. 5 (9). What the exact effect of stating the reason is nobody has decided, and that is one of the interesting questions which I am managing to evade. It must have some relevance, putting it at its lowest, but how far it is binding on the council and how far the council could give evidence if they want to give supplemental reasons I need not consider. No effort was made to give supplemental reasons in this case, but when one begins to look at a condition and finds that the reason and condition appear to bear no intelligible relation to one another—and I regret to say that is my view of the present case—at least one has to pursue the matter a good deal further.

It seems to me that, whereas the words are "subject "to such conditions as they think fit," they must be such conditions as they think fit having regard to the statutory duties with which they are entrusted. I think that limitation must apply to all persons whose rights and duties are the creation of the statute. What they are entrusted with is local planning and it is not for no purpose, I think, that in the very section which I have to construe they are called the local planning authority. Again, not without significance, in section 36, though it does not directly apply, I agree there is a reference to the "proper planning of the said area," and there are indeed many other similar phrases which, scattered about the Act, I might pray in aid. That being so, I am prepared to place one gloss on

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

Roxburgh J.

this statute because I think it is absolutely hallowed by authority, and that is: however general the words "such conditions as they "think fit" may be, they must be such conditions as they think fit having regard to the local planning considerations.

It seems to me that that is inevitably so, and I might add that, in my view, when the section refers to "any other material "consideration" it means any other consideration material to the development in connexion with local planning. Therefore, I consider that the question that I have to solve is whether this condition can possibly be one which could have been imposed solely with regard to local planning considerations.

I think that the authority of the Court of Appeal in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[1] binds me to say that Lord Denning, after referring to the condition there in question—which I may say bore no resemblance to the condition in the present case—says[2]: "The Minister claims to impose these conditions under the "general power contained in section 14 (1), or alternatively "under the special power contained in section 14 (2) (*a*)." I may say in passing that there was some point in referring to section 14 (2) (*a*) in that case because it looks very much like one of the cases specifically referred to in that section, but as section 14 (2) (*a*) is without prejudice to the generality of section 14 (1), I prefer to deal only with section 14 (1), which, I think, is more likely to cover the present case than section 14 (2) (*a*). However, it makes no difference which it is in my view.

Then Lord Denning continues: "The principles to be applied "are not, I think, in doubt. Although the planning authorities "are given very wide powers to impose 'such conditions as they "'think fit,'" and that must be a reference to section 14 (1) because it is in inverted commas, "nevertheless the law says "that those conditions," which must mean, nevertheless the conditions which they seek to impose under section 14 (1), "to "be valid, must fairly and reasonably relate to the permitted "development. The planning authority are not at liberty to use "their powers for an ulterior object, however desirable that "object may seem to them to be in the public interest." As Lord Denning points out in the next sentence, the word "ulterior" is not to bear any sinister meaning and that is the reason why I prefer the Chancery phrase, drawn from company law, "collateral purpose." There is no suggestion of naughtiness in "collateral" and I think that is binding on me. It was approved by Hodson L.J. and, I think, tentatively approved by Morris L.J. I say "tentatively" because I think in his view that matter did not really arise and, therefore, that is my problem and that is why in my view this case is not a serious threat to the Act. However, I understand that this clause has

[1] [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

[2] [1958] 1 Q.B. 554, 572.

been somewhat widely used and if that is true it may be a threat to more than this restriction.

I now pass to consider the condition in question. First, in the event, I have been absolved from the obligation of deciding what will be the consequence of the judgment which I am in process of delivering and the only person, so far as I know, who has embarked upon that problem was Hodson L.J. He has used some very far-reaching language in the *Pyx Granite* case. He said [3]: "In any event it would, I think, be impos-"sible to mutilate the Minister's decision by removing one or "more of the conditions. The permission given has been given "subject to those conditions, and non constat but that no "permission would have been given at all if the conditions had "not been attached. The consequence would be that if any "of the conditions imposed were held to be bad as imposed "without jurisdiction, the whole planning permission would fall "with it, and the respondents would be left without any "planning permission at all, for it would not be open to the "court to leave the planning permission standing shorn of its "conditions, or any of them." So that if there were twenty varied conditions attached to the permission to erect the house, and the house had been erected and yet one of them, however trivial, was ultra vires, there would be no planning permission for the erection of that house. Well, that is a very far-reaching obiter dictum and I am glad that I have been absolved from the duty of considering whether it is well founded.

To come back to this condition, Mr. Megarry has submitted that many of its elements are void for uncertainty. I persuaded him that it did not matter whether they were void for uncertainty until some other court was prepared to decide they were intra vires; but I owe it to his able argument, which did in fact raise a prima facie case of uncertainty in connection with one of them, to say that he argued it very fully and it is a point open to him, of course, if some other court thinks that this condition is intra vires.

The phrase that gives me most worry is "an industry "mainly dependent upon agriculture," but Parliament has in quite a different context used some such phrase and obviously therefore that would not be an easy question to decide. There are, I think, some things which cannot possibly be regarded as relevant to town planning; and here I am perhaps treading on somewhat dangerous ground. There are some things which seem to be so irrelevant to town planning that they should be so regarded unless somebody is prepared to give some reason, whether that reason be given by the representative of the town planning authority or in argument by the council. I have to say that, in spite of the extremely able argument put before me by Mr. Widgery, he was unable to give any reason

[3] [1958] 1 Q.B. 554, 578.

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

Roxburgh J.

for some of these restrictions. His broad proposition about them was that if there was a town and country element in it, I should disregard the things that had no town and country elements. I can believe that some such argument could be acceptable if the irrelevant matter bore some proportion to the relevant matter, but where the irrelevant matter is equal to or in excess of the relevant matter, that is an argument which does not appeal to me. As I have said, it would be difficult to upset a properly framed condition giving priority in respect of the occupation of these houses to the agricultural workers in this district. That is the first time I have mentioned "in this "district," but they might have been implied except for the words I am going to mention, because I think that it would be difficult for an agricultural worker to live in this house and work in some other district; but owing to the wide extent of this clause that ceases to be true because it covers—and I see no escape from this—as the primary category of potential occupants persons whose employment is or was agricultural. That would cover, furthermore, agricultural workers, whether their work was in the district, in the British Commonwealth or anywhere in the world, who had altogether retired from employment. That is the leading category and I am quite unable to see, and nobody has suggested, how any local planning purpose could be served by giving priority to persons who were in retirement and who perhaps had never been in the district in their lives before.

Mr. Widgery developed an argument that the avowed purpose of the council, as stated in the reasons, might be too narrow. I do not say that it is, but I do see that it might be, and therefore he says any extension in the interest of the landowner cannot be ultra vires. After all, he need not take advantage of it. We might have tied him up, so the argument goes, much more stringently; but that will not do, in my judgment. Persons entrusted with a statutory duty have to perform their duty in a manner which is fair, not only to the landlord but to all other classes in the community who may be concerned. Now the effect of this limitation is this: that supposing that there were two applicants for this cottage, one of whom was working in Chalfont St. Giles in an industry which did not fall within the range of the permitted industries and the other a retired farmworker who had never been in England before, apparently the landlord would be bound to choose the retired farmworker who had never been in England before. That in my judgment is grossly unfair to the non-agricultural resident in Chalfont St. Giles and is an unfairness which no town and country planning official could possibly justify and nobody sought to do so. The matter does not end there.

There is a second major category, "the dependants of such "persons as aforesaid." It was argued that "dependants" is void for uncertainty. I do not think as at present advised that that phrase is void for uncertainty, though it is extremely

ambiguous and one that it is not fair to put into a condition of this sort; but however I construe it, what possible town and country planning purpose could be alleged for giving priority to dependants of persons engaged in agriculture unless there was somebody also residing in the house who was in fact engaged in agriculture or unless (and this might be a perfectly fair limitation) there were widows of some other dependants who had been engaged in agricultural work while living in the house? That might be a fair limitation. I am not going to decide whether it is or not, but one can see the town and country planning purpose behind a restriction of that sort. But this condition is not limited, as far as I can see, in that way at all. A dependant of anybody who can say they were depending on such persons as aforesaid would take precedence as a new tenant over anybody who could not allege that he came within the other category. I can see no town and country planning purpose in that and it also seems to me that it is very unfair on persons now residing in Chalfont St. Giles who are not engaged in any of the permitted occupations.

Then, thirdly, even if the phrase "in an industry mainly "dependent upon agriculture" is not void for uncertainty, I should have thought it was a wholly unreasonable clause to put into a condition of this sort which, it is to be observed, is in relation to all farmworkers' cottages.

If it is capable of construction, the research necessary to ascertain who qualified would be expensive and extensive. I do not know what it means; it might be all sorts of different things; but if it can be construed (and for this comment I am assuming without deciding it) the first thing would be to get it construed and the next thing would be a very expensive and extensive inquiry as to what industries fell within the condition as so construed.

To put a thing like that into a permission for the erection of farmworkers' cottages, if it does relate to town planning, would be grossly unfair. Moreover, I am not able to see how any town planning purpose can be as wide as that. I suppose nobody would deny that, for instance, the extraction of sugar from beet was an industry mainly dependent on agriculture. Whatever the words may mean, that is not a borderline case. I cannot see what possible town planning purpose there could be in giving priority, in a proposed green belt area, to persons engaged in the beet sugar industry; that is not, I should have thought, a thing that one would plan intentionally and with some degree of priority in a green belt area.

It seems to me, whether that phrase is void for uncertainty or not, it is almost impossible to imagine any town planning purpose to which it is to be related, and if it can be so related it is, in my judgment, grossly unfair to expect the landlord and his potential tenants of this cottage to trouble over a problem of that complexity and magnitude.

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

Roxburgh J.

Therefore I have arrived at the conclusion that this clause is ultra vires as not fairly and reasonably relating to any local planning considerations. I observe that I am using words slightly different from Lord Denning. I have intended to put it in that way because the point which arises in this case is not quite the same and he might have put it slightly differently if he had been dealing with this particular case, but I do not think there is any real difference between what he said and what I am now saying.

I have already said that I entirely absolve the council from any ulterior object in the sense of improper object and I am not in a position to say whether in truth this was inserted for some collateral purpose, because local authorities have many other functions besides town planning functions, or whether it is a case of a blundering attorney's clerk. May I say in this connexion, though I am not entitled to investigate the origin of this phrase, that it would not be fair to assume that the Buckingham County Council or any of its staff or advisers were responsible. That is noted for their public protection, though I recognize in law I am not entitled to record what I believe I have heard stated during the course of the case. But I do not think that makes the slightest difference. If the condition is not for some planning purpose it does not matter whether it is for some collateral purpose or was simply put in because somebody did not know what they were doing or writing or whether there may be some other explanation of the blunder. I may say that I am disposed to think that "blunder" is the true explanation and I say that because of the complete difficulty of reconciling the reason with the clause. It may be that the reason given was too narrow to be justified in a clause; but any competent draftsman could have thought of a hundred variations of that reason which would have been very difficult to attack. Therefore to say that because it was too narrow they had to put in this clause will not do. If they thought it was too narrow they could quite consistently with the Act, in my view, put in words that were wider and that, I think, is probably all they were trying to do, in which case it is a blunder; but that is perhaps somewhat speculative.

A witness was called, but I want to make it plain in defence of Mr. Widgery that he was not called to add reasons to this or to try and correlate the reason with the clause, but to give me evidence, of which I have made use, about the position with regard to the development plan. He was not engaged in imposing this particular condition, but he was, I think, chairman of the appropriate committee of the council. I did point out to him the divergencies between the clause and the reason, and as I did not think it would be right for him to explain it, he offered no sort of explanation. Therefore I think it was a blunder, but, as I say, not necessarily a blunder in Buckinghamshire. A blunder is just as bad as a

collateral purpose, but if it is a blunder it cannot be something which was really done in purported exercise of statutory powers. Then one gets back to the same position, and when Lord Denning says[4]: "If they mistake or misuse their powers, "however bona fide, the court can interfere by declaration and "injunction," this is a mistake where, in my judgment, I ought to make a declaration, the form of which was agreed just before I gave judgment: That the said condition is and was ultra vires and of no effect. Then I order the rectification of the local land charge by deleting the entry which was made on December 5, 1952.

1958

FAWCETT PROPERTIES LTD. v. BUCKINGHAM COUNTY COUNCIL.

Roxburgh J.

Declaration accordingly.

Solicitors: *A. L. Philips & Co.; Sharpe, Pritchard & Co. for R. E. Millard, Aylesbury.*

[4] [1958] 1 Q.B. 554, 572.

[COURT OF APPEAL.]

* INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

C. A.

1958 *Oct.* 8, 9, 10, 16.

Lord Evershed M.R., Sellers and Pearce L.JJ.

Rates and Rating—"Social welfare"—Friendly society—Oddfellows—Society providing benefits and assurance—Claim by society for rating relief—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

Judicial Precedent—Statute—Construction—Whether doctrine of precedent to public benefit.

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] in respect of premises occupied by the society. The objects of the society as set out in its rules were to provide by entrance fees, contributions, fines, donations, etc., for insuring a sum of money to be paid on the death of a member or a member's wife or husband to various members of the member's family, insuring against sickness or other infirmity, and providing endowment of

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organization . . . "which is not established or con-"ducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare; . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with the "date of the coming into force of "the first new valuation list . . . the "amount of rates chargeable in re-"spect of a hereditament to which "this section applies shall . . . be "limited as follows, . . . (*a*) for the "first year of the new list, the "amount so chargeable shall not "exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year before "the new list came into force."

C. A.

1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

members, convalescent treatment and convalescent homes. A member who would otherwise be entitled as of right to payment of benefit under the rules could suffer suspension of benefit for misconduct, and the right to receive these contractual benefits was conditional on payment of contributions having been made in accordance with the rules. After payment of these benefits the lodges were given power to appropriate surplus to providing discretional benefits. Normally there was a substantial surplus available for appropriation and it had been appropriated, inter alia, to providing additional benefits for members and other persons of the class qualified under the rules to receive contractual benefits. The procedure for the admission of members to the society included a ceremonial initiation administered with the object of preserving the traditions of the society as a fraternity:—

Held, that, although the objects of the society included benevolent and discretionary succour to members and their families according to their need and the instilling into members of a fraternal feeling beyond the mere mutuality of a financial interest in one another, the main and dominant objects were the mutual insurance of the members, and through them of their families, and the benefits to which they were entitled as of right, not as the means to a benevolent end but as the end itself; those were not objects which were concerned with the advancement of social welfare within section 8 of the Act of 1955.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 applied.

Decision of Divisional Court [1957] 1 W.L.R. 1059; [1957] 3 All E.R. 310 affirmed.

APPEAL from Divisional Court (Lord Goddard C.J., Donovan and Ashworth JJ.)[2] on a case stated by Neville Laski Q.C., Recorder of Liverpool, a judge of the Crown Court at Manchester sitting as a court of quarter sessions.

At the session of the Crown Court at Manchester held on January 3, 1957, the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter called "the society") appealed against the rate by the Manchester Corporation as the rating authority for the City of Manchester (hereinafter called "the corporation") in respect of the hereditament situate at numbers 93/97, Grosvenor Street, Manchester, occupied by the society, in the sum of £1,197 for the year 1956–57, on the ground that in making the rate the corporation had failed to allow to the society the relief from liability provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The following facts, inter alia, were found by quarter sessions. Numbers 93/97, Grosvenor Street, was the head office and registered office of the society. The rate was duly and correctly made by the corporation in respect of the hereditament provided that the society was not an organization within the meaning of section 8 of the Act of 1955. If the society was such an organization the rate should be reduced to the sum of £971 17s. 4d. The society was founded in 1851 and was first registered under the

[2] [1957] 1 W.L.R. 1059; [1957] 3 All E.R. 310.

Friendly Societies Acts on August 8, 1851. The society had branches within the meaning of the Acts, such branches being either (i) Districts consisting of lodges registered as branches of the society or (ii) lodges consisting of an unlimited number of members of both sexes. The membership of the society consisted of ordinary members, registered members, junior members, honorary members, U. I. & E. (Unity Insurance and Endowment) Fund members, unity members, and widow members, as defined in the rules of the society which were annexed to the case stated and so far as material are summarized below. At all material times the number of members of the society was approximately 600,000. The qualifications for the admission of persons to the society as ordinary members included a proposal in a lodge by a member, the completion and signing of a declaration as prescribed in rule 156 of the rules of the society (rule 156 is set out in the judgment of Sellers L.J.), election by a majority of the members present and voting at a meeting of the lodge, and a ceremonial initiation administered with the object of maintaining the character of the society and preserving its traditions as a brotherhood in accordance with rule 82 of the rules. At all material times the society itself and by and through its branches carried on in varying degree activities referable to all of its said objects.

The objects of the society as set out in rule 2 were "To "provide by entrance fees, contributions of the members, fines, "donations, levies, and interest on capital for (*a*) Insuring a "sum of money to be paid on the death of a member or of a "member's wife or husband or, subject to section 2 of the Act "of 1948, of a parent, step-parent or grandparent of a member "or, subject to section 1 of the said Act, for the funeral expenses "of a member's child or of the widow of a deceased member. "(*b*) Insuring a sum of money to be paid on the birth of a mem-"ber's child. (*c*) The relief or maintenance of the members or the "cases hereinafter, or in the rules of any branch, provided, the "wives, children, fathers, mothers, brothers or sisters, nephews "or nieces, or wards being orphans or members, during sickness "or other infirmity, whether bodily or mental, in old age, or in "widowhood. (*d*) The relief or maintenance of the orphan "children of members during minority. (*e*) Providing proper "medicine and medical attendance for members. (*f*) Granting "temporary assistance to widows and children of deceased "members. (*g*) Providing members with assistance when "travelling in search of employment. (*h*) Assisting members "when in distressed circumstances, and for making grants to "members who may be incapacitated by accident from follow-"ing their usual employment. (*i*) Assisting branches unable to "meet their engagements. (*j*) The endowment of members at "any age. (*k*) Guaranteeing the performance of their duties "by the officers and servants of the order or any branch thereof. "(*l*) To provide convalescent treatment and to provide and

C. A.

1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

"maintain convalescent homes. (*m*) Insuring, to members of "the Jewish persuasion, the payment of a sum of money during "the period of confined mourning."

The income and the capital funds of the society itself and of and through its branches included not only contributions of the members and interest from investments, but also moneys received by way of fines, donations and levies. The objects and the activities of the society included the provision of benefits both to members and to persons other than members, namely their wives, children, fathers, mothers, brothers, sisters, nephews, nieces, orphans, and wards being orphans, being benefits discretionary in character. A member who would otherwise be entitled as of right to payment of benefit under the rules and tables of the society could suffer a suspension of benefit or be fined or be expelled from membership by a resolution of the lodge if, inter alia, he or she had been imprisoned for any crime or guilty of serious personal misconduct or made known the secrets of the society, and a member so expelled could be required to accept a surrender value in respect of insurance effected by him or her. A member's wife who would otherwise be entitled as of right to payment of benefit under the rules and tables of the society, but who was living in adultery would have no claim on any fund of the society.

Persons joined the society and contributed to its funds in order to obtain for themselves or for such class of persons as mentioned in (*m*) above, such benefits as the society disbursed under its rules as of right or by way of discretion. The benefits of the society payable to members as of right were only payable provided the contributions of such members have been paid or dealt with in accordance with the rules. Between 1905 and 1954 the capital of the society increased from approximately £13,000,000 to approximately £34,000,000, and in recent years the investment income had greatly exceeded in amount the contributions of members. The rules provided for the formation of various funds for benevolent purposes; an orphan gift fund (partly from donations and partly from a levy), a convalescent home fund and a war distress fund. In each quinquennial valuation except those made in the years 1870, 1894 and 1911, the society had always shown a surplus of assets over liabilities (both computed actuarily) and the last such valuation being in 1954. The surplus was appropriable by the lodges in accordance with rule 70 to the various benevolent funds (rule 70 (9)), or to funds for providing additional benefits for the member (rule 70 (10)) or in certain cases to the member's wife or husband or children under 21 (rule 70 (12)). These benefits were discretionary in character. In 1954 the appropriable surplus was £3,801,000 of which at least £1,000,000 was appropriated in accordance with rule 70 (which when spread over the five-year period represented an average of £200,000 a year). There was, further, a growing cash benefit fund, amounting in December, 1954, to over

£1,000,000, which was a savings or pure endowment fund for the provision of benefit containing no element of life assurance. The largest benefit provided was for sickness, which in 1954 totalled £871,310.

In so far as it was a question of fact the society was not established or conducted for profit, and was not a charity.

It was contended by the society that it was an organization not established or conducted for profit, whose main objects were concerned with the advancement of social welfare and that the hereditament was one to which section 8 of the Act applied.

It was contended by the corporation that the society was no such organization.

Quarter sessions was of the opinion that the hereditament was occupied for the purpose of the society and that the society was an organization not established or conducted for profit, and that the main objects of the society were concerned with the advancement of social welfare.

On the question whether, in the premises, the rate should be reduced to £971 17s. 4d. or remain unaltered in the sum of £1,197 the Divisional Court held that, as in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[3] the main objects of the society could not be held to be concerned with the advancement of social welfare within section 8 (1) of the Act of 1955. The society appealed.

Sir Andrew Clark Q.C. and *C. N. Glidewell* for the society.
G. D. Squibb Q.C. and *F. P. Hinchliffe* for the corporation.

In addition to the cases referred to in the judgments, the following were cited in argument: *Income Tax Commissioners* v. *Pemsel*[4]; *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council*[5]; *Berry* v. *St. Marylebone Borough Council*[6]; *Gibson* v. *South American Stores (Gath & Chaves) Ltd.*[7]

Cur. adv. vult.

October 16. LORD EVERSHED M.R. I will ask Pearce L.J. to deliver the first judgment.

PEARCE L.J. stated the facts, read section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and continued: It is conceded by the corporation that the society is not established or conducted for profit in view of the decision of the House of Lords in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*.[1] It is conceded by the society

[3] [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 (affirmed [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601).
[4] [1891] A.C. 531; 7 T.L.R. 657.
[5] [1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281.
[6] [1958] 3 W.L.R. 1029; [1958] Ch. 406; [1958] 3 All E.R. 677.
[7] [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.
[1] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

C. A.
1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY v. MANCHESTER CORPORATION.

Pearce L.J.

that its main objects are not charitable within the meaning of the Act. This appeal turns on whether the society can show that its main objects are concerned with the advancement of social welfare. If so, its premises are entitled to relief under the section and this appeal succeeds.

The society was founded in 1851, and in that year was registered under the Friendly Societies Acts. It has various classes of members and many branches. The total number of members is about 600,000. The objects of the society are defined in the rules of the society. Prima facie we must look at those rules in order to ascertain the main objects of the society; but where those rules are not clear or decisive the court is entitled to and must consider the actual practice of the society. The book of rules of the society, and the latest available reports dated November, 1955, and March, 1956, are exhibited to the case stated and certain relevant facts of the society's practice are carefully set out in the case stated.

In *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1] the House of Lords had to consider the case of a registered friendly society with about 700,000 members whose objects were (to use the words of Lord Keith of Avonholm [2]) "to provide on a mutual basis for pecuniary benefits "of relatively small amounts to be paid to its members upon the "ordinary chances and changes of human life such as relief during "sickness, provision of facilities in convalescent homes, old age "pay and payments to a member's family in the event of his "death." There was also an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. There were certain qualifications for membership, certain restrictions being imposed as regarded health, occupation and age. All the above characteristics are shared by the society in the present appeal.

The House of Lords held in that case that the society did not come within the terms of section 8 since it was established entirely for the common benefit of its members and lacked the element of altruism or public benefit required by the section. Unless, therefore, the society in this case can show that its main objects differ materially from those of the National Deposit Friendly Society it cannot succeed in this appeal. Sir Andrew Clark for the society submits that they do so differ by virtue of certain rules and activities which were absent in the case of the National Deposit Friendly Society and that the difference is sufficient to enable this court properly to hold that the society's main objects are concerned with the advancement of social welfare.

There can be no doubt that there are material differences between the two cases. The question we have to decide is whether those differences are great enough to distinguish this

[1] [1958] 3 W.L.R. 172. [2] [1958] 3 W.L.R. 172, 175.

case from the *National Deposit Friendly Society* case,[3] and to bring this society within the organizations defined by section 8 (1) (*a*). The differences on which Sir Andrew relies are these. First, the benefits in the *National Deposit Friendly Society* case [3] were confined to members themselves, whereas the benefits of this society extend to the families and dependants of members. Secondly, the funds in that case were derived exclusively from members' compulsory contributions. Thirdly, the benefits in that case were calculated on an actuarial basis and thus there was an absence of unselfishness or benevolence, whereas in the present case there is an element of discretionary benevolence over and above the actuarial minimum to which members are contractually entitled.

The scheme of the society, he says, is that members are contractually entitled to benefits calculated actuarially on the amounts of their subscriptions, and that any surplus after those benefits is not divisible under contractual obligation but is used to provide purely discretionary benefits to members and their families in cases of hardship or need by augmenting contractual benefits and by making payments of a purely personal nature to members or their families: such benefits are eleemosynary in character and outside the purposes of any mutual assurance. There was no such element in the *National Deposit Friendly Society* case.[3] He contends that the main objects of this society are the relief or maintenance of members and their families in sickness, in poverty, in distress, in old age and in unemployment. All these objects must be the advancement of social welfare. He stresses the element of fraternity throughout which is the basis of rules dealing with the various rituals. The fact (he argues) that the means by which those objects are attained is very largely a system of insurance, designed, in addition to contractual benefits, to provide a surplus for the exercise of benevolence, does not prevent the main objects being the advancement of social welfare, although it does prevent them from being charitable in the strict sense. The objects are fraternal and benevolent. The insurance is the means, not the end.

Admittedly the restriction of the benevolence to members and their families is an element to be considered, but in view of the number and wide dispersal of the society's members, he relies on the decision of this Court of Appeal in *Derbyshire Miners Welfare Committee* v. *Skegness Urban District Council* [4] as showing that such limitation does not prevent the objects of a society from coming within section 8, and on *In re Buck* [5] as showing that such benevolence on the part of a friendly society, though confined to a severely restricted class, may be a charity.

For the corporation, Mr. Squibb contends that the society, looked at as a whole, has for its main objects the insurance of

[3] [1958] 3 W.L.R. 172.
[4] [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; [1957] 3 All E.R. 692.
[5] [1896] 2 Ch. 727.

C. A.
1958
INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY
v.
MANCHESTER CORPORATION.
Pearce L.J.

its members. The *National Deposit Friendly Society* case [6] shows that those objects do not come within section 8. He canvasses various rules and facts in the case to show that benevolence is incidental rather than essential. Assuming, without conceding, that some of the main objects (for example, the discretionary administration) are benevolent, the society still does not come within the section. When the Act says the main objects, it means all the main objects, not one of them or some of them. For this he relies on *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*,[7] a decision of this court, as showing that a society which had two main objects, one of which was for the advancement of social welfare and one for the benefit of the members, did not come within the section.

We were referred to a number of cases which have decided whether particular organizations come within section 8 of this Act. The words of the Act are wide and general and it is not easy to decide whether particular cases do or do not fall within those words. Decisions in other cases are not necessarily a guide to what is the correct decision on the facts of a particular case. It seems to be established that the words "or otherwise for the "advancement of social welfare" were intended to connote something more than the mere distribution of money or money's worth simpliciter even although such distribution rarely fails to be beneficial to the recipient and in that sense to promote his welfare as a member of society. The words seem to me to connote something less material, something of the spirit. This is well expressed by Lord Evershed M.R. giving the judgment of the court in *General Nursing Council* case [8]: "But, if we can "add anything to illustrate the limitation which we think should "in this context be put upon social welfare, it would be that "the phrase involves at any rate the conception of what used to "be called 'good works'; the notion of things that, as a matter "of social obligation, ought to be done for the benefit of those "in the community whose living conditions in those respects are "inadequate. We do not suggest this by way of definition, but "only as an indication why, in our judgment, the advancement "of social welfare ought not to be equated with the promotion, "generally, of the well-being, in every sense and of every kind, "of society or sections of society; why, therefore, everything "which can be shown to tend to the public advantage cannot, "for the purposes of the section, be treated as concerned with "the advancement of social welfare."

Further, the words "main objects" must, in my opinion, mean in substance all the main objects. The test is this: When you look at the society fairly as a whole, can it be said that its main objects (not merely one or some of its main objects) are

[6] [1958] 3 W.L.R. 172.
[7] [1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.
[8] [1958] Ch. 421, 436.

concerned with (that is, directed to) the advancement of social welfare?

Rule 2 defines the objects of the society. [His Lordship read the rule and continued:] Some of those objects are, in vacuo, charitable. Some may be charitable.

The income of the society is derived from contributions (using that word to describe what the members are bound to contribute to secure their benefits) and also from fines, donations and levies. Persons join the society and contribute to its funds in order to obtain for themselves or for the class of persons mentioned in rule 2 (*c*) such benefits as the society disburses under its rules as of right or by way of discretion. The benefits available to members as of right are only payable provided the contributions of such members have been paid or dealt with in accordance with the rules. Rule 156 shows that members have to be proposed, elected and initiated with a ceremony whose ritual is designed to stress the fraternal nature of the bond; but the declaration which has to be signed by a candidate shows a concern with those matters such as his health and that of his wife, whether he is temperate, whether he or his parents have suffered from pulmonary disease, a concern which is normally associated with ordinary commercial insurance.

[His Lordship stated the facts relating to the provision of discretionary benefits under rule 70 and continued:] The accounts are not easy to follow, but it emerges on analysis that the society's income is about £1,700,000 (of which donations and sources other than interest on capital and contributions produce £56,000, which is about three per cent. of the total) and its expenditure is about £1,600,000. So far as I can see from the accounts, the discretionary benevolent distributions are between £200,000 and £300,000 per annum. Those to whom they are distributed are the members or their families or dependants who qualify as beneficiaries of the benevolence through the contractual link between the society and the member. The distributions are none the less discretionary acts of benevolence.

Such is the general outline of the organization in respect of which we have to decide whether its main objects are the advancement of social welfare, starting with the premise that mutual insurance against the vicissitudes of life is not concerned with the advancement of social welfare. I accept that *an* object of the society is benevolent and discretionary succour to members and their families according to their need, and that *an* object of the society is the instilling into members by ritual or otherwise of a feeling of fraternity that goes beyond the mere mutuality of a financial interest in one another or the esprit de corps normally promoted by a large business enterprise. Whether these can be properly styled "main objects" I feel some doubt. The main and dominant objects appear to me to be mutual insurance of the members and the benefits to which they are entitled as of right. These are not the means to a benevolent end: they are the end

C. A.
1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

itself. I do not wish to belittle the benevolent and fraternal objects to which I have alluded. They are no doubt of the utmost importance to some members and not unimportant to the majority. But they are not the main objects of the society. Therefore in my view the society is not one whose main objects are concerned with the advancement of social welfare.

I would, therefore, dismiss this appeal.

LORD EVERSHED M.R. In the light of the judgments already pronounced upon the imprecise formula of the Act which are binding upon this court, and particularly of the decisions of this court and the House of Lords in *National Deposit Friendly Society* v. *Skegness Urban District Council*,[9] Sir Andrew Clark felt constrained to present the case for the Oddfellows Society as one which could and should be distinguished from the *National Deposit* case[9] on the ground that, notwithstanding the common mutual insurance characteristic, certain of this society's rules, having no counterpart in the National Deposit Society's constitution, imported an eleemosynary or benevolent quality of sufficient significance to give to the Oddfellows Society a "social welfare" complexion distinct from the purely "business" colour of the National Deposit Society. Thus Sir Andrew emphasized the rules relating to the benevolent committee (21), the orphan gift fund (28), the unity distress fund (35), the convalescent home benefit fund (34 in the amending rules), the unity war distress fund (35a), meritorious service pensions (38a), Collins Memorial Fund (38b); to the rules relating to the appropriation of surplus capital (70), to Oddfellows' Halls (79), and to ritual and regalia (82); and to the special District and Lodge rules relating to the District Distress Funds (107b) and Lodge Benevolent Funds (163) respectively. Founding himself upon such considerations and upon the terms of the objects rule (2) itself, Sir Andrew forcibly contended that the benefits and purposes of the Oddfellows Society were not confined, as were those of the *National Deposit* case,[10] to the provision of such disability and other like payments to members only, and as a matter of contractual right, but extended to payments that are supplementary and discretionary, and to persons other than members, namely, persons who may broadly be classed as the families of members. Sir Andrew further drew attention to the circumstances that the income of the Oddfellows Society is not exclusively derived from contributions (or from the very substantial investments made from savings) but includes voluntary donations, and that purely charitable grants are within the power of the society's trustees; and he finally and most naturally emphasized that the provisions as to initiation and the like showed that those who joined the society must be taken to accept an ethical consideration of brotherhood as a basis of their association.

[9] [1958] 3 W.L.R. 172. [10] [1958] 3 W.L.R. 172.

I am far from saying that these matters do not constitute an important addition or qualification to what may be called the "business" aspect of the association (namely, mutual insurance) which is comprised in the first of the objects enumerated in rule 2. But I have come to the conclusion on the whole that they would not justify us in distinguishing this case from the *National Deposit* case [10] according to the principles therein laid down. I shall not, I hope, be thought unappreciative of the arguments put to us if I express my conclusions shortly. To do otherwise would inevitably involve some further attempted exposition of the Parliamentary formula and thereby add to the citations in the other cases (not likely to be few) which will have to be considered—a process which would not, I think, be to the public benefit, tending to substitute argument upon the judgments of the courts for application of the few words, simple if elusive, " . . . whose main objects are . . . concerned with the "advancement . . . of social welfare." The opinion of the noble Lords rejecting the appeal of the National Deposit Society, and the judgment of this court in the same case expressed by Parker L.J., have emphasized the significance—and the limiting effect—of the words "concerned with the advancement of": the main objects (and not merely some of them) must be directed to the furtherance or promotion of social welfare, that is, as an end, or an altruistic conception. See, for example, the speech of Lord Keith of Avonholm [11]: "The desire for protection in time of need "is the common bond that has brought them together. That is "a most laudable object, but I find it impossible to distinguish "their organization in any essential respect from any mutual "insurance society which provides similar, if more enlarged, "benefits for a wider and more diverse cross-section of the "community." Lord MacDermott, in the same case, after referring to a judgment of FitzGibbon L.J. in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*,[12] said [13]: "The principle, as I "understand it, is that a valid charity must be substantially "altruistic and benevolent in its purposes. That quality, which "is, of course, but one facet of legal charity, appears to me to be "reflected in the word 'advancement' as used in the paragraph "in question, for there it seems clearly to be used as it is com-"monly used in relation to what is charitable, and, so used, I "think it must be construed as implying a desire to do good to "others. If, then, as I would hold, that is the nature of the "quality which links and runs through the categories mentioned "in section 8 (1) (*a*), it remains to inquire whether the objects of "the society possess or lack this quality."

In my judgment, the Oddfellows Society fails to satisfy the test. The recorder fairly summarized the purposes of those who

[10] [1958] 3 W.L.R. 172.
[11] Ibid. 181.
[12] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.
[13] [1958] 3 W.L.R. 172, 184.

C. A.
1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY v. MANCHESTER CORPORATION.

Lord Evershed M.R.

join the society: "That persons joined the society and contributed to its funds in order to obtain for themselves or for such class of persons as mentioned in (*m*) above such benefits as the society disbursed under its said rules as of right or by way of discretion." Highly laudable though the society's main objects be, they at least significantly include mutual insurance for protection in time of need and, in my opinion, the result is not affected for present purposes by the fact that the benefits may extend to his family as well as to the member, and may not be confined to the contractual minima.

Sir Andrew, in his reply, urged that the main objects of the society were relief of members (and their families) in sickness, poverty and distress, and their maintenance in old age and when out of work, and that the mutual insurance characteristics were but means to those ends. But such an analysis would surely be no less capable of invocation in a case strictly comparable to the *National Deposit* case.[14] To treat the mutual insurance characteristics as "means" only is, in my judgment, to disregard the words "concerned with the *advancement* of . . . ," which the House of Lords has held to be essential to the proper application of the statute.

I agree, accordingly, that the appeal should be dismissed.

SELLERS L.J. The resemblance of the present case to that of the *National Deposit Friendly Society*[14] is apparent, and the argument has been developed very largely by both sides by making a comparison, on the society's side to emphasize the differences, on the side of the corporation, to demonstrate the similarities, in the two cases. It is not perhaps the most attractive way of considering a case, but as the law has so recently been reviewed and pronounced by the House of Lords and the Court of Appeal in the cases which have been cited, it seems to me to be not only permissible and reasonable but necessary to do so.

Counsel for the corporation relied strongly on rule 156, which, if not, as they asserted it was, the key to the whole matter, does show that a main and outstanding object of the society is insurance on a contractual basis. Rule 156 (1) is as follows: "Any person of good character, sound health, and within the age limits applicable to the respective tables contained in the general rules, or as stated in the lodge or district special rules, may become a member." Sub-rule (2) contains a form of declaration to be signed by every candidate for admission to the society which includes an affirmation "that I am not affected with any hereditary disease tending to cause prolonged sickness or to shorten life"—and in respect of a candidate's wife "that she is also of sound bodily health and good constitution." Sub-rule (3) requires that the declaration must be accompanied by a certificate of health signed by a medical practitioner if one is required by district or lodge. Sub-rule (5) deals with the

[14] [1958] 3 W.L.R. 172.

candidate's wife's health, and in sub-rule (6) there is a form of declaration in lieu of a medical certificate, requiring answers to questions all directed to the applicant's health or the health of his parents or family, and the last question is (*g*): "Have you ever "been admitted, or proposed to be admitted, a member of this or "any other sickness benefit society."

It would seem on the information available, and viewed as a whole, that the main activity of the society is sickness and life insurance of the members, and through them of their families and specified classes of relatives.

In the conduct of this class of business over the years, with a care and prudence commonly associated with such insurance on a purely business basis, the society has built up reserves of no less than £34,000,000. I would not seek to belittle the society's purely benevolent provisions, they are substantial in terms of money, but they have been sufficiently restrained year by year to permit of this great accumulation of capital. Even the substantial voluntary payments go unaccompanied, it would seem, by any friendly or neighbourly ministrations of an individual or personal character and, therefore, lack a not unimportant element in social welfare.

As it has been laid down that all the main objects must fulfil one or other of the requirements of section 8 (1) in order to bring the hereditament within the provisions for special relief then I think this society fails to qualify. It cannot be held, in my view, in the light of the decided cases, that all the main objects of the society are "otherwise concerned with the "advancement of social welfare."

I add these observations to the judgments of my lords, which I have read and with which I agree. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Forsyte, Kerman & Phillips for John Gorna & Co., Manchester; Sharpe, Pritchard & Co. for Philip B. Dingle, Town Clerk, Manchester.*

E. D.

[DURHAM CONSISTORY COURT.]

* *In re* ST. MICHAEL AND ALL ANGELS, BISHOPWEARMOUTH. RECTOR AND CHURCHWARDENS OF BISHOPWEARMOUTH *v.* ADEY.

1958
Sept. 30.
Garth Moore Ch.

Ecclesiastical Law—Faculty—Aumbry—Reservation—Whether reservation of the Blessed Sacrament theologically permissible and whether

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

1958

St. Michael and All Angels, Bishopwearmouth, *In re.*

reservation an illegal ceremony — Whether aumbry an illegal ornament.

A faculty was sought by the rector and churchwardens for the placing of an aumbry in the south wall of their parish church. The petition was resisted by one parishioner: —

Held, (1) that an aumbry was not an illegal ornament;

(2) that reservation of the Blessed Sacrament was not repugnant to the doctrine of the Church of England, and was not forbidden either in the Book of Common Prayer or by common law or statute and, accordingly, where reservation had been sanctioned by the ordinary as part of the jus liturgicum, it might properly be practised in connexion with the communion of the sick.

In re Lapford (Devon) Parish Church [1955] P. 205; [1954] 3 W.L.R. 748 and *In re St. Mary Magdalene, Altofts* [1958] P. 172 applied.

Petition for a faculty.

The rector and churchwardens of the parish of St. Michael and All Angels, Bishopwearmouth, petitioned for a faculty to construct an aumbry in the south wall of the south chapel of the church, for the express purpose of facilitating the communion of the sick. The petition was supported by a majority resolution of the parochial church council. The architectural details were not disputed and the bishop of the diocese had given his permission for reservation of the Blessed Sacrament in the church. The petition was opposed by one person, who while not being a parishioner, was on the electoral roll.

The petitioners appeared in person.

C. D. Renney (solicitor) for the opponent.

Garth Moore Ch. This is a petition by the rector and churchwardens of the parish of St. Michael and All Angels, Bishopwearmouth, for an aumbry to be inserted into the south wall of the south chapel of the church, the express purpose for which it is sought, being soley the communion of the sick. The petition is supported by the parochial church council, which consists of 38 members, and, at the most relevant period, there was a resolution in favour of this petition, in which, in the presence of 34 members, 24 votes were cast in favour of the resolution and four were cast against the resolution. The architectural details are not the subject of dispute and, so far as they are concerned, I say at once that I am satisfied that they are aesthetically and architecturally satisfactory. The bishop has given his permission for reservation for the purpose of the communion to the sick. The petition is opposed by a Mr. Adey, and his is the sole opposition in a parish of some 6,000 to 8,000 persons, he himself not being a parishioner, but being on the electoral roll. He tells me in evidence that he could produce a number of opponents. In point of fact, he had produced only a document in the nature of an informal petition which is signed by 14 persons, who he says are parishioners. He opposed the grant of a faculty on the limited

grounds contained in his pleadings, namely, that the aumbry, if installed, would be illegal as being an ornament not authorized by the ornaments rubric, and/or that it would be used or would be likely to be used in connexion with and/or ancillary to an illegal ceremony or practice, namely, the reservation of the sacrament. He further alleges that the aumbry is unnecessary. In the normal course of events I should be not merely content but happy to deliver a very short judgment showing the conclusion at which I have arrived; but, in the light of the difficulties which tend to beset this and similar matters, and in the light of the fact that I have no idea how far this case may go, it is incumbent upon me to give my reasons in full.

First, I will consider the argument that an aumbry is an illegal ornament. To my mind, it is an abuse of language to describe an aumbry as an ornament at all. It is no more than a cupboard. It is in this case, though not in every case, a cupboard intended for the reception of the Blessed Sacrament; but it is still a cupboard. It is idle to argue that a cupboard is an illegal ornament; and it would not occur to anyone to argue that a cupboard at the west end of the church, for the storing of brushes or dustpans, was an illegal ornament. Its insertion might be opposed on other grounds; but certainly not on that ground. That is not the real gravamen of the opponent's objection. His real objection is that he contends that reservation is unlawful and that, because reservation is unlawful, facilities for it (and an aumbry comes in that category) should not be granted. Now as to that last point it would normally follow that, if reservation is intrinsically unlawful, facilities for it should not be granted; but it does not necessarily follow. It is conceivable that, where reservation is taking place or is going to take place, in some circumstances it might be the court's duty to see that, despite the question of legality, proper safeguards for the sacrament are provided. The object of that would be, not to encourage illegality but to mitigate what would otherwise be one of the bad effects of illegality. If one wants support for that proposition in the temporal law, one finds something of that line of reasoning in *Humphries* v. *Connor*.[1] It may be that it was some such consideration as this which Vaisey Ch. had in mind in *In re St. Mary Magdalene, Altofts*[2] (which is referred to in *In re Lapford (Devon) Parish Church*[3]), and it may even be this which the late Dean of the Arches had in mind in his decision in the *Lapford* case[3] itself. I am not sure; but, in any event, I myself would not lightly subscribe to a theory that the court can grant a faculty to facilitate an illegality, and I shall return to this point later on, when I am considering the judgment in the *Lapford* case.[3]

It is, I think, desirable to begin from first principles, and in the first instance to consider the theological implications of reservation. Needless to say, I have no intention of going deeply

[1] (1864) 17 Ir.C.L.R. 1.
[2] [1958] P. 172n.
[3] [1955] P. 205; [1954] 3 W.L.R. 748; [1954] 2 All E.R. 310.

1958

St. Michael and All Angels, Bishopwearmouth, *In re.*

Garth Moore Ch.

today into all the facets of eucharistic doctrine. That would take far too long. I confine myself to the question whether reservation is theologically permissible within the Church of England, and, in saying "theologically permissible," I am stating the matter with considerable moderation. First of all, it is to be observed that a very large part of Christendom has reservation, both in the Western Church and in the Eastern Church. Secondly, it is to be observed that there was a normal practice of reservation in England in pre-Reformation times. It is all too frequently forgotten that pre-Reformation canon law is still fully extant in the Church of England and in this realm, save in so far as pre-Reformation canon law has been expressly repealed or by necessary implication altered. Thirdly, there is no Anglican formula which in terms condemns reservation theologically. Fourthly, many branches of the Anglican communion (as distinct from the Church of England) practise reservation. Fifthly, many churches in the Church of England have reservation. Sixthly, in 1900 the two archbishops after inquiry concluded, first, that reservation is doctrinally permissible and, secondly, that it is probably illegal. It is the first point with which I am at present concerned. It is, furthermore, a matter to which I should pay great attention, emanating as it does from so weighty a source on a point of doctrine; whereas, on a matter of law, I should naturally not be expected to give the same weight to the opinions of the archbishops. Seventhly, the practice of reservation was approved by the Church of England and found its way into the deposited Prayer Book of 1928 which was rejected by Parliament. Inasmuch as the 1928 book was rejected by Parliament, it carries no legal weight whatever; but, inasmuch as the Church gave the seal of her approval to reservation, it is, to my mind, a matter of great moment when one is considering the theological propriety of reservation. These seven matters which I have mentioned provide very weighty material upon which to base a conclusion that reservation is (to put it no higher) theologically permissible. The only theological argument within the framework of the Church of England against reservation of which I know is that which Mr. Renney has sought to draw from the Thirty Nine Articles. Article 28 states that the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped. That is language carefully chosen at a time of great controversy. It is literally true that the sacrament was not by Christ's ordinance to be reserved, and the language used is an echo of that used in the 25th article, which says that the sacraments were not ordained of Christ to be gazed upon or to be carried about. Again, that is literally true. But, if reliance is to be placed upon the Thirty Nine Articles, they must be regarded in their entirety, and, in their entirety, they include the Sovereign's declaration which is as it were a preface to the Articles, and which states more than once that the Articles are to be taken in their literal and grammatical sense. In their

literal and grammatical sense these two Articles do no more than state the obvious fact that by Christ's ordinance the sacrament is not reserved, lifted up or carried about. Many other things which are perfectly lawful and perfectly proper have not been ordained by Our Lord. In my view, the Articles do not forbid reservation, and I have no doubt whatever that from a theological angle the practice of reservation is doctrinally sound, so I turn to the further consideration of whether, although doctrinally sound, it may be contrary to law.

By far the most formidable argument for the illegality of reservation is that contained in the rubric at the end of the service of Holy Communion in the Book of Common Prayer, which directs that the consecrated elements shall not be carried out of the church but shall be reverently consumed. It is, I think, clear both from the immediate context of the words and also from all that we know of the history of the seventeenth century, that the object of this rubric was to avoid profanation by the taking away of the consecrated elements and consuming them as though they were common food at an ordinary meal. The rubric was not, I think, aimed directly at reservation, which was not a common practice at the time of the rubric and was, therefore, probably not within the immediate contemplation of its authors. But it might be argued with some force that, whatever be the object of the rubric, its wording is perfectly clear and should be taken as it stands. Or, is it the case that the Thirty Nine Articles are to be taken in their grammatical and literal sense, but that the Book of Common Prayer is to be interpreted liberally? The Book of Common Prayer has statutory authority. It is a schedule to the Act of Uniformity. But there is often considerable confusion of thought by reason of this. Because the Book of Common Prayer has statutory authority it does not mean that it is itself a statute. Nor does it mean that it is to be interpreted as one would interpret the statute itself. It is the work of clergymen and its rubrics are directives written by clergymen for clergymen, in language which, for a directive, is clear enough, but which from a lawyer's angle leaves many loose ends and much to be desired, and which one would not employ, for example, in the drafting of a conveyance. If examples are wanted, they abound throughout the Book of Common Prayer; witness the loose use of the words "minister" and "priest" in morning prayer and evening prayer; the absence of any authority for the antiphonal rendering of the psalms; the absence of any provision for hymns; the absence originally of any provision for a sermon after morning or evening prayer; and the oft-quoted failure to direct the return of the infant after baptism. It is, in my view, of the highest importance to remember that the Book of Common Prayer is not itself a statute and ought not to be interpreted as though it were. Regarded in its true light as a directive, to be interpreted liberally according to the occasion, this rubric which we are now considering really does no more than

1958

St. Michael and All Angels, Bishopwearmouth, *In re.*

Garth Moore Ch.

forbid the profanation of the sacrament. It takes no account, one way or the other, of its reservation for a purpose which was not present to the minds of the clerical authors of a devotional manual in the seventeenth century. In my judgment, that rubric cannot possibly be interpreted as governing the present situation.

Furthermore, I do not think that I am necessarily to assume that reservation would, in this instance, be effected at a public service; and it is to be observed that section 13 of the Act of Uniformity which enjoins the use of the form of service in the Book of Common Prayer does so only so far as the sacraments, rites and ceremonies are openly used.

There is one further matter to which I do not think reference has been made, but which I do not think I can ignore, and that is the Brawling Act, 1553.[4] That Act of Parliament was reviewed as recently as the reign of King George VI, and it was then in part repealed. But the part which was left on the statute-book amongst other things makes provision for the protection of the sacrament and its pyx or canopy. I think that there is at least some significance in the fact that an Act reviewed by Parliament as recently as this was contains provision for the protection of the reserved sacrament. This part of the Act being still extant and being deliberately left in force, it would appear that Parliament contemplates the fact of reservation.

When one turns from basic principles and statutory provisions to decided cases, I agree with Mr. Renney that one need not look further for a review of the authorities than *In re Lapford (Devon) Parish Church*,[5] except that one must also look at the decision in the first case of *In re St. Mary, Tyne Dock*,[6] which was heard in this court by my predecessor, and which, out of all the many cases referred to in the *Lapford* case,[7] is the only case which is in strict law binding upon me, and in which Hylton Foster Ch., as he then was, decided that an aumbry was not an illegal ornament, and that there could be lawful reservation in an aumbry. If one is going to look (as one must) at the *Lapford* case,[7] one should begin with the report of that case in the Consistory Court of Exeter.[8] I do not propose again to review the authorities which in that case were so fully reviewed by Wigglesworth Ch. It is to be observed that out of that large collection of cases there reviewed, while tabernacles have been condemned, there is no case where reservation in an aumbry with the permission of the bishop has been condemned, and there are several reported cases and many, many unreported cases in which it has been allowed; and I, myself, in this diocese and in two other dioceses have often granted petitions for faculties for aumbries for the purpose of reservation. I say nothing today about tabernacles, for that issue

[4] 1 Mar. Sess. 2, c. 3 (7 *Statutes* 493).

[5] [1955] P. 205.

[6] [1954] P. 369; [1954] 2 All E.R. 339.

[7] [1955] P. 205.

[8] [1954] P. 416.

is not before me; but, so far as reservation is concerned, and so far as aumbries are concerned, I entirely adopt the view of Wigglesworth Ch. where he says[9]: "I know of no authority "which compels me to hold that reservation is unlawful when "it takes place with the sanction of the bishop. I do not "consider that it is forbidden by article 28 or by the rubric at "the end of the Communion Service which was inserted for a "wholly different reason, namely, for the prevention of the "irreverent practices of Puritans. In my view the prayer book "neither forbids nor authorizes reservation; it makes no provision "for it. Where the bishop considers that something not provided "for is needed, it is for the bishop to make provision in the "exercise of that authority which he has in his diocese." In other words, where no other provision is made, the matter falls within the scope of the jus liturgicum, and all that the chancellor is asked to do is to grant permission for a cupboard or aumbry. It is for the bishop to allow or forbid, now and hereafter, the use or the cupboard for reservation.

I have now stated my own views which, on this point, entirely accord with the views of Wigglesworth Ch. as expressed in the *Lapford* case.[9] I do not, of course, overlook the fact that that case was the subject of an appeal to the Court of Arches.[10] Strictly speaking, that judgment is not binding on me in the northern province; but it is, of course, one to which I pay very great deference, and which I consider I ought to follow, unless there is a compelling reason to the contrary. I confess that I do not wholly understand that case. So far as I do understand it, I propose to follow it. Its plain wording would seem to me to indicate two points, namely (i) that reservation is illegal; but (ii) that, since Parliament in 1928 refused to make it lawful, it is proper for courts of law to grant facilities to enable it to take place. That is something which is so wholly at variance with what I understand to be the duty of a court, that I can only suppose that for some reason or another, I have misunderstood the learned dean. What, however, is clear beyond doubt is that, according to the dean, it is proper for a consistory court to grant a faculty for an aumbry when the bishop has sanctioned reservation. If, then, I do grant a faculty in this case (whatever be the learned dean's true meaning and by whatever route he arrived at his conclusion), I shall at least be doing what he says it is proper for me to do. I shall also be doing what, in similar circumstances, I have so often done before, and what has been done so often by my brother chancellors in their dioceses. I shall, too, be following the one precedent binding upon me in this court, namely, the decision of Hylton Foster Ch. in 1954 in *In re St. Mary, Tyne Dock.*[11]

I have said that I would not lightly subscribe to a theory that it could be proper to grant facilities for what is illegal. I do

[9] [1954] P. 416, 424.
[10] [1955] P. 205.
[11] [1954] P. 369.

1958

St. Michael and All Angels, Bishopwearmouth, *In re.*

Garth Moore Ch.

feel bound, however, to draw attention in this case (I have already done so during argument) to the doctrine of necessity, a doctrine which has its place in the common law of England, though its limits have never been exactly defined. It has an even older place in the jus commune of the Church and is, if anything, there more firmly entrenched. Its relevance to the present case is this. The incumbent has given evidence (which I do not think has been challenged) about the number of occasions on which in his parish he or his assistant curates, of whom there are two, are called upon to administer Holy Communion to the sick. The number varies from week to week. There are generally from 15 to 30 with a considerably larger number at the greater festivals. Now in 1662, when the Act of Uniformity was passed and the Book of Common Prayer received its statutory authority, there was a population in this country of something like five and a half million. Statistics are uncertain, but according to Gregory King's tables, in the seventeenth century there were at least 10,000 clergymen. It may be there were many more; but there were at least 10,000. This means that there was at least one clergyman for every 500 persons. In the twentieth century the population is something like 45 million, and, although there are no accurate statistics available, there are at most 18,000 clergymen of the Church of England to cater for that 45 million. When one looks at the 1931 census one finds only 32,479 ministers of *all* denominations for a population of 43 million. But let us keep to the figure of the seventeenth century, which is certainly approximately correct, of one clergyman for every 500 persons, and compare that today where it is no uncommon thing to find a single parish priest for a population of something like 20,000. Or take the present case, where there are three available priests for a population of some 6,000 or more. The provision in the Book of Common Prayer in the seventeenth century for a special service for the communion of the sick could well have been practicable as a normal practice in the seventeenth century. Today, it is often quite out of the question for the sick to have a separate sick-bed service for the celebration of the Holy Communion for each person. Quite apart from the question of the time involved, it would be spiritually very undesirable for a parish priest to communicate (as communicate he must if he actually celebrates at the sick-bed) as often as the needs of today would dictate were he to provide a separate service of Holy Communion for every sick person. I say nothing whatever today about the strong theological arguments in favour of communicating the sick from the sacrament consecrated at the parish eucharist, rather than from the sacrament consecrated at what is in effect a private service. At the moment I am considering only the practical problem. For practical reasons a separate celebration at each sick-bed is often impossible, and in the present case I am satisfied that, if the sick are to receive Holy Communion, reservation is a necessity not as striking as in many cases I have known, but,

nevertheless, a real necessity. That, in my judgment, would be a sufficient reason in law to sanction facilities for reservation in an aumbry, and, as I have indicated, this may be the type of consideration which was referred to by the Dean of Arches in the *Lapford* case [12] and by Vaisey Ch. in the *Altofts* case.[13]

I, therefore, hold (1) that an aumbry or cupboard can properly be the subject of a faculty; (2) that reservation is not repugnant to the doctrine of the Church of England; (3) that neither in the Book of Common Prayer nor anywhere else is it forbidden by law; (4) that, accordingly, it may be sanctioned by the bishop as part of the jus liturgicum; (5) that, that being so, it is open to the chancellor to grant lawful facilities for it and, among these lawful facilities, is an aumbry; (6) that in this case the necessity for reservation for the communion of the sick has been established, and (7) that the proposed conditions are satisfactory from an aesthetic and architectural point of view. I, therefore, decree that a faculty shall issue as prayed; but there are still two further matters which require attention. By an oversight the petitioners have not as yet petitioned for any vessel or vessels for the purpose of reservation, and to decree an aumbry without decreeing also the appropriate vessels would nullify the effect of the proceedings. It could be argued, of course, that these could be the subject of a further petition, but a further petition would cost more money, and I accordingly give leave to the petitioners to amend the petition to pray therein for the appropriate vessels, when the petitioners have decided more precisely the manner in which reservation is in this case to be carried out. The issue of the faculty will be held up for that amendment to be made, and furthermore, I shall have to make the usual condition about the completion of the work within a certain time, and so, unless I am told of a reason to the contrary, it will be a term that the work be completed within three months or such further time as the court may allow. Then there is the question of a white light. I appreciate that the incumbent has deliberately refrained from asking for a light with the express object of giving as little offence to the party opponent as possible; but I feel a little doubtful about the propriety of reserving without giving the customary indication of the presence of the Blessed Sacrament. It is well that persons who come into the church should know that the Blessed Sacrament is in fact reserved therein. I propose to leave this to the personal discretion of the incumbent; and, since he already has leave to amend the petition for the introduction of the appropriate vessel or vessels, if on reflection and after consultation with the bishop he wishes also to amend so as to pray for the grant of permission for a light on the same faculty, he may do so.

Faculty as prayed.

Proctors for the opponent: *C. R. Walker & Renney, Sunderland.*

[12] [1955] P. 205.

[13] [1958] P. 172n.

[RESTRICTIVE PRACTICES COURT.]

R. P. Ct.† (E. & W.)

1958

Oct. 6, 7, 8, 9, 10, 13, 14; *Nov.* 3.

* *In re* CHEMISTS' FEDERATION AGREEMENT (No. 2).

[1957 No. 4 (E. & W.).]

Restrictive Practice—Restriction—Whether contrary to public interest—General principles applicable—Task of court—Injury to public—"Reasonably necessary" to protect public—Restriction on sale to public of proprietary medicines otherwise than by qualified retail chemists—Qualified chemists competent to advise customers in relation to proprietary medicines—Advice alleged to protect public against injury from misuse of medicines—Risk of injury negligible—Whether restriction "reasonably necessary" for the protection of public—"Reasonably necessary"—Whether reasonable and prudent man would seek to enforce restriction—Whether removal of restriction would deny to public substantial benefits or advantages—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *ss.* 20 (1), 21 (1) (*a*) (*b*).

Injunction—Restrictive practice—Restriction contrary to public interest—Whether injunction should be granted—Whether ordinary rule applies—Form of order—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 68), *s.* 20 (3).

Evidence—Restrictive practice—Trade witness—Evidence of conditions of particular trade—Whether trade witnesses experts in relation to their trade—Whether trade witnesses may be asked what is injurious or beneficial to public.

On the true construction of the words "reasonably necessary" in section 21 (1) (*a*) of the Restrictive Trade Practices Act, 1956,[1]

---

† Before DEVLIN J. (PRESIDENT), UPJOHN J., LORD CAMERON, SIR GODFREY MITCHELL, SIR STANFORD COOPER, MR. W. L. HEYWOOD and MR. W. G. CAMPBELL.

* For report of this case with argument, see L.R. 1 R.P. 75.

[1] Restrictive Trade Practices Act, 1956, s. 20: "(1) The Court shall "have jurisdiction, on application "made in accordance with this "section in respect of any agreement "of which particulars are . . . "registered under this Part of this "Act, to declare whether or not any "restrictions by virtue of which this "Part of this Act applies to the "agreement . . . are contrary to the "public interest. . . . (3) Where any "such restrictions are found by the "Court to be contrary to the public "interest, the agreement shall be "void in respect of those restrictions; "and without prejudice to the fore-"going provision the court may, upon "the application of the registrar, "make such order as appears to the "Court to be proper for restraining "all or any of the persons party to "the agreement . . . (*a*) from giving "effect to, or enforcing or purporting "to enforce, the agreement in respect "of those restrictions; (*b*) from "making any other agreement "(whether with the same parties or "with other parties) to the like "effect."

S. 21: "(1) For the purposes of "any proceedings before the Court "under the last foregoing section, a "restriction accepted in pursuance of "any agreement shall be deemed to "be contrary to the public interest "unless the Court is satisfied of any "one or more of the following cir-"circumstances, that is to say—(*a*) "that the restriction is reasonably "necessary, having regard to the "character of the goods to which it "applies, to protect the public against "injury . . . in connection with the "consumption, installation or use of "those goods; (*b*) that the removal "of the restriction would deny to the "public as purchasers, consumers or "users of any goods other specific "and substantial benefits or advan-"tages enjoyed or likely to be enjoyed "by them as such, whether by virtue

where it is sought to bring a restriction within that paragraph, the question which the court has to ask itself is whether or not a reasonable and prudent man who was concerned to protect the public against injury would enforce the restriction if he could; a reasonable and prudent man would not do so unless he was satisfied that the restriction afforded an adequate protection, and that the risk of injury was sufficiently great to warrant it, and it is not enough, therefore, merely to show a chance of injury.

The Chemists' Federation, a federation consisting of manufacturers of proprietary medicines, wholesalers and retail chemists, by its rules imposed on its members a number of restrictions designed to prevent the sale to the public of proprietary medicines manufactured by its members otherwise than by qualified retail chemists. The original purpose of the restrictions was to protect chemists from competition by other traders. The federation, though a considerable body, controlled less than half the trade, and the sale of proprietary medicines manufactured by its members amounted to about one-third of the sale of all proprietary medicines. The federation sought to justify the restrictions on the ground, inter alia, that restriction of the sale of proprietary medicines to a chemist's shop where there was in attendance a qualified chemist who, unlike an ordinary retailer, was able to and did give advice or warning to his customers in relation to the medicines, afforded a protection to the public against the injury which could arise through misuse or excessive use of proprietary medicines and that, therefore, the restrictions were reasonably necessary to protect the public against injury within section 21 (1) (*a*) of the Act, and/or their removal would deny to the public specific and substantial benefits or advantages within section 21 (1) (*b*). On a finding by the court that that risk of injury and the opportunities for giving such advice were negligible:—

Held, that if the effect of the restrictions was in fact the avoidance of injury to the public, it was immaterial that that was not their prime object, but that the protection which the existence of the restrictions was supposed to afford was not reasonably necessary for the protection of the public within the meaning of section 21 (1) (*a*) because the risk of injury was too slight to justify so wide a restriction and because, even if the risk had been greater, the restrictions afforded no real protection against it.

Dictum of Buckley J. in *Stanford* v. *Roberts* [1901] 1 Ch. 440, 444; *Glasgow Corporation* v. *Muir* [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44; and *Bolton* v. *Stone* [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078 applied.

Held, further, that removal of the restrictions would not deprive the public of substantial benefit or advantage within the meaning of paragraph (*b*).

Section 20 (1) of the Act of 1956 does not require the court to

"of the restriction itself or of any "arrangements or operations resulting therefrom; . . . (*g*) that the "restriction is reasonably required "for purposes connected with the "maintenance of any other restriction accepted by the parties, . . . "being a restriction which is found "by the Court not to be contrary to "the public interest upon grounds "other than those specified in this "paragraph, . . . and is further "satisfied . . . that the restriction is "not unreasonable having regard to "the balance between those circumstances and any detriment to the "public or to persons not parties to "the agreement (being purchasers, "consumers or users of goods produced or sold by such parties, or "persons engaged or seeking to "become engaged in the trade or "business of selling such goods or of "producing or selling similar goods) "resulting or likely to result from "the operation of the restriction."

R. P. Ct.
(E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

answer the fundamental question whether or not a restriction is contrary to the public interest as a matter of policy, for by section 21 (1) the court is bound to conclude that a restriction is contrary to the public interest unless it is brought within one of the categories set out in paragraphs (*a*) to (*g*), and also satisfies the general requirement in the subsection, and the task of the court is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, on the facts proved, the case falls within them.

An injunction under section 20 (3) does not, as a matter of course, follow a declaration that a restriction is contrary to the public interest. The Act provides that such restrictions should be void, not that they are illegal, and, therefore, the approach adopted by the court to an application for an injunction should be in accordance with the ordinary rule that an injunction is not granted unless the commission or repetition of an offence can reasonably be apprehended, and whether or not an injunction will be granted must be a matter of discretion in each case; nor should the words in section 20 (3) be taken automatically as the formula for the order itself.

Where, therefore, on a declaration by the court that the federation's restrictions were contrary to the public interest, the registrar applied for an injunction in the terms of section 20 (3), and no special grounds for the application were put forward:—

Held, that the injunction should not be granted. When Parliament had resolved that a particular practice was contrary to the public interest the court would not expect the federation, which up till now had not known whether its rules were good or bad, to carry on as before, and it should be given a reasonable time to put its affairs in order without having to do so under the shadow of an injunction. If, later, the registrar was given good cause for dissatisfaction, he could make another application, and, if he did so, should specify in his application the particular activities which he desired to be restrained.

REFERENCE.

The Registrar of Restrictive Trading Agreements, pursuant to section 20 (2) (*a*) of the Restrictive Trade Practices Act, 1956, referred to the court an agreement numbered 1027 on the register of agreements maintained under section 1 (2) of the Act, subsisting between all the members of the Chemists' Federation and contained in the constitution and rules of the federation, the list of members, the Handbook of the Federation, and the C.F. Code of Standards for Proprietary Medical Products compiled and adopted by the federation.

The federation was made sole respondent to the proceedings on behalf of all its members by a representation order made by the court on the application of the registrar under rule 11 of the Restrictive Practices Court Rules, 1957.

The rules of the federation, a registered trade union, provided, inter alia, that the affairs of the federation should be under the management and control of a council (rule 8) which should from time to time compile, publish or alter a list or lists of members and a list or lists of C.F. products (rule 32 (i)).

The objects of the federation as set out in rule 2 were as

follows: "(1) To encourage and promote by lawful means the "sale by retail of proprietary medicinal preparations and pro- "prietary surgical dressings which are included in 'The C.F. "'List' only from premises which are registered under section 12 "of the Pharmacy and Poisons Act, 1933, or as provided by "these rules. (2) To take such steps as may be lawful to ensure "that those proprietary medicinal preparations and surgical "dressings which are included in 'The C.F. List' are sold by "retail only from premises which are registered under section 12 "of the Pharmacy and Poisons Act, 1933, and as provided by "these rules. (3) To establish and administer for the protection "of the public, standards, rules and regulations in relation to "the quality, presentation of, claims made and the advertising "and selling of proprietary medicinal preparations and proprietary "surgical dressings which are included in 'The C.F. List.' (4) To "advise members and to assist them on matters of common "interest, and to do such other things as are of benefit to them "and/or of service to the public."

By rule 3 membership of the federation consisted of three classes: "(1) Manufacturer members—manufacturers of pro- "prietary medicinal preparations and proprietary surgical "dressings who have agreed to conform to the rules of the "federation and whose products have been accepted for inclusion "in 'The C.F. List.' (2) Wholesaler members—wholesale "distributors of proprietary medicinal preparations and propriet- "ary surgical dressings who have agreed to conform to the rules "of the federation and whose names are included in the list of "wholesalers . . . (3) Retailer members—retail chemists who are "vendors of proprietary medicinal preparations and proprietary "surgical dressings and who are carrying on business as retail "chemists from premises registered under section 12 of the "Pharmacy and Poisons Act, 1933."

By rule 32 (ii): "In the public interest the Council shall "compile and maintain a Code of Standards for proprietary "medicinal preparations and proprietary surgical dressings." By rule 32 (iii): "To be eligible for inclusion in 'The C.F. List' a "product must be a pharmaceutical or medical preparation of a "proprietary character . . . intended for the prevention or "alleviation of human ailments and approved by the C.F. "Council. In addition a product shall be governed by submission "of evidence to the Council as to manufacturing facilities "Quality and presentation Suitability for purpose and claims "made in respect thereof Advertising and marketing policy. "Reasonable relationship between cost and retail price and in all "other ways complying with the C.F. Code of Standards for the "time being in force." Rule 33 provided that no product might be included in or remain upon the C.F. list unless the proprietor was for the time being a manufacturer member.

The Handbook of the Chemists' Federation, issued by the federation, contained four points for the guidance of retailer

R. P. Ct. (E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

members and alphabetical lists of C.F. manufacturers, C.F. products and C.F. wholesalers. The first of the points for the guidance of retailer members was that "Personal recommenda-"tion should be given to C.F. products," and after the last point was the statement "Only by observing these points will the "retail member be supporting in a practical way the principle "in which he believes: 'That the correct channel for distribu-"'tion of medicinal preparations is through premises registered "'under section 12 of the Pharmacy and Poisons Act, 1933.'"

For the assistance of the court, and for the purpose of the proceedings, the parties agreed a list of restrictions in the agreement as follows:

"*Manufacturers.* 1. (rule 38 (i)): Not to supply C.F. pro-"ducts to persons other than wholesaler members on the list of "approved C.F. wholesalers, persons who carry on the business "of a retail chemist in accordance with the Pharmacy and "Poisons Acts . . . and who sell products by retail to the public "from premises . . . which are registered under [that Act] "whether or not they are members of the federation, registered "medical or dental practitioners or other professional persons . . . "hospitals and approved nursing institutions, who buy for use "and not for resale, unless authorised in writing by the federa-"tion. 2. (rule 38 (ii)): Not to supply C.F. products to agents "other than members of the federation" except with the consent of the federation and subject to certain conditions. "3. (rule "38 (iii)): Not to supply C.F. products to wholesaler members "or retail chemists except on a condition of sale" that certain conditions relating to resale provided by the rules, including, inter alia, the restrictions contained in rule 39 (i) and (ii) be observed. "4. (rule 38 (iv)): Not to supply C.F. products in "quantities which are excessive having regard to the reasonable "requirements of the purchaser's business. 5. (rule 38 (v)): Not "to supply any products eligible for inclusion in the C.F. list "without first offering the said products for inclusion in the "C.F. list.

"*Wholesalers.* 6. (rule 39 (i) and (ii)): Not to supply C.F. "products to persons other than persons who carry on the busi-"ness of a retail chemist in accordance with the Pharmacy and "Poisons Acts . . . and who sell products by retail to the public "from premises . . . registered under those Acts whether or not "they are members of the federation, registered medical or dental "practitioners or other professional persons . . . hospital and "approved nursing institutions who buy for use and not for "resale . . . except with the written consent of the federation. "7. (rule 39 (iii)): Not to supply C.F. products except in "a manner which assists the federation's policy of selling "proprietary medicinal preparations and proprietary surgical "dressings through retail chemists. 8. (rule 39 (i) (*d*)): Not "to supply C.F. products to retail chemists except on condition

"that the conditions relating to resale in rules 36 and 40 are "observed.

"*Retail Chemists.* 9. (rule 40 (i); Points for Guidance, No. "4): Not to sell, supply, exchange, barter any C.F. product or "proprietary medicinal product manufactured by the retailer . . . "except by retail to the public; or to hospitals, medical or "approved allied professional persons for professional use only. "10. (rule 40 (ii)): Not to acquire C.F. products from persons "other than the proprietor thereof or a wholesaler member" or manufacturer member. "11. (rule 40 (iii); Points for Guidance, "No. 3): Not to sell any C.F. product otherwise than in the box, "bottle, container, etc., in which the product has been packed for "sale to the public by the proprietor except with the consent of "the proprietor or when it is dispensed.

"*All members.* 12. (rule 36): Not to supply C.F. products "in any way by sale, exchange, barter, gift or otherwise to any "person who contravenes any of the conditions in force under the "rules. (Rule 41 (ii)): Not during such period as the council "may prescribe to supply or acquire C.F. products to or from any "person to or from whom the council has directed that such "products shall not be sold or bought."

There was also prepared for the assistance of the court a list of restrictions contended for by the registrar but not admitted by the federation.

By its case the federation stated that the paramount purpose of the restrictions contained in the rules was to restrict the sale to the public of proprietary medicines manufactured by its manufacturer members through retail chemists or pharmacists. Having set out, inter alia, the development of and the present law relating to pharmacy, it contended that such restrictions were not contrary to the public interest but were justified under section 21 (1) [1] of the Act in that they came within paragraphs (*a*), (*b*) and (*g*), and satisfied the general requirement of that subsection. Under paragraph (*a*) the federation in the main relied on the contentions and allegations that a qualified chemist (who by virtue of section 8 of the Pharmacy and Poisons Act, 1933, was always present in premises registered under section 12 of that Act), unlike an ordinary retailer was competent to, and did, give warning and advice to his customers as to the choice and use of proprietary medicines, and that members of the public who bought those medicines from a chemist's shop were thereby protected from the injury which could arise through misuse or excessive use of the medicines; that if medicines were widely sold by ordinary traders the public would cease to appreciate the need or desirability of their being sold under supervision by a qualified chemist, and would tend to treat them as articles of ordinary consumption, with the result that the dangers of self-medication would be increased; that there was no official examination or approval of proprietary medicines before they were placed on the market, and that, in so far as a medicine

R. P. Ct.
(E. & W.)
1958
CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

was offered for inclusion in the C.F. list, when it was marketed it would have been examined by the C.F. Standards Committee [which examination, it had already been alleged, provided an additional safeguard not available under present law]; that medicines not at present statutorily restricted to chemists included a very wide variety of preparations, many of which if taken in the wrong circumstances were capable of causing injury, and the possibilities of such injury were increasing in direct proportion to the continuous increase in the quantity, complexity and specific nature of available proprietary medicines and, accordingly, it was increasingly important, in order to protect the public against injury that such medicines should be sold only by qualified persons under some form of control; and that a declaration that the arrangements restricting the sale of medicines to chemists were contrary to the public interest might be treated as an open invitation to certain traders to go in for the sale of medicines, the composition and use of which they did not understand, and to certain manufacturers to adopt a policy of injurious advertisement, and even to market medicines which fell below the standards now generally prevailing. If and in so far as any of the facts and matters relied on under paragraph (*a*) were not regarded by the court as rendering the restrictions reasonably necessary to protect the public against injury, the federation relied upon them under paragraph (*b*) on the ground that their removal would deny to the public specific and substantial benefits or advantages which fell short of protection against actual injury, and in addition to relying on the matters set forth under paragraph (*a*) they submitted that removal of the restrictions would deny to the public the benefits or advantages summarized as follows: that of buying medicines from persons specially qualified to sell them, and who were subject to disciplinary control; of buying medicines from registered and inspected premises which were suitable for the storage of medicines and where the wide variety of medicines now needed to meet public requirements were likely to be stocked; of buying medicines which had been examined and approved by a competent third party and of the work of the standards committee; and the benefit or advantage of the present wide distribution of pharmacies, particularly in rural areas and provincial towns. As to the requirement of the Act that the restrictions should not be unreasonable, having regard to the balance between the circumstances justifying the restrictions and any detriment to the public or to persons not parties to the agreement, the federation submitted that the restrictions on the supply of C.F. products caused no detriment to the public; and as to persons not parties to the agreement, although it might be suggested that non-members suffered a detriment in that they did not enjoy certain advantages which membership of the federation involved, it was submitted that retailers who were not chemists had no claim on the merits to be entitled to sell medicines, that manufacturers might carry on business without being

members, that membership was open to all who complied with the reasonable requirements of the rules and that, in any event, the restrictions were not unreasonable in the circumstances.

The registrar, in his answer, inter alia, denied that the restrictions were limited to medicines. He submitted that all the restrictions were contrary to the public interest and denied that any of the circumstances set forth in paragraphs (*a*), (*b*) or (*g*) of section 21 (1) of the Act existed in respect of any of the restrictions. He did not admit that all medicines constituted a single class of goods which could not safely and competently be sold by the general shopkeeper or shop assistant and, having invited the court to have regard to the fact that, in so far as products on the C.F. list were poisons, radio-active substances, drugs controlled by the Dangerous Drugs Act, or substances controlled by Part II of the Therapeutic Substances Act, 1956, their sale by retail was already restricted by the relevant statutes, and in so far as the federation contended that it was desirable to restrict to chemists' shops the retail sale of goods on the C.F. list, those products and two important classes of medicines and treatments, known as "ethical" products (products which were not normally advertised direct to the public, and products intended by the manufacturer to be eligible for dispensing on National Health Service prescriptions), were in practice sold to the public only by chemists' shops. He alleged that even if legislation or regulations respecting distribution of poisons, dangerous drugs and therapeutic substances permitted a freedom which was too wide for the protection of the public, further restraint was a matter for the legislature. Nor did he admit that examination by the federation of new proprietary medicines afforded any or any significant safeguard to the public, or, if any additional safeguard was required, that examination by the federation was the appropriate method, and he alleged that if any examination by the federation was desirable, it was not necessary to impose the restrictions in the agreement to procure examination. In answer to the specific contentions in the federation's case in relation to paragraph (*a*), the registrar invited the court to take note of, inter alia, the following circumstances: that proprietary medicines were commonly prepared and packed with instructions whereby the purchaser could inform himself as to the sensible dosage and the occasion for use; that where in registered premises a registered pharmacist was present, sales of proprietary products were commonly effected by unqualified assistants and the safeguard, such as it might be, to be derived from the advice of a qualified person was thereby limited; that the products eligible for inclusion in the C.F. list included poisons and therapeutic substances, the sale of which was controlled by legislation, and "ethical" products which were not advertised to the public and were not in practice distributed through unqualified retailers, and that in respect of the other products on the list there was little risk of harm to the public resulting from

R. P. Ct. (E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

sale by an unqualified person; that proprietary medicinal products which were not ethical were already marketed through unqualified channels in so far as legislation permitted, it being denied that that caused any or any significant injury to the public and not admitted that if the restrictions were removed the public would resort to shops other than chemists for a wide variety of medicines, or would tend to treat medicines as articles of ordinary consumption or that there would be any substantial added risk of self-medication; if it was necessary to protect the public by ensuring that all goods eligible for inclusion in the C.F. list were only sold in circumstances which would enable the customer to obtain the advice of a qualified chemist, the registrar alleged that such protection should be afforded by legislation and not by restrictions by interested parties; and contended, further, that if and in so far as there was any need for official examination or approval of proprietary medicines before they were placed on the market, that need did not extend to all the goods on the C.F. list in order to protect the public against injury. Nor was it admitted that the possibilities of injury had increased or were increasing as alleged, or that there was any greater need today to impose restrictions than hitherto, or that a declaration that the restrictions were contrary to the public interest would cause a decline in the standards of advertising or products; but it was alleged that it was a detriment to persons not parties to the agreement and to the public as customers resulting from the restrictions, that manufacturers who were not members were likely to be discouraged from distributing through chemists, as retailer members were under an obligation to discriminate against their products irrespective of their merits.

As to the benefits or advantages pleaded by the federation the registrar denied that any of the matters relied on by the federation was a specific or substantial benefit or advantage within the meaning of section 21 (1) (*b*); he submitted that all the restrictions were unreasonable, having regard to the balance between the circumstances relied upon by the federation and the detriment to the public and to persons not parties to the agreement resulting, or likely to result, from the operation of the restriction, and invited the court to have regard to certain specific matters pleaded as constituting such detriment.

The federation, in reply, inter alia, contended that if, which was not admitted, there were a few products on the C.F. list which might more properly be regarded as not being pharmaceutical or medical preparations, that fact did not materially affect the case or the issues before the court; it did not admit the relevance to any issue before the court of any classification of medicines according to whether or not they were advertised to the public, and the registrar's allegations of discrimination were denied.

Further facts and issues and contentions raised on the pleadings relevant to this report appear from the judgment of the court.

In accordance with the expressed wish of the court [2] written statements by witnesses were submitted to the court and exchanged between the parties prior to the hearing. In the case of each witness whose statement had been so submitted, his statement was accepted as his evidence-in-chief and taken as read.

T. G. Roche Q.C. and *Joseph Dean* for the federation.
Cyril Harvey Q.C. and *J. R. Cumming-Bruce* for the registrar.

The following cases were referred to in argument [3]: *In re Naylor Benzon Mining Co. Ltd.*,[4] *Stanford* v. *Roberts* [5] and *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[6]

Cur. adv. vult.

November 3. DEVLIN J. read the following judgment of the court: This case concerns restrictions on the sale of proprietary medicines. The fundamental principle adopted by the Chemists' Federation is that proprietary medicines should be sold to the public only by or through registered pharmacists. For this purpose the relevant definition of a medicine is that which is contained in rule 32, paragraph (iii), of the federation's rules, and is "a pharmaceutical or medical preparation of a proprietary "character (including surgical dressings) intended for the alleviation of human ailments." This is a wide definition and includes some preparations which might not popularly be thought of as medicines, as, for example, corn caps, barrier creams, insect repellants and blackcurrant and glycerine pastilles.

A proprietary medicine is one which is sold under a proprietary designation, as, for example, "Beecham's pills." Its distinguishing marks are that it is sold made up in a bottle or packet containing the name of the proprietor and the formula from which the medicine is compounded, and usually also directions for its use and a description of the ailments which it is intended to

[2] In *In re Chemists' Federation Agreement* (1958) L.R. 1 R.P. 43, the court ruled on a summons for directions that in order to save time and expense it was desirable that as much evidence as possible should be put into writing, and that statements of witnesses and memoranda should be submitted to the court and shown to the other side in advance of the final hearing. The court also ruled that, in making preparations for the final hearing, the parties should be guided, not by a consideration of whether any advantage might or might not be gained by the withholding of evidence until the last minute, and whether they were willing to forgo that advantage, but by a consideration of what was the cheapest and most expeditious way of putting evidence before the court; no party would be allowed to gain an advantage by surprise.

[3] For report of this case with argument, see L.R. 1 R.P. 75.

[4] [1950] 1 Ch. 567; [1950] 1 All E.R. 518.

[5] [1901] 1 Ch. 440.

[6] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.

R. P. Ct.
(E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

alleviate. It is distinguishable from a medicine made up by a chemist (that term is used in this case interchangeably with the more accurate description of registered pharmacist) to suit a particular patient, either upon a doctor's prescription or as something which he himself recommends. The distinction is recognized by legislation; no one but a chemist may sell a medicine made up and recommended by himself but, except for poisons and the like, anyone may sell a proprietary medicine.

There is a wide range of proprietary medicines. At one end there are drugs made up for use in hospitals or by doctors; at the other end there are the common household remedies, such as aspirins, salts, cough mixtures and digestive tablets. Medicines in the former class are advertised, if at all, only in a very limited way; many of the household remedies are extensively advertised and thereby a large popular demand is created.

Included among the proprietary medicines there are drugs which contain poison or other dangerous substances. Their sale to the public is forbidden by statute except in the course of a business which is under the personal control of a registered pharmacist, and carried on from premises which must also be registered. The restriction which we have to consider seeks to control in the same way the sale of all medicines; the principle behind it, as set out in the handbook of the federation, is "that "the correct channel for distribution of medicinal preparations is "through premises registered under section 12 of the Pharmacy "and Poisons Act, 1933."

Statutory prohibitions cover, perhaps, a quarter of all proprietary medicines. The bulk of proprietary medicines is therefore left free of all legal control. They can be sold not only in the 15,000 chemists' shops in England and Wales, but also in about 200,000 other retail outlets. These other outlets consist of drug stores (that is, shops which sell goods similar to those sold in a pharmacy but which, having no pharmacist on the premises, cannot do any dispensing), grocers and general stores.

The restriction imposed by the federation upon its members dates from 1935 and was not designed to supplement any defects, actual or supposed, in legislation. It originated out of the desire of the retail chemists to protect themselves against what they regarded as unfair competition. This occurred especially in the marketing of new products. A manufacturer who wants to introduce a new product may feel that he is unlikely to get the public to try it unless it is recommended and sold by chemists. The complaint of the chemists was that, when the product had become accepted, the manufacturers began to supply it to every sort of shop, and the chemists lost to other tradesmen part of the market which their efforts had helped to build up. This was the origin of the Chemists' Federation and of the C.F. list. The manufacturers who belong to the federation agree that every product of theirs which is a medicine within the definition in rule 32, paragraph (iii), may be put on the C.F. list, and they

undertake that no product on the list shall be supplied except to retail chemists or to wholesalers who are members of the federation, and who also undertake not to supply except to retail chemists. A retail chemist for this purpose is a person who is authorized to sell poisons under the Act of 1933. It must be observed that the sale is not restricted to retail chemists who are members of the federation—about two-thirds of them are—but is permitted to any retail chemist. It must also be observed that C.F. manufacturers do not demand from the chemists, whether they are members or not, any undertaking that they will sell only C.F. goods, that is, goods made by C.F. manufacturers. But C.F. manufacturers do expect that chemists who are members of the federation will promote C.F. goods as against "non-C.F." goods, that is, goods produced by their competitors who are not members of the federation; and the federation does its best, by means of recommendations and otherwise, to induce chemists to adopt this policy. To receive C.F. goods as a wholesaler it is necessary to be a member of the federation. There are other requirements for wholesaler membership besides an undertaking to resell only to retail chemists; but it is unnecessary for us to consider what these other requirements are, since, if the restrictions on sales to retail chemists are held to be void, those which affect wholesalers must inevitably perish also.

We have made it plain that the federation does not include all manufacturers of proprietary medicines. Though it is a very considerable body, it controls less than half the trade. 122 out of 356 manufacturers belong to it. The medicines which they manufacture and which are put on the C.F. list number 4,000 out of a total of 9,000 products which can be described as proprietary medicines. The sale of proprietary medicines on the C.F. list amounts in value to about one-third of the sale of all proprietary medicines.

This is the background against which we have to consider the fundamental question whether it is contrary to the public interest that sales of medicines should be effected only through chemists. This is the form of the determination which we are required to make by section 20 (1) of the Restrictive Trade Practices Act, 1956. But since this is the first judgment delivered under the Act, it is as well that we should make it clear that we are not, in our view, in any way required to answer this question as a matter of policy. We are not to consider whether competition in the sale of medicines is desirable or undesirable, whether drug stores are a suitable outlet for them or whether chemists should have a monopoly, or whether the Chemists' Federation is a good or a bad thing. Such questions of general policy are settled by the Act. This is the effect of section 21, by which we are bound to conclude that a restriction is contrary to the public interest unless it is brought within one of seven categories—(*a*) to (*g*)—there set out. For each category there is

R. P. Ct. (E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

prescribed a particular set of circumstances about which we must be satisfied before admitting the restriction into it; and for each there is also a general requirement that the restriction is not unreasonable having regard to the balance between the relevant circumstances and any detriment to the public resulting from the restriction. Our task is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, upon the facts proved, the case falls within them. The federation has selected two categories, (*a*) and (*b*), and claims that the restriction should be placed in one or other of them. For category (*a*), we have to be satisfied that the restriction is reasonably necessary to protect the public against injury in connexion with the consumption or use of medicines. This we shall now proceed to consider.

Avoidance of injury to the public was not the criterion employed in drawing up the C.F. list. Its object was, and still is, to restrict competition. This is by no means fatal to the federation's case. If the sale by unqualified competitors would in fact cause injury to the public, the test is satisfied, notwithstanding that the prime object of the restraint is not the avoidance of injury; it is enough that it should be the effect. But we mention this because it clarifies the essence of the proposition presented to us. No one has ever reviewed the C.F. list in order to determine whether the sale of any particular medicine through an unqualified person is likely to be injurious. We are not now invited to dissect the list in this way. The federation's case is one and the same in respect of the whole list from sedatives and hypnotics at one end to cod liver oil at the other. The case is not that there are at one end of the list some injurious substances which have not yet been caught by statutory control and which should be reserved for chemists; we are not invited to consider such substances separately or to discriminate at all. If those compiling the list had had as their object the avoidance of injury, they might have made up a very much reduced list and might then have put forward a plausible case for it on different lines from those which have been argued. But plainly their object was not to avoid injury but to avoid competition and to maintain a preserve for chemists, especially, no doubt, in the valuable field of popular household remedies. To achieve this end the federation's proposition is, and has to be, all-embracing; it is that as a matter of principle it is not safe for any unqualified person to sell any medicine.

What is the difference between a sale effected by an unqualified person and one by a chemist? The federation's case rightly seizes on the only significant distinction, which is that a chemist who is told of the condition to be relieved has the training and ability to select the appropriate remedy and to advise upon its use. It follows that there is no distinction between a sale by a chemist and one by an unqualified person unless the chemist is told of the condition and given the opportunity of exercising his

skill. It follows, too, that if there is a real risk of injury, it is no protection merely that the sale should be effected from a chemist's premises; it would be necessary to make it a rule that the sale should be effected only by the chemist himself and after due inquiry had been made. No one proposes a restriction of this sort. One has only to consider it in relation to a product such as "Buzz Off" Cream to realize how impracticable, and even how ridiculous, it would be. But if there is a real risk of injury through ignorant self-medication, what protection is afforded by anything less? We believe that the vast majority of proprietary medicines sold by chemists are sold over the counter, frequently by unqualified assistants, without any inquiry being made, just in the same way as they are in drug stores or general shops, and that it has never up till now occurred to anyone to think there is any real risk of injury in the process. The sort of proprietary medicine that is usually demanded is designed for use without advice, and in only a small minority of sales is there any need for advice. A sensible person who is in doubt about the right medicine will, of course, always go to a chemist in preference to an unqualified person, and the removal of the restriction will in no way interfere with that. The restriction can protect only a fraction of this small minority, for to qualify for the fraction three conditions must be satisfied: first, the buyer must be a person in need of advice but without the good sense to ask for it from a qualified source; secondly, he must be served by the chemist himself; and thirdly, unless it is just a matter of luck, there must be some manifestation which causes the chemist to make some inquiry. We have been given illustrations of cases where an inquiry made by a chemist has prevented the wrong treatment from being pursued, and we have no doubt that such cases do from time to time occur. But we are satisfied that, in proportion to the total of the sales of proprietary medicines, they are quite negligible.

We are strengthened in this conclusion by a further consideration. Before 1935 the sale of all proprietary medicines was unrestricted. Since that time the efforts of the Chemists' Federation have succeeded in restricting to chemists the sale of not much more than half in value of the proprietary medicines sold in this country. That is more than the one-third that is produced by C.F. manufacturers, but some of the output of non-C.F. manufacturers goes to chemists. We have no exact figures, but the evidence suggests that nearly half of the total output of all manufacturers, whether inside or outside the federation, is retailed to the public by unqualified persons. Nevertheless, we have not had any concrete proof of any single case of injury, whether before or after 1935, resulting from the sale of medicine by an unqualified person. Nor have we had any independent and experienced witness, such as a doctor in busy practice, to testify that this is a contingency which causes him any serious alarm and to exemplify the danger.

R. P. Ct.
(E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

We must now apply our finding of fact that the risk of injury is negligible to the terms of the clause upon which the federation relies. Is the restriction "reasonably necessary" to protect the public against injury? The expression "reasonably necessary" was considered by Buckley J. in *Stanford* v. *Roberts* [1]; in that case it occurred in section 13 of the Settled Land Act, 1890, which permits capital money to be applied in "making any "additions to or alterations in buildings reasonably necessary or "proper to enable the same to be let." Buckley J. said [2]: "The "second point is whether this is an alteration 'reasonably necessary or proper' to enable this property to be let. I understand "'reasonably necessary or proper' to mean something which, "although not absolutely necessary, a reasonable and prudent "owner of property, if he were the absolute owner, would do. "Mr. Buckmaster says that tenants will be found if the floor "boards are replaced from time to time. I agree that the new "floor is not absolutely necessary, but, in my opinion, it is what "a reasonable and prudent owner would do if he were absolutely "entitled to the property."

We think that this passage is a helpful guide to the meaning of "reasonably necessary" in the clause we are considering. We have to ask ourselves whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection and, secondly, that the risk of injury was sufficiently great to warrant it. It is well established as a general principle that the degree of care which a reasonable and prudent man should take depends upon the magnitude of the risk. Cases such as *Glasgow Corporation* v. *Muir* [3] and *Bolton* v. *Stone* [4] show that the prudent man is not obliged to guard against the bare possibility of injury. We think, therefore, that it is not enough for the federation to show a chance of injury. We find that the protection which the existence of this restriction is supposed to afford is not reasonably necessary because the risk of injury is too slight to justify so wide a restriction and because, if the risk were greater than we think it is, the restriction affords no real protection against it.

We reach this conclusion upon the terms of sub-paragraph (*a*) without having to consider the terms of the general requirement. If, however, we are wrong in our construction of the sub-paragraph, or in our assessment of the risk, we should reach the same result by the application of the general requirement. The general requirement lets in additional evidence to establish a detriment to the public, or a section of the public, if the restriction remains. The registrar has, in this case, relied upon such

[1] [1901] 1 Ch. 440.
[2] [1901] 1 Ch. 440, 444.
[3] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.
[4] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

evidence but we have not found it necessary to consider it. Inconvenience is inevitably caused to the public generally by not being able to buy the commodities it wants from any retailer who is willing to sell them, and we do not think that the risk of injury can possibly be rated so high as to say that on balance it justifies that detriment.

We turn now to consider category (*b*) and the contention of the federation that the removal of this restriction would deny to the public other specific and substantial benefits or advantages within the meaning of the clause. The federation sets up four specific benefits. The first is that the restriction affords to chemists an opportunity of giving beneficial advice. We have already dealt with the considerations affecting this point; we need not say more than that we think that such opportunities are negligible and, accordingly, are not satisfied that the removal of the restriction would in this respect deprive the public of any substantial benefit or advantage.

The other suggested benefits introduce new considerations. The first of them concerns the work of the standards committee of the federation. This is a body which was formed in 1941 and whose function it is to approve the products upon the C.F. list. It examines the formula of any medicine on the C.F. list to see if it is suited to the conditions which it is designed to alleviate; and it examines the claims which are made on behalf of the medicine to see if they are justified. Since 1942 no new product has been put upon the C.F. list unless the standards committee passed it in these respects; and the committee has also gone through many of the products that were on the list before that date, and in a number of cases has required the manufacturers concerned to modify their claims. This is a good work, and, if it stood by itself, might well be considered of substantial benefit to the public, but there are other factors to be taken into consideration.

The list is divided into class A products, which are not advertised to the public generally, being intended for use by doctors and in hospitals; and class B products which are so advertised. The work of the standards committee has to be considered separately in relation to these two classes. Class B is plainly by far the more important; it comprises more than two-thirds of the list, and the making of spurious or exaggerated claims through the medium of the popular press might well be disadvantageous to the public. It appears, however, that for some years before the standards committee was formed this danger had been appreciated and safeguards devised. The Proprietary Association of Great Britain (known as P.A.G.B.) was founded in 1919 as an association of manufacturers of British proprietary medicines. It now has 92 members, 23 of them being also members of the Chemists' Federation. One of its specific objects is to exercise control over its members' advertisements to the public. It must include among its membership most of those manufacturers who

go in for public advertisement on a large scale, for, although the products which it reviews number only 300, their annual sale amounts in value to about 80 per cent. of the value of all publicly advertised medicines. Like the federation, it has the advantage of distinguished medical consultants to whom it can submit the therapeutic claims made on behalf of any product. In 1937 the association published its first code of standards governing advertisements. For some time before that date, the newspapers themselves had been concerned to stop the undesirable advertisement of medicines; in particular, the Newspaper Proprietors Association had formed a committee which laid down certain standards. When the P.A.G.B. issued its code in 1937, the Newspaper Proprietors Association at once agreed to apply it. In the course of time other associations of newspaper proprietors, and also a number of advertising associations, came into the scheme, and in 1945 a document was issued known as the British Code of Standards relating to the advertising of medicines and treatments. It is based on, and is substantially the same as, the P.A.G.B. code; but as all manufacturers of proprietary medicines are not members of the P.A.G.B., the British code is necessary to deal with those who are not. We are satisfied that this code is now accepted and enforced throughout the newspaper world, and also in other advertising media, such as posters and television. There are, therefore, other bodies which control satisfactorily the advertisement of medicines without imposing restrictions on their sale, and so the work of the Standards Committee in relation to class B products is, from the point of view of the public, unnecessary, and cannot be classed as a substantial benefit.

There is no body, other than the federation, which does similar work for class A products, that is, those which are not generally advertised. But in the case of medicines which, before they reach the public, must pass through the hands of doctors or hospitals, there is not the same need for scrutiny. No doubt it is helpful but we are not satisfied that it is of substantial benefit to the public. Certainly, the benefit, if any, in respect of either class of product, does not outweigh the disadvantage to the public of the general restriction on the sale of medicines.

The next important benefit to the public which is said to flow from the existence of the restriction is that it keeps in business a number of chemists in country districts; it is argued that if they were forced out of business, the National Health Service and the public in those districts would suffer. We have not had to consider whether, if this was so, the case would fall within category (*b*), because we are not satisfied that the removal of the restriction would drive any appreciable number of chemists out of business. The evidence we have had is too nebulous to support that conclusion. It consists almost entirely of a survey of the small chemist's position made in 1954 for the purposes of the

National Health Service. This was a sample survey based on returns made by a very limited number of chemists. It was relied on as proving that the income of small chemists was so low that any reduction in their earnings would be disastrous. The extent to which there might be such a reduction as a result of increased competition had to be left to guesswork. The removal of the restriction would not give the unqualified trader a new class of business. Nearly all the popular household remedies are represented already by non-C.F. brands as well as by C.F. brands and the general dealer obtains all the former brands without restriction. There are some C.F. brands which, in some districts, are evidently preferred to their non-C.F. rivals, and the chemists in those districts who have hitherto enjoyed a monopoly in the sale of them are bound to suffer a loss on these particular lines. But we are not satisfied that over the whole of his business the average small chemist would be unable to meet the challenge of new competition. Finally, we have no satisfactory evidence of the number of chemists who, on this argument, it would be in the public interest to preserve in business. We do not know what proportion serve country districts or how many, if any of them, are essential to the maintenance of the National Health Service. In our judgment, the federation did not succeed in lifting this point out of the realm of speculation.

Finally, it is suggested as a benefit to the public that retail chemists have better facilities than other tradesmen for the storage of medicines. We think that there is nothing in this point.

The federation has therefore failed to satisfy us that a restriction which confines to chemists the right to sell medicines is justifiable in accordance with section 21. Before we assess the effect of this general conclusion upon those provisions in the rules of the federation which are specifically attacked, there is one incidental point with which we must deal. During the hearing of the case we allowed to be put to the witnesses de bene esse a number of questions designed to obtain expressions of opinion; and at the end of the case we heard argument upon the admissibility of the evidence obtained. The evidence has not affected our judgment but, having heard the argument, we think it desirable to give a ruling. It was necessary that we should be fully informed about the conditions of the trade and about the circumstances under which medicines are retailed to the public. The witnesses who can best give us information of this sort are persons who are experienced in the trade; a great number of these were called and they were properly asked questions to elicit such information. Mr. Harvey has submitted that these witnesses can for this purpose be treated as experts, so that an opinion given about conditions in the trade, and the hearsay upon which it is based, is admissible under the ordinary principles of common law. If this is not so, he submits, we have power to admit the evidence

R. P. Ct. (E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

under rule 55 of the Restrictive Practices Court Rules. We accept this submission.

But these witnesses were not experts in the sense of being qualified by study or experience to form a better opinion on matters within their own special field of knowledge than could be formed by the ordinary man. They spoke with knowledge of their trade, but that did not qualify them to express opinions about what is injurious or beneficial to the public. Nevertheless, a great many questions were put from both sides in the course of the case that were purely argumentative, and were indeed justified by Mr. Harvey on the ground that it would be unfair not to give a witness the chance of dealing with points that were being made against his side. We think that there is no obligation upon counsel to invite argument in this way; moreover, expressions of opinion by witnesses, who are not independent experts but are attached to one side or the other, about the matters we have to decide are quite valueless.

We turn now to consider the effect of our general conclusion upon the restrictions contained in the federation's rules. The registrar contends, but the federation does not admit, that there is also a number of restrictions in the form of recommendations set out in the Handbook of the Chemists' Federation. We have decided that the matter of these alleged restrictions can stand over for further argument, if necessary; the effect of our judgment upon the rules may make further argument of academic interest only. Except upon two points, the parties are agreed upon which clauses in the rules are restrictions within the meaning of the Act, and are agreed also that our general conclusion is fatal to them. The two points arise under rules 38 and 40.

Rule 38 lays down the conditions affecting manufacturer members in five paragraphs. The first four paragraphs deal with the terms on which manufacturers may sell their products and are admittedly restrictive. The fifth paragraph reads as follows: "Manufacturer members shall offer for inclusion in 'The C.F. "'List' all their eligible products as defined in rule 32 (iii)." Mr. Roche has submitted that this is not a restriction within the meaning of section 6 of the Act because it does not affect the supply or sale of the product; if the product is rejected for inclusion in the C.F. list, the manufacturer is free to sell it to anyone. If, however, the product had been accepted, it could have been sold only to chemists; and the object of this additional paragraph was to bar a way out of the general restriction that would otherwise have been open to the manufacturer; but for this paragraph he could have evaded all restrictions on the sale of any medicine by the simple expedient of not submitting it for inclusion in the C.F. list. It is argued that once the general restrictions on the sale of medicine by manufacturers in paragraphs (i) to (iv) inclusive of the rule have been removed by our judgment, there is nothing restrictive about paragraph (v). This may be so if the paragraph is looked at in isolation, but we think

that we have to regard the rule as a whole. We cannot go through a rule, which is designed as a whole, sentence by sentence, considering as we come to each sentence whether or not it is void, and construing the later sentence in the light of the alienation of the earlier ones. The provision in paragraph (v) is ancillary to the others and must stand or fall with them.

The other point arises under rule 40, which contains the conditions imposed upon the retail chemists. There are four conditions and each one appears to be independent of the others. The first two conditions are admittedly restrictive; the fourth condition is bound up with the recommendations in the handbook to which we have referred, and we do not consider it at this stage. The third condition is in the following terms: "Save with "the consent of the proprietor, no C.F. product shall be sold "otherwise than in the box, bottle, package or other enclosure "(if any) in which the product has been packed for sale to the "public by such proprietor except when dispensed."

The object of this must be to protect the manufacturer. The manufacturer naturally wants to keep for himself and to hold under his own name the goodwill which the public may extend towards a good product, and so cannot allow a chemist to sell it as his own make. This is a harmless provision of a kind that any manufacturer might reasonably put into a contract with his buyer. But it is not enough to show that the provision is harmless and reasonable; the law now is that these stipulations may not have put behind them the power of a combination unless they also make for the public interest, that is, satisfy the requirements of section 21. We cannot see that the provision holds any substantial benefit for the public or protects them from injury. We agree that if medicines and packages got mixed up so that the wrong label got attached or the wrong directions, injury might easily result. But we cannot believe that a registered pharmacist is likely to be careless in this way and we think the risk of injury negligible; moreover, the rule would give no protection worth adding to existing sanctions, for carelessness of this sort would certainly lay a chemist open to an action at law and, perhaps, also to criminal proceedings under the Food and Drugs Act, 1955.

The result of these final considerations is that we declare to be void rules 36, 38, 39, 40 (except paragraph (iv)*) and paragraph (ii) of rule 41.

The registrar has made an application for an injunction under section 20 (3) of the Act. He proposes that the form of the injunction should follow the general words used in the subsection, and that we should make an order restraining the federation or any of its members from giving effect to, or enforcing or purporting to enforce, the agreement contained in the rules we have declared void, and from making any other agreement to the like effect. He does not put forward any special grounds for an

* *Note.*—Paragraph (iv) of rule 40 contained one of the alleged restrictions not admitted by the federation.

R. P. Ct.
(E. & W.)

1958

CHEMISTS' FEDERATION AGREEMENT (No. 2), *In re.*

injunction; he submits that in the ordinary case the injunction should follow the declaration as a matter of course. Mr. Harvey points out that the effect of the Act is to render the restrictive terms void merely and not illegal. The courts will not enforce a void agreement, but normally, if the parties choose to accept it as binding in honour, they are at liberty to act under it; if the agreement is illegal as well as void, they may not do so. The registrar anticipates that the federation will, unless restrained by this court, continue to enforce these rules as best it can without the aid of the law.

We think that this argument loses sight of the reason why these restrictions are declared void. It is because on the facts we have found they are contrary to the public interest, and in conformity with the Act of Parliament we have so declared. The phrase "contrary to the public interest" may or may not have any legal significance; its terms are novel; but at least it makes plain to the ordinary man the view of Parliament in the matter. When Parliament has resolved that a practice is not in the public interest, we should not expect the federation, whose council consists of men of the highest reputation, representing in many cases well-established firms, to carry on just as it was doing before, and we are told by Mr. Roche that the council has no intention of doing so. Moreover, we do not think that Parliament intended that an injunction in general terms should follow the declaration as a matter of course. An injunction in the terms asked for by the registrar would be equal in effect to an express provision in the Act that all the restrictive terms were forthwith to be declared illegal, for the breach of an injunction carries penalties at least as serious as those which Parliament normally ordains for a breach of a statute in this class. If Parliament had intended a liability to penalties to arise automatically, we think it would have made the restrictive terms illegal as well as void. We think that Parliament intended a milder approach in accordance with the ordinary rule that an injunction is not granted unless the commission or repetition of an offence can reasonably be apprehended. In this case no question of that sort has yet arisen. Up till now the federation has not known whether its rules were good or bad and, like many other bodies in a similar position, has been concerned simply to ascertain the effect of a new law. There is no case here for an immediate injunction. In any case in which we find that there is a determination on the part of anyone to behave in a manner that is contrary to the public interest as laid down in the statute, we shall act differently.

Having regard to these considerations, and in the exercise of our discretion under the Act, we do not propose to grant injunctions as a matter of course. It must be a question of discretion in each case. The federation will be given a reasonable time to put its affairs in order, and should not have to do so in the shadow of an injunction and in the fear that a false step may

result in immediate proceedings for contempt of court against itself or any of its members individually. Mr. Roche, on behalf of his clients, has offered to keep the registrar informed of the steps which the federation will be taking in consequence of our declaration, and if the registrar is given good cause for dissatisfaction, he can make another application. If he does so, he should specify in his application the particular activities which he desires to be restrained. The words in section 20 (3) of the Act define the area within which the power of injunction is to operate, and are not to be taken automatically as a formula for the order itself. A breach of the orders of this court, like the orders of the High Court, is punishable as a contempt; and it is, therefore, of the first importance that every party who is made subject to such an order should be told as precisely as possible what it is that he may not do.

The order of the court will consist of a declaration in the terms indicated in this judgment.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Treasury Solicitor.*

J. F. L.

[RESTRICTIVE PRACTICES COURT.]

* PRACTICE DIRECTION.

1958
Nov. 19.

Restrictive Practice—Practice—Statement of case—Identification of admitted restrictions—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2, *c.* 68), *s.* 20 (1).

Under subsection (1) of section 20 of the Restrictive Trade Practices Act, 1956, the court is empowered to declare whether or not any restrictions, as defined in the subsection and contained in the agreement to which the notice of reference applies, are contrary to the public interest. In order that such a declaration may be made in precise terms, the statement of case delivered by the respondent should identify precisely all the terms in the agreement which are admitted to be restrictions within the meaning of section 6 of the Act. The statement of case should set out in relation to each of the restrictions, taking them either separately or in a group as may be convenient, the particulars required under rule 18. If the registrar wishes to contend that there are other restrictions contained in the agreement, and which are not identified in the statement of case, he should in his answer identify such other restrictions. If the respondent admits the restrictions alleged in the answer, he should in his reply give the same particulars in relation to them as are required for those set out in the statement of case.

1958

PRACTICE DIRECTION.

Where pleadings which do not conform with this practice have already been filed, it will not be necessary to amend them; but the parties should identify in a separate document to be filed with the proper officer of the court seven days before the earliest date for which the hearing of the case is fixed, the restrictions which they admit or allege.

By Direction of the President,
JOHN BOWYER,
Clerk of the Court.

November 19, 1958.

[PRIVY COUNCIL.]

J. C.†
1958
Nov. 5.

* KHATIJABAI JIWA HASHAM . . . PETITIONER;

AND

ZENAB, EXECUTRIX OF HAJI G. HARJI . RESPONDENT.

PRACTICE NOTE.

Privy Council—Appeal—Withdrawal of appearance—Judicial Committee Rules, 1925 *and* 1957.

The Judicial Committee Rules, 1925, and also those of 1957, contain no express provision for the withdrawal of appearance.

PETITION.

On December 7, 1957, the Court of Appeal for Eastern Africa granted to the present petitioner leave to appeal to Her Majesty in Council from a judgment of that court which had affirmed a judgment of the Supreme Court of Kenya ordering that a contract whereby the petitioner had agreed to sell certain land at Nairobi should be specifically performed.

On December 19, 1957, the petitioner, by the solicitors then acting for her, duly entered an appearance in the appeal pursuant to rule 21 of the Judicial Committee Rules, 1925. After correspondence between the solicitors and the petitioner the former, on March 14, 1958, purported to withdraw the appearance. On March 18, 1958, the petitioner instructed new solicitors to proceed with the appeal. The petition stated that the new solicitors in fact took no further step in the appeal, and in particular did not take any of the steps prescribed in rule 86, namely, to give notice in writing of the change of agents to the registrar and to the outgoing agents, and to amend the appearance accordingly.

By letter of April 16, 1958, the registrar purported to dismiss the appeal for want of prosecution under rule 34. Thereafter, the

---

† *Present*: LORD TUCKER, LORD COHEN, the RT. HON. L. M. D. DE SILVA.

petitioner applied by petition for leave to restore her appeal; that petition was dismissed by the Judicial Committee on July 16, 1958.

By the present petition the petitioner sought an order that her appeal was still pending.

D. N. Pritt Q.C. and *A. Campbell* for the petitioner. The point is a short and simple one of construction, the submission being that there is no sort or kind of provision in the Judicial Committee Rules for the withdrawal of appearance, and the appearance entered by the original solicitors has not therefore been effectively withdrawn. The proper and only procedure to be followed when there is a change of agent in any appeal is that laid down in rule 86. In consequence, the petitioner's appeal has not been effectively dismissed, but is still pending. This is a petition for an unusual order and is, in effect, an appeal from the registrar. If it be the case that the practice has, as it were, grown up of allowing agents to withdraw appearances, it is submitted that it is not in fact justified by the rules, and should never now be used to justify the exercise of the summary and conclusive penalty under rule 34.

Dingle Foot Q.C. and *T. O. Kellock* for the respondent. There are three submissions. First, on the true construction of the rules there is nothing to prevent a withdrawal of an appearance by an agent. Admittedly, there is no express provision enabling appearance to be withdrawn, but it is submitted that there is by necessary implication such a power. We know of no authority on it. It is implicit where there is authority to serve any form of process that there must also be authority to withdraw it. The common sense of the matter is that a solicitor or agent has always had power to undo what he has done. Secondly, this matter is res judicata. The contention for the petitioner—based on the construction of the rules—was raised in effect on the hearing of the petition to restore the appeal; alternatively, it was open to the petitioner to have taken the point on that occasion, she did not do so and cannot do so now. Thirdly, the petitioner is in a similar position to, and certainly in no better one than, a petitioner who asks the Board for a rehearing of an appeal, and in such a case he has to ask for the discretion of the Board, which is very rarely exercised, and only in the most exceptional circumstances. The petition should be refused.

LORD TUCKER, after their Lordships had consulted, said that they would humbly advise Her Majesty that this petition be allowed, and that an order be made as prayed in the petition declaring that "notwithstanding the order made as aforesaid on "July 16, 1958, dismissing your petitioner's application for leave "to restore, and notwithstanding all or any other matters or steps "that may have occurred or been taken, the appearance entered "by [the original solicitors] on December 19, 1957, still stands

J. C.
1958
HASHAM v. ZENAB.

"as an effective appearance, and that this appeal is still pending." Their Lordships also ordered that the period prescribed by rule 22 should be extended until 10 days from the date of Her Majesty's order herein, and that there should be no order as to the costs of this petition.

Solicitors: *Theodore Goddard & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

C. C.

[CHANCERY DIVISION.]

[COURT OF APPEAL.]

1958
June 3, 4.
Danckwerts J.

C. A.
Oct. 27, 28, 29, 30.
Jenkins, Romer and Willmer L.JJ.

* G. L. BAKER LTD. *v.* MEDWAY BUILDING AND SUPPLIES LTD.

[1957 G. No. 735.]

Trust and Trustee—Breach of trust—Fraudulent conversion by trustee—Transfer of part of proceeds to innocent third party—Claim by beneficiary to follow the assets—Appropriate defence to such claim.

Limitation of Action—Fraudulent breach of trust—Transfer of part of proceeds to innocent third party—Claim by beneficiary to recover from third party—Whether limitation applicable to such claim—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 19, 26.

Practice and Procedure—Pleadings—Amendment—"Such amendments "... as may be necessary for the purposes of determining the real "question in controversy"—Fraudulent conversion of trust fund—Claim by beneficiary to follow assets in hands of innocent third party—Application at trial to amend defence by pleading giving of value—R.S.C., Ord. 28, *r.* 1.

In 1950 the plaintiff company entrusted to one T., who was their auditor, sums amounting to some £80,000. This was paid by T. into his bank account, which was at the time overdrawn. T. subsequently accounted to the plaintiffs for part of the sum, but diverted the balance to purposes unauthorized by them. In actions against T. to recover the sums the plaintiffs obtained judgment, but recovered nothing. T. was later tried and found guilty of fraudulent conversion.

On March 4 and 22, 1950, T. drew two cheques, which were met, in favour of the defendant company, of which he was a director. These payments, amounting to some £6,161, came out of the funds entrusted to T. by the plaintiffs. The plaintiffs did not learn of the payments made to the defendants until discovery was had of T.'s bank account in the course of other litigation in 1956.

On April 10, 1957, the plaintiffs' solicitors claimed from the defendants repayment of the said sum, and on May 2, 1957, a writ was issued. The statement of claim alleged (1) that T. had fraudulently and in breach of trust paid the moneys to the defendants, who had knowledge of the fraud through T. their director and were consequently trustees for the plaintiffs; (2) that the plaintiffs

had lawfully demanded repayment of the moneys from the defendants, who wrongfully retained the same. They claimed repayment of the moneys (1) as money had and received to their use; alternatively (2) as damages for money wrongfully detained or converted; and (3) "as the plaintiffs' money traceable in equity."

By their defence, the defendants (1) admitted the payments, but did not admit that they were made fraudulently or in breach of trust; if they were so made the defendants had no knowledge and were not trustees; (2) admitted the demand for the money but denied that its retention was wrongful; (3) pleaded the Limitation Act, 1939; (4) alleged that the statement of claim disclosed no claim in equity.

At the hearing before Danckwerts J. the plaintiffs argued their case on the equitable claim not only as a claim in rem against traceable assets, but as one in personam (based on *Nelson* v. *Larholt*, post). The defendants then applied to amend their defence by pleading that the cheques in question had been received for value; this application was refused.

Held, by Danckwerts J. (1) that, subject to the question of limitation, the defendants were liable in equity to repay the sums received from T. which he had obtained fraudulently; although they could not be fixed with knowledge of T.'s fraud by the mere fact that he was a director, they could not, as the pleadings stood, establish the necessary defence of receipt in good faith and for value without notice of the want of authority.

Dictum of Denning J. in *Nelson* v. *Larholt* [1948] 1 K.B. 339, 342; 64 T.L.R. 1; [1947] 2 All E.R. 751 applied.

(2) That by virtue of the provisions of sections 19 and 26 of the Limitation Act, 1939,[1] the action was not barred, as it was one based on the fraud of a trustee through whom the defendants claimed, and there was no proof that the plaintiffs had any knowledge of the payments before 1956.

On an appeal, in which the arguments were confined to the question whether the defendants should be allowed to amend their defence by adding an allegation that they had given value for the cheques:—

Held, by the Court of Appeal, that the case shown on the pleadings as framed at the hearing below was one which had no relation to the probable state of the facts; and as the object of litigation was to adjudicate on the real matters at issue between the parties the judge below, in refusing leave to amend, had acted on a wrong principle. Accordingly, the case should be remitted for

[1] Limitation Act, 1939, s. 19: "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use. (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. . . ."

S. 26: "Where, in any case for which a period of limitation is prescribed by this Act, either—(*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (*b*) the right of action is concealed by the fraud of any such person as aforesaid . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. . . ."

1958

G. L. Baker Ltd. v. Medway Building and Supplies Ltd.

a retrial, with liberty to both parties to amend their pleadings as advised.

Lowther v. *Heaver* (1889) 41 Ch.D. 248 and *Edevain* v. *Cohen* (1889) 41 Ch.D. 563; (1890) 43 Ch.D. 187 (C.A.) distinguished.

Tildesley v. *Harper* (1876) 10 Ch.D. 393 applied.

Per Willmer L.J.: When an appellant seeks to amend a pleading, the provisions of Order 58, rule 3 (2) require that the proposed amendment shall be formulated in the notice of appeal.

Action.

The plaintiff company had conducted a transport business, and on the nationalization of road transport they received compensation in the form of British Transport stock, which was sold and the proceeds, some £80,000, were with the plaintiffs' authority received by one Titley, a chartered accountant, who was the plaintiffs' auditor. Titley paid the money into his own bank account, which was at the time substantially overdrawn, at the beginning of March, 1950. He subsequently accounted to the plaintiffs for some £41,000, but failed to account for some £38,000 which he used for various unauthorized purposes. In two actions the plaintiffs obtained judgments against Titley, which were unsatisfied. He was later convicted of fraudulent conversion.

On March 4, 1950, and March 22, 1950, Titley, who was a director of the defendant company, drew cheques in their favour, which were met, for £3,268 0s. 5d. and £2,893 9s. 6d. respectively. These sums came out of the moneys entrusted to Titley by the plaintiffs. The plaintiffs did not learn of the payments made to the defendants until discovery was had of Titley's bank account in other litigation in 1956.

On April 10, 1957, the plaintiffs' solicitors demanded from the defendants repayment of the said sums, and on May 2, 1957, more than six years after the payments in question, the plaintiffs issued a writ claiming repayment of the sums in question. By paragraph 3 of the statement of claim: "Without the knowledge and "consent of the plaintiff company, fraudulently and in breach "of trust the said Titley paid part of the said moneys to the "defendant, which thereby through its said director Titley had "knowledge of the fraudulent breach of trust thereby committed "and was and is a trustee for the plaintiff company of the said "moneys," the payments by means of the two cheques being particularized. By paragraph 4: "By letter dated April 10, "1957, the plaintiff company by its solicitors lawfully demanded "repayment of the said moneys and the defendant wrongfully "retained the same." The plaintiffs claimed "(a) the said sum of "£6,161 9s. 11d. (1) as money had and received to the use of the "plaintiff company; alternatively (2) as damages for money "wrongfully detained alternatively converted by the defendant; "alternatively (3) as the plaintiffs' money traceable in equity."

By paragraph 3 of the defence: "The defendant admits that "Titley paid to the defendant [the two respective sums] by two

"respective cheques on or about March 4 and 20, 1950, respec-
"tively. The defendant does not admit that the said payments
"were made either fraudulently or in breach of trust. If, which
"is not admitted, the said payments or either of them were made
"either fraudulently or in breach of trust the defendant denies
"that it had notice of such fraud or breach of trust. The defen-
"dant denies that it was at any time and denies that it is now a
"trustee of the said respective sums . . . or either of such sums
"for the plaintiff." By paragraph 4: "The defendant admits
"the letter dated April 10, 1957. The defendant denies that its
"retention of the said respective sums . . . or either of them
"is or was at any time wrongful." By paragraph 5 the defendants pleaded additionally sections 2 and 3 of the Limitation Act, 1939, and further alleged that the statement of claim did not disclose any course of action which would entitle the plaintiffs to the relief claimed in paragraph 3 of the prayer of the statement of claim.

At the hearing before Danckwerts J. the defendants applied to amend the defence by adding an allegation that they had given value for the cheques. Danckwerts J. refused leave to amend.

Neil McKinnon Q.C. and *M. O. Stranders* for the plaintiffs.
Charles A. Settle for the defendants.

Danckwerts J. after stating the facts and referring to the pleadings: It is not clear whether the plaintiffs are alleging that the defendant company has still got the moneys and it is not at all clear whether the defendant company is not admitting that it has retained the moneys and has still got them. There is no evidence on that matter before me but it would be unusual if the defendant company still retained any part of the sums in question after this lapse of time between the payments and the issue of the writ. This, however is plain, that although fraud is denied, there is not in terms a claim on behalf of the defendant company that they acted innocently and bona fide—perhaps it is more a matter of inference—and there is no claim that the defendant company gave value for the cheques which were handed by Titley to the defendant company. An application was made on behalf of the defendant company for leave to amend so as to allege the giving of value. This application was made after the point had been realised on the case being opened, and it seemed to me that it was not proper for me to allow the amendment, and I refused the application. One thing is perfectly plain. Titley was fraudulent in his dealing with the balance of these moneys which belonged to the plaintiffs.

Therefore the case in its essence arises out of frauds committed by Titley, for which he was eventually tried and sentenced to a term of seven years' imprisonment. An action was brought by the plaintiff company against Titley and judgment was recovered in July and August, 1950, but that judgment

1958

G. L. Baker Ltd. v. Medway Building and Supplies Ltd.

Danckwerts J.

was entirely unsatisfied and the plaintiff company has never succeeded in recovering any part of the moneys from Titley. Having discovered that these cheques were received by the defendant company, the plaintiffs seek to recover a proportion of their loss in this manner in this action against the defendant company.

There is one point which I can deal with first of all without much difficulty. Titley was at the material time a director of the defendant company, and the plaintiffs' statement of claim relies upon that fact as giving rise to notice by the defendant company of Titley's fraudulent dealings. On the authorities it seems to me plain that the defendant company cannot be fixed with the knowledge that these dealings by Titley were fraudulent, and consequently it must be accepted that they had no notice of Titley's fraud in fact. Indeed, apart from the point on the position of Titley as director, no allegations are now made against the defendant company that they had knowledge or notice of Titley's fraudulent dealings. They were merely in the position of having received payments which were undoubtedly fraudulent payments from Titley.

That being the case, does the action lie against the defendant company to recover the moneys which they received, whether or not they are to be taken as still retaining the money? The action really is not based upon the fact of retention, even if it may be said to be alleged in the pleadings. On that point it seems to me that the plaintiff company must be entitled to succeed, unless they are debarred by the Limitation Act, 1939, and unless the defendant company can establish the position stated by Denning J. in *Nelson* v. *Larholt*,[1] which seems to me to be justified also by the decision of the Court of Appeal in *In re Diplock*,[2] which was affirmed by the House of Lords.[3] Denning J. said[4]: "A man's money is property which is protected by law. It may "exist in various forms, such as coins, treasury notes, cash at "bank, or cheques, or bills of exchange of which he is 'the "'holder,' but, whatever its form, it is protected according to "one uniform principle. If it is taken from the rightful owner, or, "indeed, from the beneficial owner, without his authority, he "can recover the amount from any person into whose hands it "can be traced, unless and until it reaches one who receives it "in good faith and for value and without notice of the want of "authority." Applying that to the present case, it seems to me that in order to defeat the action the defendant company must, and the onus is upon them to establish, that they satisfy those conditions, namely that they received the money in good faith and for value and without notice of the want of authority. I will assume that they received it in good faith and it is plain

[1] [1948] 1 K.B. 339; 64 T.L.R. 1; [1947] 2 All E.R. 751.

[2] [1948] Ch. 465; [1948] 2 All E.R. 318.

[3] [1951] A.C. 251; [1950] 2 All E.R. 1137.

[4] [1948] 1 K.B. 339, 342.

that they received it without notice of the want of authority, but they have not been able to establish, and they are not entitled to establish on the pleadings, that they gave value. Consequently, it seems to me that the action would prima facie succeed unless it is defeated by the Limitation Act, 1939.

I should add that it appears to me to be well established by *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.*[5] and *Baker* v. *Barclays Bank Ltd.*[6] that the position of the defendant company in regard to the cheques which they received from Titley was that they could not claim to be holders for value in due course of negotiable instruments in any way, because they were the payees of those cheques. Whether that makes any particular difference to the action I do not know, but that is undoubtedly the situation.

The matter really turns on the question whether the defendant company are in a position to rely upon the Limitation Act, 1939, to defeat the plaintiff company's prima facie claim. The relevant sections are section 19 and section 26 and possibly the definition section, section 31 (4). Section 20 has also been referred to, but that seems to me to be a section dealing with a different subject-matter which has no application to the present case.

Section 19 (1) is in these terms: "No period of limitation "prescribed by this Act shall apply to an action by a beneficiary "under a trust, being an action—(*a*) in respect of any fraud or "fraudulent breach of trust to which the trustee was a party or "privy; or (*b*) to recover from the trustee trust property or the "proceeds thereof in the possession of the trustee, or previously "received by the trustee and converted to his use." Paragraph (*b*) is not really applicable to the present case, but the question is whether (*a*) applies, and if it does apply the position is that the defendant company could not rely upon any period of limitation at all. This Act is one which I understand was drafted by a very eminent Chancery lawyer, but none the less it is one which gives considerable difficulties of interpretation whenever the court is concerned with its application. Paragraph (*a*) does not in terms refer to an action against a trustee, and the first question to consider is: is it a provision which only deals with proceedings against a trustee who was guilty of fraud, or does it also apply to a person who was not the original trustee but one who has acquired the trust property or payment which was fraudulently made out of the trust property? It does not in terms refer to actions against trustees, but the words used are "in respect of any fraud or fraudu-"lent breach of trust to which the trustee was a party or privy." It seems to me that the words "in respect of any fraud or fraudu-"lent breach of trust" may be capable of referring to a case where the action of the plaintiffs is based upon the fact that their moneys were fraudulently paid away and have reached the hands of an innocent party. That is a possible construction, but

[5] [1926] A.C. 670.

[6] [1955] 1 W.L.R. 1409; [1955] 2 All E.R. 571.

1958

G. L. Baker Ltd. v. Medway Building and Supplies Ltd.

Danckwerts J.

whether or not it is the right one is not at all clear. Section 19 (1) appears to be intended to reproduce the effect of section 8 of the Trustee Act, 1888. It is true that in the preamble the Act is described as a consolidating Act to some extent, but also with amendments. In *Beaman* v. *A. R. T. S. Ltd.*[7] Lord Greene M.R. refused to treat it as a purely consolidating Act, because he said it was also an amending Act in regard to certain aspects of the subject under consideration, which adds to one's difficulties. Section 8 (1) of the Trustee Act, 1888, provides: "In any action "or other proceeding against a trustee or any person claiming "through him, except where the claim is founded upon any fraud "or fraudulent breach of trust to which the trustee was party or "privy, or is to recover trust property, or the proceeds thereof "still retained by the trustee, or previously received by the "trustee and converted to his use, the following provisions shall "apply. . . ." The later part of this subsection is presumably intended to be dealt with by section 19 (2) of the Limitation Act, 1939, but section 19 (1) is apparently designed to reproduce in inverted form the provisions which are contained in the first part of section 8 (1) of the Act of 1888, and if it is intended to reproduce the provisions of the Act of 1888 it is quite plain that it is dealing with proceedings not only against a trustee himself who has been guilty of fraud or fraudulent breach of trust, but any person claiming through him.

Therefore, it seems to me that the Act of 1888 was designed to deal with both those cases. It is not at all clear whether the Act of 1939 has the same purpose, but it may be so. There is a point taken by Mr. Settle on behalf of the defendant company that they do not claim through the fraudulent trustee. He also said with regard to section 19 (1) of the Limitation Act that the action was not in respect of any fraud or fraudulent breach of trust, because the action against the defendant company in the present case is based upon the receipt by them without any fraud of moneys which were part of the trust fund belonging to the plaintiff company. I am bound to say that I think that the words "in respect of any fraud or fraudulent breach of trust" are wide enough to cover the present case, because it is the fraudulent payment by Titley to the defendant company which is the origin of the proceedings against the defendant company. It is because they received that payment by virtue of Titley's fraudulent breach of trust that the plaintiff company is able to bring this action against them. Consequently, so far as those words are concerned, the provision seems to me wide enough. I will postpone consideration of the question whether the defendant company claims through Titley until I have dealt with section 26 of the Limitation Act, 1939.

Section 19 (2) of the Limitation Act is in these terms: "Subject as aforesaid, an action by a beneficiary to recover trust

[7] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

"property or in respect of any breach of trust, not being an action "for which a period of limitation is prescribed by any other pro-"vision of this Act, shall not be brought after the expiration of "six years from the date on which the right of action accrued." The defendant company contend that that subsection applies to their position and, therefore, that, as the action has not been brought within six years from the date of the payments, which were in March, 1950—it was not brought, it will be remembered, until May 2, 1957—the action was outside the period of limitation, and therefore is defeated by that subsection.

Assuming that subsection does apply, that is not the end of the matter, because there are the provisions of section 26 of the Act of 1939. That section was designed to reproduce, it would appear, the former equitable rule which was not the subject of any statutory provision at all, but is now put in a statutory form in this section. The old rule in equity would not allow a claim in equity to be defeated if the defendant was guilty of what was termed concealed fraud. Section 26 provides: "Where, in the "case of any action for which a period of limitation is prescribed "by this Act, either—(*a*) the action is based upon the fraud of "the defendant or his agent or of any person through whom he "claims or his agent, or (*b*) the right of action is concealed by "the fraud of any such person as aforesaid . . . the period of "limitation shall not begin to run until the plaintiff has discovered "the fraud or the mistake, as the case may be, or could with "reasonable diligence have discovered it. . . ."

There has been no fraud in this case by the defendant company. They are in a way the innocent victims of Titley, in the same way as the plaintiffs have been defrauded by him of the moneys in question. Do they claim, however, in regard to the subject-matter of the action, through Titley? In my view, the answer is plainly that they do. How did they come to have the moneys? By means of cheques which were handed to them by Titley in respect of which they were not holders for value in due course, and they received the moneys by cashing those cheques. It seems to me that their claim to the moneys must be through Titley and through nobody else, and therefore it seems to me that they are plainly within the provisions of section 26 (*a*), that is to say, "the action is based upon the fraud of the defendant or of any "person through whom he claims." It is based on the fraud of Titley, because Titley made the payments in fraud of the plaintiffs and, therefore, within those terms. It also seems to me that in view of *Beaman* v. *A.R.T.S. Ltd.*[8] which was cited to me, there might be an answer to the period of limitation under section 26 (*b*) —"the right of action is concealed by the fraud of any such "person as aforesaid." "Any such person as aforesaid," must be any person through whom the defendants claim—Titley again. In *Beaman* v. *A.R.T.S. Ltd.*[9] it was held by the Court of Appeal

[8] [1949] 1 K.B. 550. [9] Ibid.

1958

G. L. Baker Ltd. v. Medway Building and Supplies Ltd.

Danckwerts J.

that persons who made away with certain parcels deposited with them were guilty of concealed fraud because they did not tell the victim what they had done. In the present case, of course, Titley did not tell the plaintiffs that he had paid their money away wrongfully. It was left to them to discover it by such means as were eventually available to them. And, if he is a person through whom the defendant company claims, then it was in the terms of section 26 (*b*).

I have been referred by Mr. Settle on behalf of the defendant company to the definition of a person through whom a person claims in section 31 (4), but I really do not think it carries the matter any further, and I do not propose to spend time upon it.

I come now to the question whether the plaintiff company can succeed having regard to the period within which the action was started, that is, May 2, 1957. The words in section 26 permit the period to begin to run when "the plaintiff has discovered the "fraud of the mistake, as the case may be, or could with reason-"able diligence have discovered it." A director of the plaintiff company, one Littmoden, gave evidence that they did not find out about the payment of these cheques by Titley to the defendant company until they brought an action against Barclays Bank in January, 1956, when the bank disclosed the account of Titley, and then from an examination of the account it became perfectly plain that payments were debited against the account in favour of the defendant company on March 4, 1950, and March 22, 1950.

On the other hand, evidence was given on behalf of the defendant company by Mr. Napley, the solicitor who conducted the defence of Titley. He produced the information against Titley which was dated in January, 1951, and gave evidence that the bank clerk was called at the hearing on July 15, 1951. It is plain from the information that the information itself would not have disclosed payments to the defendant company, because one of the cheques in question, though referred to in paragraph 9 of the information, is dealt with in this way. It is alleged that Titley had fraudulently converted the sum of £3,268 0s. 5d., which, of course, is the amount of one of the two cheques mentioned in this action, to the use and benefit of Haddon Products Ltd., another company associated with the defendant company. That would not, as far as I can see, have given anybody who had happened to see the information any line on the payments which were actually made to the defendant company. If any director of the plaintiff company was in court at the hearing on July 15, 1951, he might have then perceived that the payment was to the defendant company and therefore had some knowledge of the payment in question, but there is no evidence that any director did so attend, though one gave evidence, and it is not proved that any director of the plaintiff company did acquire knowledge of the payment at that date. Anyhow, even if he did, it would be within six years before May 2, 1957, and the action, therefore, would not be defeated by the provisions of the Limitation Act.

Consequently, it seems to me that the defendant company is unable to rely upon the Limitation Act, 1939, and the action of the plaintiff company is not barred by any period of six years, if section 19 (2) of the Limitation Act, 1939, is the appropriate section. It may be that section 19 (1) (*a*) is the appropriate provision in the Act. Then, of course, no period of limitation would apply at all. Consequently, the plaintiffs' action succeeds and they are entitled to judgment for the amount claimed.

Judgment for the plaintiffs.

The defendants appealed.

Among the grounds of appeal was an allegation that Danckwerts J. had been wrong in refusing leave to amend the defence by adding an allegation that the defendants had given value, but the amendment sought was not set out in the notice. After the argument for the defendants had been opened the court intimated that the defendants should elect whether to argue the appeal on the pleadings as they stood, or to apply for leave to amend; the defendants adopted the latter course.

Geoffrey Cross Q.C. and *Charles A. Settle* for the defendants.
Neil McKinnon Q.C. and *M. O. Stranders* for the plaintiff.

Cases cited in argument but not referred to in the judgments: *Banque Belge pour L'Etranger* v. *Hambrouck* [1]; *Rahimtoola* v. *Nizam of Hyderabad.* [2]

JENKINS L.J. This is an appeal from an order of Danckwerts J. dated June 4, 1958, in favour of the plaintiffs, G. L. Baker Ltd., for a sum of £6,161 9s. 11d. and costs. The defendants. Medway Building and Supplies Ltd., by their notice of appeal ask that that order should be reversed with an order for costs in the defendants' favour, and ask in the alternative that the defendants may be given leave to amend their defence and that a new trial may be ordered. The grounds of appeal include paragraph 3, which deals with that matter in these terms: "That the judge "in the exercise of his discretion ought to have acceded to the "defendants' application made during the trial to amend the "defence and to have granted an adjournment for that purpose."

On the appeal being opened before us by Mr. Cross for the defendants, after we had heard some submissions of his upon the merits of the case we expressed the view that he should elect either to prosecute his appeal on the pleadings as they stood or else to make his application for leave to amend. We thought it would be wrong to allow him to develop his case on the unamended pleadings and then, in the event of failure, to claim that he should be able to pursue the question of amendment and argue

[1] [1921] 1 K.B. 321; 37 T.L.R. 76.

[2] [1958] A.C. 379; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

the case de novo on the amended pleadings, if leave to amend was given.

The nature of the case is this. It appears that the plaintiffs on two dates in March, 1950, entrusted a chartered accountant, one George Eric Titley, who in fact, I understand, was the plaintiffs' auditor, with a large sum of money amounting to some £80,000, being money of the plaintiffs. It is unnecessary to consider the circumstances in which that sum became payable, for it is common ground that it was a sum of money belonging to the plaintiffs and that it was paid over to George Eric Titley. Titley on receipt of the money paid it into his own private business account. Then on March 4, 1950, by a cheque drawn on his private business account he paid the sum of £3,268 0s. 5d. to the defendants, and on March 22 he paid in a similar manner by a cheque drawn on his private business account the sum of £2,893 9s. 6d. to the defendants, making the total of £6,161 9s. 11d. for which judgment was awarded to the plaintiffs by the judge in the action. Those payments having been made on March 4 and 22, 1950, the plaintiffs by their writ in the action issued on May 2, 1957, that is to say, more than six years after the date of the payment, claimed against the defendants the relief appearing from the statement of claim, which I had better next read.

It begins by identifying Titley in paragraph 1, and in paragraph 2 states how Titley was entrusted with the plaintiffs' money —there is no dispute about those matters—and proceeds as follows in paragraph 3: "Without the knowledge or consent of the "plaintiff company, fraudulently and in breach of trust the said "Titley paid part of the said moneys to the defendant"—then there is this, which was added by way of amendment—"which "thereby through its said director Titley had notice of the fraudu- "lent breach of trust thereby committed and was and is a trustee "for the plaintiff company of the said moneys." Then the payments by means of the two cheques, to which I have referred, were particularized. Then paragraph 4: "By letter dated "April 10, 1957, the plaintiff company by its solicitors, Messrs. "Bell and Ackroyd, lawfully demanded repayment of the said "moneys and the defendant wrongfully detains the same." Then there is this prayer: "And the plaintiff claims: (a) the said sum "of £6,161, 9s. 11d. (1) as the money had and received to the "use of the plaintiff company; alternatively (2) as damages for "money wrongfully detained alternatively converted by the "defendant." Nothing turns on those two claims for the purposes of this appeal. The judge did not, as far as I understand the matter, deal with them, and their application in the circumstances of this case would be fraught with difficulty. The claim is put in the alternative: "(3) As the plaintiffs' money traceable "in equity," and then consequential relief is claimed, with which I need not trouble.

Pausing there, that pleading appears to me to base the

plaintiffs' claim primarily on the ground of constructive trusteeship due to the fact that the defendants received the money with knowledge that it was money of the plaintiffs. One would, I think, also understand from the statement of claim that a claim was being made in respect of the moneys on the basis of the equitable doctrine of tracing in the form which, until recently, was I think commonly attributed to it, and on that basis it would seem from the terms of the pleading that the plaintiffs were claiming that, irrespective of notice, the money wrongfully paid to the defendants was still in their hands either in its original form or in some other form which could be identified with the original sum paid. It is no doubt true that the function of a statement of claim is to plead the facts on which the plaintiff relies, and he is not strictly obliged to plead law, but here it does seem to me that any person of ordinary experience reading the statement of claim would consider that the matters in issue were confined to those which I have described, and would not appreciate that on this pleading it was intended not merely to make out a claim of tracing in the old and restricted form, but also to rely on the personal liability in equity which was held to exist in the case of *In re Diplock*,[1] and which was referred to in sweeping terms by Denning J. in *Nelson* v. *Larholt*.[2] According to the doctrine as enunciated by Denning J., a person who receives trust money, as I understand it, irrespective of notice is liable to make it good even after he has parted with the money, and so the liability passes from hand to hand so that anyone who has had the money at any stage is liable unless and until it comes into the hands of some person who can claim to be a purchaser for value without notice. If the claim was to be put in that way it would obviously be vital for the defence to raise, if they could, a case of purchaser for value without notice, which, as I understand it, would be their only effective shield to a claim on the principle enunciated by Denning J.

The statement of claim being in the form which I have read, the defendants put in this defence. They admitted paragraph 1; they made no admission as to paragraph 2 although there is actually, I think, no serious dispute about that, and then by paragraph 3 of the defence they said : "The defendant admits "that Titley paid to the defendant two respective sums of "£3,268 0s. 5d. and £2,893 9s. 6d. by two respective cheques "on or about March 4 and 20, 1950, respectively. The defendant "does not admit that the said payments were made either fraudu-"lently or in breach of trust. If, which is not admitted, the said "payments or either of them were made either fraudulently or "in breach of trust the defendant denies that it had notice of "such fraud or breach of trust. The defendant denies that it "was at any time and denies that it is now a trustee of the said "respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. or either

[1] [1948] Ch. 465; [1948] 2 All E.R. 318, 429.

[2] [1948] 1 K.B. 339; 64 T.L.R. 1; [1947] 2 All E.R. 751.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

"of such sums for the plaintiff." So far then the allegation of notice is traversed and the allegation of constructive trusteeship based on notice is also traversed.

Then comes this paragraph on which there has been much debate: "(4) The defendant admits the letter dated April 10, "1957. The defendant denies that its retention of the said "respective sums of £3,268 0s. 5d. and £2,893 9s. 6d. or either "of them is or was at any time wrongful." That paragraph should, I think, be read in conjunction with paragraph 4 of the statement of claim which I will read again: "By letter dated "April 10, 1957, the plaintiff company by its solicitors, Messrs. "Bell and Ackroyd, lawfully demanded repayment of the said "moneys and the defendant wrongfully detains the same." Paragraph 4 of the defence, as I read it, was clearly intended as a traverse of that. In the circumstances it would really be unreasonable to hold the defendants to it as an admission that they retained in their hands the actual identical sums of money or those sums in traceable form. I think a fair reading of it is that while the letter is admitted, the defendants say they have done nothing wrong in refusing to comply with the letter by paying over the amount claimed. Then in paragraph 5 of the defence the Limitation Act, 1939, sections 2 and 3, are pleaded in addition to all other defences. Then there is this: "The state-"ment of claim does not disclose any cause of action which "would entitle the plaintiff to the relief claimed in paragraph 3 of "the prayer to the statement of claim." That, read in conjunction with paragraph 4, reinforces to my mind what I have said about the reasonable construction to place on that paragraph 4 of the defence.

It will be observed that in that pleading there is no allegation that the money was paid to the defendants for valuable consideration, that is to say, the allegation that the defendants were purchasers for value without notice, as one may loosely describe it, was not raised. Further, there is no positive allegation that the defendants had parted with the money. One cannot find any satisfactory allegation of that, but, on the other hand, one finds in paragraphs 4 and 6 something amounting by implication to a plea that the defendants no longer had the money. I cannot regard as a serious defect in the pleading the fact that it did not allege the paying away of the money because if one looks at the matter from a common-sense point of view, it was in the highest degree improbable that six years after the cheques had been paid the proceeds remained in the coffers or bank account of the defendants either in the form which they originally took, that is to say, sums of cash, or in the form of some identifiable property into which the cash had been converted. The judge did not at the trial hold the defendants to any such admission, that is to say, to any admission that the defendants still had the money in their hands.

When the matter came before the judge, as I understand the

course of events, Mr. McKinnon for the plaintiffs opened his case on the footing that he was entitled to succeed on the strength of admissions in the defence; in other words, as I understand it, he said the receipt of these cheques was admitted, and it was not alleged that they had been paid away; on the contrary, Mr. McKinnon relied on paragraph 4 as an admission that they still owed the money, and they had not raised the plea of purchaser for value without notice. Consequently it was submitted that the plaintiffs were virtually entitled to succeed on the ground that the defendants had raised no effective defence at all. Mr. Settle, whom we all know as a very experienced pleader, has told us that on the claim as it stood it did not appear to him to be necessary to raise a case of purchaser for value without notice because the plaintiffs' case was a case of constructive trusteeship which would be defeated by absence of notice and on tracing in its old sense, that is to say, identifying in the hands of the defendants either the money or something that could be identified as representing it. The plaintiffs' case standing thus, I think there is justification for the view that it would not be necessary to raise the defence of purchaser for value without notice. Mr. Settle says that when the case was opened by Mr. McKinnon, he then appreciated for the first time that the case was being put against him as a case for the application of the principle stated by Denning J. in *Nelson* v. *Larholt*,[3] and when he appreciated that this was the case which he had to meet, he asked the judge for leave to amend by pleading purchase for value without notice. The judge refused that application out of hand; he thought that it was too late to make it, and he thought it would cause hardship to the plaintiffs. We are told that he said in the course of his interlocutory observations on this matter that the defendants had really failed so far to raise any proper pleading in answer to the claim, and ought not to be allowed at the last moment for the first time to add a defence which was necessary, so to speak, in order to get his case on its legs. One finds this reference to the application in the judgment of the judge, who said this[4]: "It is not clear whether the plaintiffs "are alleging that the defendant company has still got the "moneys and it is not at all clear whether the defendant com-"pany is not admitting that it has retained the moneys and has "still got them. There is no evidence on that matter before me "but it would be unusual if the defendant company still "retained any part of the sums in question after this lapse of "time between the payments and the issue of the writ. This, "however is plain, that although fraud is denied, there is not in "terms a claim on behalf of the defendant company that they "acted innocently and bona fide—perhaps it is more a matter of "inference—and there is no claim that the defendant company "gave value for the cheques which were handed by Titley to

[3] [1948] 1 K.B. 339.

[4] Ante, p. 1219.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

"the defendant company. An application was made on behalf "of the defendant company for leave to amend so as to allege "the giving of value. This application was made after the point "had been realized on the case being opened, and it seemed to "me that it was not proper for me to allow the amendment, and "I refused the application."

Then I think it is material to refer to this passage where the judge says [5]: "There is one point which I can deal with first of "all without much difficulty," and that was the matter of notice with which it was sought to saddle the defendants on the strength of the fact that Titley was one of the defendants' directors. The judge dismissed that as concluded against the plaintiffs by authority. Having done that he proceeded in these terms [6]: "That being the case, does the action lie against the defendant "company to recover the moneys which they received, whether "or not they are to be taken as still retaining the money. The "action really is not based upon the fact of retention, even if it "may be said to be alleged in the pleadings." Then later he says [7]: "Applying that to the present case, it seems to me that in "order to defeat the action the defendant company must, and "the onus is upon them to establish, that they satisfy those con-"ditions, namely, that they received the money in good faith and "for value and without notice of the want of authority. I will "assume that they received it in good faith and it is plain that "they received it without notice of the want of authority, but "they have not been able to establish, and they are not entitled to "establish on the pleadings, that they gave value. Consequently, "it seems to me that the action would prima facie succeed unless "it is defeated by the Limitation Act, 1939." Then the judge in the course of the remaining part of his judgment dealt with the question of the Statute of Limitations and held that the defendants were not entitled to avail themselves of it.

That, in brief, is the course the matter took at the trial, and it is to be observed that the judge in refusing leave to amend fully appreciated that on the view he took of the law the effect of refusing such leave would mean that the defence must necessarily fail. It also appears from the passages I have read that the judge was in considerable doubt as to the precise issues raised on the pleadings.

In these circumstances Mr. Cross says that, while it is no doubt true that this court will be reluctant to make an order for amendment in a case in which an application for such amendment has been refused by the court below on an application made at the hearing, and that such late amendments ought to be sparingly allowed, in the present case it can be said that the omission of the plea of purchase for value, which it is now sought to introduce, was contributed to in a substantial degree, at all events, by the obscurity of the statement of claim and its failure

[5] Ante, p. 1220.
[6] Ante, p. 1220.
[7] Ante, pp. 1220, 1221.

to make it clear what relief was being sought. I have, I think, sufficiently discussed the terms of the pleadings and I will not return to them again. I think Mr. Cross's argument on that is well founded. At the same time I think that a particularly circumspect pleader, on the principle that it is useful to have as many strings to one's bow as possible, might have been expected to add for good measure the plea of purchaser for value to his defence. Nevertheless, it does appear to me that this omission was to a great extent due to the form of the statement of claim. I think that this consideration is of considerable assistance to the defendants' present application. One cannot regard this simply as a matter of carelessness or at all as a matter of a party, if I may use a colloquialism, sitting on the fence with an amendment in reserve to be produced if the case did not go well on the existing pleading. It was a genuine misunderstanding by an experienced pleader of a somewhat obscurely formulated statement of claim.

I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the judge with which this court should not in ordinary circumstances interfere unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties. Bearing that in mind, I will refer to some of the authorities read in the course of the very full argument on this matter.

One begins with the Rules of Court, Order 28, rule 1, which is in these terms: "The court or a judge may, at any stage of the "proceedings, allow either party to alter or amend his indorse-"ment or pleadings, in such manner and on such terms as may be "just and all such amendments shall be made as may be neces-"sary for the purpose of determining the real questions in con-"troversy between the parties." I repeat the second half of the rule "and all such amendments shall be made as may be neces-"sary for the purpose of determining the real questions in con-"troversy between the parties." I do not read the word "shall" there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made "as may be "necessary for the purpose of determining the real questions in "controversy between the parties." It appears to me that the pleadings as they stood when the matter came before the judge were not in this case so framed as to enable the real question in controversy to be determined. The case shown on the pleading was a case which had no relation to any remotely probable state of facts. It was contrary to all probability that this money should still exist in the hands of the defendants in its original form of cash or in some other identifiable form. It was further

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

in the highest degree improbable that the cheques were paid over by Titley without something in the way of consideration. It is clearly an assumption far removed from any probable state of facts that Titley should have paid these cheques as gifts or presents to the defendant company, taking as a mere volunteer. Mr. McKinnon, who has said all that possibly could be said on the plaintiffs' side, says that nevertheless leave to amend should not be given in this case and that the judge rightly refused it in the exercise of his discretion.

Mr. McKinnon puts it that the matters on which the defendants now seek to rely in support of the proposed pleading, as it will stand if their amendment is allowed, must have been known to them long before the trial, and it would be a hardship on the plaintiffs and wrong in principle now to let the defendants raise this new matter. I regard that submission as deprived of a great deal of its force by the circumstances I have already mentioned in relation to the form of the statement of claim.

Then Mr. McKinnon referred us to a number of authorities, mostly in cases in which leave to amend was refused. As to these authorities, one may observe that the circumstances in which amendments may be sought are infinitely various, and a decision against an amendment in the particular circumstances of one case may be no ground for refusing leave in another. The first of these authorities is *Lowther* v. *Heaver*.[8] That was a case in which, under some form of building contract, the defendant was to grant leases to the plaintiff as and when certain houses were completed and roofed in, and the defendant having failed to grant the leases and having been sued by the plaintiff for an order compelling him to grant them, raised a defence which said nothing whatever about the roofing in, and he then asked leave to amend his defence by adding an allegation that the houses had not been roofed in. There was an application at the hearing before Kekewich J. to add this allegation, and Kekewich J. refused leave to make that amendment, and his decision was upheld in this court. But the case was a very different one from the present. Cotton L.J. said[9]: "I think that Kekewich J. was right in refusing to give "him any such leave. Mr. Heaver was, at least from June, "1887, residing constantly in the neighbourhood of this property, "was frequently seeing it, and knew what the state of it was, and "yet when he comes to defend and account for his refusing to "grant leases he does not allege that these buildings were not "roofed in as required by the agreement. If in fact they were "not roofed-in at the time when he took possession, then the plain-"tiff would have no right to have leases granted. Mr. Heaver "took possession on September 1, 1887, and when leases were "asked for he did not say, 'You are not entitled to leases because "'these buildings are not roofed-in as the agreement required.' "In my opinion, as he has taken that course, and has not referred

[8] (1889) 41 Ch.D. 248. [9] Ibid. 262.

"to want of roofing-in in paragraph 10 of his defence, we ought "not to allow him to amend his pleadings in order to raise that "question." From that passage it appears that the court's refusal of leave to amend there was based in great measure on the fact that the amendment was contrary to the whole previous course of the defendant's conduct.

Then Lindley L.J. said[10]: "So far as the pleadings go "the defendant has admitted that the plots were roofed-in, what-"ever that means. I should not myself attach very much "importance to that if I thought that the admission was a slip "or an oversight, but on the evidence we find that the main "buildings were completely roofed-in, and that there was nothing "wanting except the zinc covering of a small part of the erec-"tions." A little later on he says: "I am satisfied that, "according to the true meaning of the parties, the buildings were "roofed-in, or, at all events, if they were not roofed-in, it was "for the defendant to raise that point and prove it." Then there is this: "Ought we, then, to give him liberty to amend in order "to raise such a point? I should say unquestionably we ought "not. I am satisfied that it is merely an afterthought. It is a "mere straw at which a drowning man is catching, and there is no "substance in it." That appears to me to be an entirely different case from the present one.

Then there is *Edevain* v. *Cohen* before North J.[11] I need not go into the facts of that case, but again it was a very different kind of case from this one. The judge said[12]: "It is quite "clear to me that to some extent they could new assign effec-"tively"—that is the plaintiffs—"therefore I cannot simply "allow it now without either putting the plaintiffs in a position "in which I ought not to allow them to be put by such amend-"ment being made at the last moment, or I should have to "direct the matter to stand over in order that they may amend "their pleadings and go into further evidence, which would have "to be taken before the court for the purpose of getting definite "information on definite points to which"—and this is, I think, important—"although all the evidence has been taken with the "knowledge that this amendment would be asked for, the atten-"tion of the parties and the counsel on the other side has not "been drawn, and without going into which evidence it would be "impossible to do justice to the plaintiffs; because at any rate, "if the defence were held and allowed to be good, I could not "without that fresh evidence give them the benefit of the new "assignment, upon which I see clearly they must, to some "extent, succeed." From that passage it appears to me that the parties seeking the amendment had, as it were, stood by at the trial and had not called the other side's attention to this point. There is no ingredient of that sort in the present case.

The same case went to the Court of Appeal.[13] The decision

[10] 41 Ch.D. 248, 266.
[11] (1889) 41 Ch.D. 563.
[12] Ibid. 567.
[13] (1890) 43 Ch.D. 187.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

of North J. was upheld by this court. Cotton L.J. said this [14]: "In dealing with this appeal I will first of all consider what case "the appellant is entitled to raise having regard to the pleadings." Then he discussed that and went on: "The contention of the "appellant, however, is that he is only raising a point of law, not "an issue of fact. But that is not so; the amendment would "raise facts to enable a point of law to be relied upon; and those "facts ought, according to the rule, to have been pleaded by the "present appellant in answer to this action. Then it is said that "the appellant ought to have liberty to amend his pleadings. "An application to that effect was made to North J., and the "learned judge, after he had heard all the evidence, refused "leave to amend. That was done by him in the exercise of his "discretion, and that fact alone, to my mind, is a strong reason "to induce us now to refuse leave to amend. Another strong "reason is this. I do not think that this amendment is neces-"sary to bring out the real question between the parties. I "think this amendment is proposed merely to enable the appel-"lant to avail himself of what I may call a technical rule of law "supported by the cases which have been referred to, and not "in order to determine the real issue which ought to be deter-"mined in this action," and the Lord Justice points out that the question of amendment was not raised until a late stage at the hearing. That again appears to me to be a very different case.

I can pass over very shortly the case of *Ellis* v. *Manchester Carriage Co. Ltd.*,[15] for that was, as I understand it, a case in which there was an action for the obstruction of the plaintiff's lights and the plaintiff sought to amend by introducing a claim that the building obstructing his lights also obstructed a right of way to which he was entitled. The court held, not unnaturally, that that was an entirely different claim and they refused to grant leave to raise it by amendment. Grove J. said [16]: "The amend-"ment asked was, I think, properly refused: it would have "introduced an entirely different case from that which the "defendants came prepared to meet. So far as the lights were "concerned, the defendants had a clear right to obstruct them."

Then a case where the decision went the other way, to which we were very properly referred by Mr. McKinnon, is *Tildesley* v. *Harper*,[17] which in a way is a locus classicus because it contains the oft quoted judgment of Bramwell L.J. on the question of the amendment of pleadings. The headnote reads: "In an action against a lessee to set "aside a lease granted under a power, the statement of claim "stated that the donee of the power had received a specified sum "as a bribe, and stated the circumstances; the statement of "defence denied that that particular sum had been given, and "denied each circumstance, but contained no general denial of a "bribe having been given. Fry J. having held that the denial

[14] 43 Ch.D. 187, 189.
[15] (1876) 2 C.P.D. 13.
[16] Ibid. 16.
[17] (1876) 10 Ch.D. 393.

"was evasive, and amounted to an admission that some bribe "had been given, and having refused leave to amend the state-"ment of defence: *Held*, by the Court of Appeal, that leave to "amend the statement of defence ought to be given." Baggallay L.J. said [18]: "We all think that leave to amend ought to "be given. The order will be to discharge the judgment of "Fry J., with liberty to the defendant to amend his statement "of defence; the plaintiffs to pay the costs of the appeal; and "the costs of the day of trial in the court below to be costs in "the cause. The plaintiffs will also be at liberty to amend their "pleadings." Bramwell L.J. said [19]: "I have had much to do "in chambers with applications for leave to amend, and I may "perhaps be allowed to say that this humble branch of learning "is very familiar to me. My practice has always been to give "leave to amend unless I have been satisfied that the party "applying was acting mala fide, or that, by his blunder, he had "done some injury to his opponent which could not be compen-"sated for by costs or otherwise. I confess that if the present "case had come before me I should have had some doubt whether "the defendant had made a bona fide mistake, as the mistake is "so very obvious. I should probably have required some affidavit "or statement by the solicitor to show that the slip in the plead-"ing was a bona fide one, and if satisfied on that point, I should "not have refused leave to amend." Then a little further on he said [20]: "It is quite right that the rules of the court should be "observed, and that a party should be fined for his mistake, but "the fine should be measured by the loss to the other side, and "not by the importance of the stake between the parties."

Thesiger L.J. said [21]: "I am also of opinion that it is "important that the rules of the court as to pleading should be "enforced, but this may be done at too great a price. The "object of these rules is to obtain a correct issue between the "parties, and when an error has been made it is not intended "that the party making the mistake should be mulcted in the "loss of the trial."

The passage from the judgment of Bramwell L.J., to which I have referred, is quoted in the Annual Practice in the notes to Order 28, rule 1, and it is immediately followed by this quotation from the judgment of Sir William Brett M.R. in *Clarapede* v. *Commercial Union Association*,[22] and that passage is: "How-"ever negligent or careless may have been the first omission, "and however late the proposed amendment, the amendment "should be allowed if it can be made without injustice to the "other side. There is no injustice if the other side can be "compensated by costs."

It appears, therefore, that in the present case the judge ought in the exercise of his discretion to have granted this amendment

[18] 10 Ch.D. 393, 396.
[19] Ibid. 396.
[20] Ibid. 397.
[21] Ibid. 397.
[22] 32 W.R. 263.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Jenkins L.J.

if it appeared that this would involve no loss or detriment to the plaintiffs which could not be made good to them by an appropriate order as to costs. It should have been apparent to the judge, and indeed it was apparent to him, that this was a vital point in the case and that unless it was adjudicated upon, the real matter in issue between the parties would not be decided, for the case would proceed on an assumed state of the facts which, more likely than not, was wholly at variance with and bore no relation to the true facts of the case. Accordingly, in refusing this leave to amend out of hand, it does appear to me that the judge here proceeded on a wrong principle. As to responsibility for the inadequacy of the defence, I have already expressed my view about that and I will not discuss that aspect of the case further, except to say that it is observable that the judge said [23]: "This "application was made after the point had been realised on the "case being opened, and it seemed to me that it was not proper for "me to allow the amendment, and I refused the application." If the point was taken as soon as it was realised on the case being opened, then all the more reason, I should have thought, to have granted leave to amend.

We were also referred by Mr. McKinnon to one or two other cases. We were referred to *Esso Petroleum Co. Ltd.* v. *Southport Corporation* in the House of Lords.[24] That case, which was cited by Mr. McKinnon for the observations of Lord Morton of Henryton, was not a case of amendment at all. It was a case in which this court in the view of the House of Lords had decided an appeal on an issue which had not been raised in the pleadings, and the observations of the Law Lords were directed to bringing out the importance of deciding cases secundum allegata et probata and not on the strength of issues which had not been properly formulated in the pleading. I do not see how any assistance can be derived from that case except possibly this in the defendants' favour, that pleadings ought to be amended where it can reasonably be done so as to ensure that any issues on which the case is likely to turn are properly pleaded, for if they are not pleaded they ought to be disregarded.

Then there was *Derrick* v. *Williams*,[25] which is to the effect that where leave is given to amend, the amendment must be formulated, and Mr. McKinnon pointed out with force that the actual amendment sought to be made here only emerged yesterday morning when Mr. Cross produced an affidavit to which it was exhibited. Mr. McKinnon says that in these circumstances the course taken by the defendants in regard to the amendment in the court below was not strictly speaking such as to entitle them to appeal at all. He says on the judge's refusal to grant the amendment, counsel for the defendants ought to have insisted on an adjournment and insisted on the judge considering the precise

[23] Ante, p. 1219.
[24] [1956] A.C. 218; [1955] 2 W.L.R. 81; [1955] 3 All E.R. 864.
[25] 55 T.L.R. 676; [1939] 2 All E.R. 559.

form of amendment which would have been prepared during the adjournment. In my view that is really hypercritical. What actually happened in this case, as I understand it, was that the judge refused out of hand an application to make any amendment raising the question of value. I think it is really too much to expect of counsel in those circumstances that they should necessarily pursue the matter to the extent of insisting on an adjournment with a view to the amendment being formulated and with a view to the judge rejecting it, as indeed he had already refused any amendment of the kind sought when the point was first raised. Accordingly, I do not think that *Derrick* v. *Williams* [26] affords any obstacle to the defendants' claim.

Lastly, as to the precise form of the amendment which was produced in accordance with Mr. McKinnon's submissions, that does make out, as I understand it, a case of value, and if the facts which are verified by affidavit are true, then prima facie without seeking to prejudge the result in any manner at all, and I merely say "prima facie," it does appear that the defendants have serious and substantial grounds for claiming to be in the position of purchasers for value without notice of the proceeds of these two cheques. I will not go into the account of the transaction under which the cheques were paid given in the affidavit and in the proposed amendment of the defence, for I think it is for the present purpose unnecessary. I think it does show that there is a substantial and serious ground for the plea of value, and I leave it at that; whether it will suffice or not remains to be seen, and all questions bearing upon the question of value, and, indeed, every other question is intended to be left entirely open so far as this judgment is concerned.

For the reasons I have endeavoured to state, although this court is rightly slow to interfere with the discretion of a judge in such a matter, I think that the judge in this case did proceed on a wrong principle in refusing this application to amend out of hand, and I think that way of dealing with the matter did involve a real injustice on the defendants who were thus in effect deprived of the only defence left to them in the action once it was put as an action in which the personal liability in equity enunciated in the *Diplock* case [27] and in *Nelson* v. *Larholt* [28] was to be relied on; once that appeared, as far as I can see the plea of purchaser for value became of vital importance.

For the reasons I have endeavoured to state, in my view this appeal should be allowed so far as it is an appeal against the refusal of Danckwerts J. of the application to amend. The necessary consequence of that is that the order of Danckwerts J. must be discharged and the case must go back for a new trial on the footing that the defendants are to be entitled to amend their defence in accordance with the proposed amendment exhibited to the affidavit produced.

[26] 55 T.L.R. 676.
[27] [1948] Ch. 465.
[28] [1948] 1 K.B. 339.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.

Romer L.J. I agree, and if I add a very few words of my own, it is only because we are differing from the judge and because the position which has arisen seems to me to be a very unusual one. As the judge said, both the plaintiff company and the defendant company were innocent victims of the fraud of a man called Titley, who was the plaintiffs' auditor and was a director of the defendant company, and the question arises as to which of the two companies is to pay for his misdoing.

It seems to me it would be highly unsatisfactory that either of the innocent parties should have judgment entered against them for the considerable sum which is in question without having had an opportunity of presenting every defence on which they desire to rely and of having it considered and dealt with by the judge, for otherwise the unsuccessful party would not unnaturally think that he had not received justice and would feel that he was under a grievance.

The defendants desired before the judge, and desire now, to amend their defence by pleading that they gave value for the cheques which they received from Titley, and they desired to introduce that as an additional defence to their other defences when the matter was before Danckwerts J., but he refused to allow them to do so. I have a note of seven points on which Mr. McKinnon relied as showing that the judge was right in refusing them leave and that we should be wrong if we gave the defendants leave now. Having regard to the judgment which my Lord has just delivered, I need do little more than summarize the points on which Mr. McKinnon relied, and I do not take them necessarily in the order in which he mentioned them.

He in the first place referred to certain correspondence which passed and he said that the letters showed that all the relevant facts and issues were known to the defendants long ago and they should have pleaded them in their defence if they wanted to rely on them. But it seems to me the answer to that is that the only function of a defence is to plead to allegations which are made in the statement of claim unless, which is not the case in the present proceedings, the defendants raise a counterclaim. I agree with my Lord that what has been for convenience referred to as the "*Diplock*" point in the discussion before us, did not emerge from the statement of claim. My Lord has referred to this question in detail and I will not refer to it again except to say that paragraph 3, which Mr. McKinnon said does really give birth to this "*Diplock*" point, does not appear to me to do anything of the kind. Paragraph 3 is an allegation of constructive trusteeship of the defendant company on the ground that they had notice of the fraudulent breach of trust by Titley. It does not seem to me that that would convey to anybody reading it that the plaintiffs were, apart altogether from any question of notice, relying on the "*Diplock*" point, and accordingly, it was not necessary to plead value in answer to paragraph 3.

Then, says Mr. McKinnon, be that as it may, the statement

of claim as a whole, including as it does a claim based upon tracing, would render it obviously desirable for the defence to raise the plea of purchaser for value without notice. I do not myself take that view, but in any case such a plea would be vital, on the assumption that Mr. Cross is wrong on the main point on which he started to open the appeal, on the "*Diplock*" point and either irrelevant, or not really relevant, to the rest of the statement of claim as delivered.

Then the third point Mr. McKinnon took was that the defence showed that the defendants still did possess the sums which they received from Titley. With regard to that I really have nothing to add to what my Lord has said. The judge did not read it in that way: I should not read it in that way, and if it is read in that way, then nothing whatever, so far as I can see, would be left in the defendants' defence had they intended to admit they still had in their hands the sums which they received in breach of trust from Titley.

The fourth point was that when Danckwerts J. refused leave to amend when Mr. Settle asked for leave, the defendants should have come straight to the Court of Appeal to appeal against that refusal. As to that I think that such a course would have been highly inconvenient and in my experience it would have been unusual.

Then, says Mr. McKinnon, we are being asked to overrule a matter which is essentially one of discretion vested in the judge and to come to a conclusion which did not commend itself to him. I realize the weight of that, but, after all, the question that justice should be done between litigants to my mind is paramount, and if justice can only be effected by disturbing the exercise of the discretion of the judge in such a matter as this, then it is the bounden duty of this court to give effect to the view they have formed themselves, as indeed was done in the case of *Tildesley* v. *Harper*,[29] to which my Lord has referred.

Then the sixth point to which Mr. McKinnon referred was—and I think perhaps this is more directed to costs, in fact—that Mr. Settle ought to have produced before Danckwerts J. when he made his application for leave to amend a piece of paper on which was written the precise terms and form of the amendment which he desired to introduce into the defence, in accordance with what Lord Greene stated to be a convenient practice in *Derrick* v. *Williams*.[30] I cannot myself think much would have come of that if Mr. Settle had adopted that course. The nature of the amendment that he desired to make was perfectly obvious in the context in which the application was made, and to think he would have been any better off if he had asked for an adjournment to write it out and put it into exact form and bring the matter to the notice of the judge again, is to my mind unrealistic in the extreme. Danckwerts J. knew perfectly well what the

[29] 10 Ch.D. 393.

[30] 55 T.L.R. 676.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Romer L.J.

nature of the amendment was and he said that he was not prepared to admit it. As I say, I do not think that Mr. Settle would have advanced the position in the slightest if he had produced the precise form of the proposed amendment.

Then, finally, Mr. McKinnon said in relation to the amendment which was handed to us yesterday by Mr. Cross and the affidavit which exhibited it, that in fact the affidavit showed no consideration by the company and that all that happened was that Titley at most made a loan to the defendant company. That obviously is not a matter which can be tried out now. I am quite satisfied, whether or not the defendants will succeed in this case either on that point or on any other, that the affidavit does at least show a prima facie question to try on the question of value, and in as much as I take that view, and there is no question of any want of bona fides on the part of the defendant company, I am clearly of the opinion that justice can only be done in this case by allowing the defendants to amend in the way they have indicated so that that defence and all the other defences may be brought fully to the attention of the judge, so that in the light of them he can finally decide which of these two unfortunate companies has to pay for the fraud of Titley.

I agree, therefore, that the defendants should be allowed to amend and the matter should be remitted for a rehearing.

Willmer L.J. I agree that this appeal should be allowed for the reasons stated by my Lords, but as we are differing from the judge I will just add a few words of my own.

It is objected that we are being asked to overrule the judge's exercise of discretion, whereby he refused the application which was made to him for leave to amend the defence. That, of course, is a formidable argument, but it seems to me that the judge's ruling on the point is open to the objection that it offends against what I conceive to be the principle enshrined in Order 28, rule 1, namely, that "all such amendments shall be made as "may be necessary for the purpose of determining the real "questions in controversy between the parties." This is a case in which, if the plaintiffs were to have their way, we should have had to deal with this appeal on the basis of a hypothetical state of facts. Her Majesty's courts exist, as I understand it, for the determination of real disputes between real people, and not for the purpose of arriving at academic decisions on hypothetical facts. When Mr. Cross started to open the appeal he frankly stated that, unless leave to amend the defence were granted, he would have to go on with the presentation of his argument on the basis of a hypothetical state of facts, as though a moot were being conducted at a university. That seems to me to offend against the principle, and I refer not only to the rule I have mentioned but also to the decision of this court in *Tildesley* v. *Harper*,[31] to which my Lord has already made

[31] 10 Ch.D. 393.

reference. In that connexion perhaps I may stress the words used by Thesiger L.J. in his judgment,[31] which I repeat: "The "object of these rules is to obtain a correct issue between the "parties, and when an error has been made it is not intended "that the party making the mistake should be mulcted in the "loss of the trial."

The question before us relates to an allegation which the defendants now desire to make, namely, that they gave value for the cheques received from Titley. They did not make that allegation in the first instance when the defence was delivered because, as we were told, their advisers misapprehended the nature of the case which the plaintiffs eventually sought to make against them. There has been much discussion during the hearing of this appeal as to whether or not the defendants' advisers were justified in misapprehending the case that was to be made. As to that I do not wish to add anything to what my Lords have said, except this observation—and it is perhaps an observation which comes all the better from me as this is a branch of the law in which my experience in the past has not lain. It is quite clear that it is a rather obscure question which has been raised in this case, and one on which there is little authority. Indeed, as has been pointed out by my Lord, the judge's decision was ultimately based on a dictum of Denning J. in *Nelson* v. *Larholt*,[32] a dictum which, it has been properly pointed out to us, was not in fact necessary for the decision of that case. It occurs to me that the very fact of the obscurity of the point at issue makes it all the more necessary that the issues of fact should be clearly defined in the pleadings, so that the court may have every opportunity of ascertaining the real facts and applying its judgment to a real state of facts. Quite clearly if the defendants are allowed to amend, and can prove that they gave value for the cheques received from Titley, the case will necessarily wear a very different complexion from that which it had as decided by the judge. Indeed, the main part of his judgment—and by that I wish to be understood as excluding so much of his judgment as dealt with the Statute of Limitations—may turn out to be quite irrelevant to the real facts of the case. If, on the other hand, the defendants fail to prove that they gave value for the cheques received, then we may get back to the position which has already been reached; but until the real facts have been ascertained, we are in the realms of hypothesis.

I should like to add this, and I do so without wishing to be thought to be in any way expressing any view as to the merits of the dispute which has emerged. For myself I find it difficult to treat this question of giving value for the cheques in isolation from the other question, which was clearly raised on the pleadings, as to whether or not the defendants had notice of the fraud and breach of trust on the part of Titley. If the defendants

[32] [1948] 1 K.B. 339.

C. A.
1958
G. L. Baker Ltd. v. Medway Building and Supplies Ltd.
Willmer L.J.

in the event fail to prove that they gave value for the cheques, the position would be that they, a trading corporation, had received a wholly unexplained gift of a very considerable sum of money from one of their own directors, since we have been told Titley was a director of the defendant company. I should have thought, if such a state of facts emerged, namely, the receipt of such a large sum of money without showing that any value was given for it, that would be at least sufficient to have put the defendants upon inquiry as to whether Titley was really acting bona fide or not; and that in turn must, I should have thought, be relevant to the issue as to whether the defendants did or did not have notice of Titley's fraud and breach of trust. I mention that because Mr. McKinnon told us that, having regard to the way the trial proceeded before the judge, he abandoned his allegation that the defendants had notice of the breach of trust. It seems to me quite clear, and this was readily acceded to by Mr. Cross, that if this case is to go back for a new trial, all points must be open to the parties; in particular, it would be wrong to hold the plaintiffs to their counsel's abandonment of the point that the defendants had notice of the fraud. That point should, in my judgment, be fully open to the plaintiffs if on the fresh trial they desire to take it.

There is one other matter I wish to deal with quite briefly, and that is with regard to the formulation of the amendment which it has been sought to make. I agree with what my Lords have said with regard to the failure to reduce the proposed amendment to writing at the trial. Having regard to the way in which the matter was dealt with at the trial, I apprehend it would have been a useless formality merely to write out on a piece of paper that which the judge had already refused to allow. But when the case was to come to this court, it seems to me different considerations applied. I venture to refer to the provisions of the rules governing appeals which will, I think, be seen to justify what I have to say. Order 58, rule 3 (2) says: "Notice of appeal "may be given either in respect of the whole or in respect of any "specified part of the judgment or order of the court below; and "every such notice shall specify the grounds of the appeal and "the precise form of the order which the appellant proposes to "ask the Court of Appeal to make." It occurs to me that if the appellants proposed to ask the Court of Appeal for leave to amend their pleading, the provisions of that rule necessitated that the proposed amendment to the pleading should be formulated in the notice of appeal. That was not done in this case, and, indeed, the proposed amendment was only reduced to writing and handed to us yesterday. I venture to raise that point because this is a rule which is of comparatively recent origin, and it may be that its implications have not yet been fully appreciated. Whether or not it is of significance in this case is a matter which I think the parties should have an opportunity of arguing, in so far as it concerns the question of costs.

[An order was made that the appeal should be allowed, the order of Danckwerts J. discharged, and that the matter should go back to chambers, either side being at liberty to amend their pleadings as they might be advised. Costs up to and including hearing before Danckwerts J. to be reserved and dealt with at new trial. One-half of defendants' costs to be paid by plaintiff.]

Appeal allowed.

Solicitors: *Alfred Neale & Co.; Bell & Ackroyd.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* SAHAL'S WILL TRUSTS. ALLIANCE ASSURANCE CO. LTD. *v.* H.M. ATTORNEY-GENERAL AND OTHERS.

1958
Oct. 30.
Danckwerts J.

[1958 S. No. 2234.]

Charity—Children—Deprived of parents—Gift of dwelling-house for use as children's home—Gift of fund for benefit of children in home—Whether valid charitable gifts—Charitable Uses Act, 1601 (43 *Eliz.* 1, *c.* 4), *preamble.*

By clause 8 (i) of his will a testator devised his dwelling-house to the S. Corporation "Upon trust to use and maintain the same "as a children's home" and by clause 8 (iii) he bequeathed to the corporation the sum of £2,000 on trust to invest the same as a fund and apply the annual income therefrom "for the benefit of such "one or more of the children for the time being resident in the "said house," at the corporation's discretion. Clause 8 (iv) provided that if at any time "the said corporation shall discontinue the "use of the said dwelling-house" as a children's home, then the house should be held on trust to use and maintain it as "a hostel for "young soldiers sailors airmen or merchant seamen or for poor "aged and infirm people of the neighbourhood," the fund to be applied in purchasing "extra comforts for the residents in such "hostel." The corporation had power to establish and maintain homes for the reception and care of children in need of care and protection and hostels for poor, aged and infirm people. They considered that there was need for a hostel of the latter kind in the district and that the house was suitable for it.

On a summons to determine whether the trusts contained in clause 8 concerning the house and money were valid charitable trusts and whether the corporation could hold and apply the trust property in accordance with clause 8 (iv) without having first held and applied it in accordance with clause 8 (i):—

Held, (1) that the gift of the dwelling-house for the purpose of founding a children's home by the corporation was a valid charitable gift, the children being a class of persons within the ambit of charity.

In re Cole [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102 distinguished.

1958

Sahal's Will Trusts, *In re.*

But that the gift of the money "for the benefit of such one or "more of the children for the time being resident in the said house" was void for perpetuity.

In re Cole, ante, applied.

(2) That the gift of the dwelling-house in clause 8 (iv) as a hostel for young soldiers, sailors, airmen or merchant seamen, or for poor, aged and infirm people of the neighbourhood was a valid charitable gift, its purpose coming within the general terms of the preamble to the Statute 43 Eliz. 1, c. 4, but that the gift of the fund was again void for perpetuity.

(3) That the trust contained in clause 8 (iv) of the will was a trust alternative to and subject to the primary trust contained in clause 8 (i) and it was unnecessary for the corporation first to found a children's home before carrying out the terms of the trust contained in clause 8 (iv).

Adjourned summons.

The plaintiffs, the Alliance Assurance Co. Ltd., were the executors of the will of the testator, Isaac Felix Sahal, dated November 23, 1953. By clause 8 (i) of the will the testator devised his dwelling-house, known as "Summerhill," in Salford, Lancashire, to the second defendant, the Salford Corporation, "Upon trust to use and maintain the same as a children's home "to be known as Sahal House and it is my desire that the said "home shall be conducted as far as possible along domestic and "not along institutional lines and without discrimination what-"soever on grounds of race religion colour or creed and that food "prepared in accordance with the requirements of the Jewish "religion shall always be available." By clause 8 (ii) he bequeathed certain pictures in his house to the corporation and expressed his wish that they should continue to hang in the home. By clause 8 (iii) he bequeathed to the corporation the sum of £2,000 on trust to invest the same as a fund to be known as the "Sahal Welfare Fund" in certain authorized investments, "and to apply the yearly income therefrom for the benefit of such "one or more of the children for the time being resident in the "said house" at the corporation's discretion: "(iv) Provided "always that if at any time the said corporation shall discontinue "the use of the said dwelling-house as a children's home as afore-"said the said dwelling-house shall be held upon trust to use and "maintain the same as a hostel for young soldiers sailors airmen "or merchant seamen or for poor aged and infirm people of the "neighbourhood and the said fund . . . and the income therefrom "shall thereafter be applied in purchase of extra comforts for the "residents in such hostel."

The testator gave his residuary estate to the plaintiffs on trust to distribute it among such charitable organizations, other than those specifically mentioned in the will, as they should in their absolute discretion think fit. The testator died on May 5, 1956.

The corporation had power to establish and maintain houses for the reception and care of children in need of care and protection, and also power to establish and maintain hostels for poor, aged and infirm people in the district.

The corporation considered that there was need for such a hostel and were prepared to accept the devise and the endowment if they could use the dwelling-house as such a hostel.

By originating summons the plaintiffs asked the court to determine, inter alia, (1) whether the trusts declared by clause 8 (i) (ii) and (iii) of the will concerning the house and chattels comprised therein and the fund were valid charitable trusts, or whether the same were void for perpetuity; (2) in case the said trusts were valid charitable trusts, whether the second defendant would be at liberty to hold and apply the trust property in manner provided for in clause 8 (iv) without having first held and applied it in manner provided by clause 8 (i).

J. A. Wolfe for the plaintiffs.
Denys Buckley for the Attorney-General.
H. C. Easton for the Salford Corporation.
John Brunyate for the Solicitor-General.

The only case cited in argument is referred to in the judgment.

DANCKWERTS J. stated the facts and continued: I should not have found any difficulty whatever in coming to a conclusion that the gift of the house and the gift of the fund were both charitable but for the decision of the Court of Appeal in *In re Cole*.[1] There the defendants, the East Sussex County Council, maintained a house called Southdown House under the powers contained in section 15 of the Children's Act, 1948, which was a house for the accommodation of children committed to their care. The headnote says: "A testator, by clause 6 of his will, devised to his "trustees two freehold houses upon trust to apply the income "therefrom 'for the general benefit and general welfare of the "'children for the time being in Southdown House . . . as a "'small token of my appreciation of the work carried on at such "'home.'"

The home the testator desires to found in the present case seems to be of a similar nature to that which was the subject of the bequest in *In re Cole*,[2] because the testator's intention was to found a home which the Salford Corporation would carry on under their statutory powers, to maintain therein children who needed care and control due to their lack of amenities of a home or environment, or, through the failure of their parents, required to be assisted by being put in a home of this kind. In that case a majority of the Court of Appeal held, upon the question whether or not a gift for the purposes of the endowment or maintenance of such a home as a children's home would qualify as a charitable trust, that the gift of such funds or the gift of the houses for the purposes of creating a fund for the general benefit or general welfare

[1] [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102.

[2] [1958] 3 W.L.R. 447.

1958

Sahal's Will Trusts, *In re.*

Danckwerts J.

of the children for the time being in the home was not a valid charitable trust. Lord Evershed M.R. dissented. The reasons for the conclusion reached by the majority appear to be that the funds applied for the purpose of supplying any sort of amenity in these homes, without apparently being necessarily one which was essential to the welfare of the children, involved a perpetuity, and the purpose was not to be regarded as charitable. Harman J. took the same view. That decision is, of course, binding upon me, and, if it covers the case which I have now to consider, I shall have to follow it. The Court of Appeal did, however, leave open the case of a gift for the endowment or maintenance of a house of this kind, and also left open the question of a gift for the purpose of founding a home of this kind for these types of children. For that reason, it seems to me that the present case, as to the general gift in the first sub-clause of clause 8 of the will, is not covered by the decision of the Court of Appeal. It appears to me on general grounds, which are to be found by analogy from the preamble to the Statute 43 Eliz. 1, c. 4, that this is a gift for a class of person which the ambit of charity covers, and, therefore, the gift of the house for the purpose of founding a children's home by the Salford Corporation is a valid charitable gift.

As to the fund, however—and the result is very unfortunate—it seems to me that I am bound by the terms of the decision of the Court of Appeal. I find myself unable to distinguish the terms of the gift contained in sub-clause (iii) of clause 8 of the will from the terms of the gift which was considered by the Court of Appeal in *In re Cole*.[3] Taking the grounds upon which the majority of the Court of Appeal came to the conclusion that they did, the present gift is more difficult to justify than the gift in *In re Cole*.[3] Accordingly, it seems to me that the gift of the fund was not a valid charitable bequest.

I will therefore declare that the gift of the house in clause 8 (i), and of the family portraits in clause 8 (ii), are valid charitable trusts, but that the gift of the fund given by clause (iii) is not.

I have now to consider the effect of the gift in sub-clause (iv) of clause 8 of the will. [His Lordship read the provision and continued:] Mr. Brunyate argued that the words should be construed in a strict manner so that the gift could not take effect unless the corporation had first started the children's home for some period and then had discontinued it. I do not think that that is the right way to deal with the clause. Common sense must come in even in the case of a will, and what the testator is really doing is giving an alternative trust which is subject to the primary trust which he has directed in the first sub-clause of clause 8 of his will. It would be absurd that the corporation should be required to construct a home for perhaps a day and then abandon it, and then turn to the second alternative

[3] [1958] 3 W.L.R. 447.

trust. Therefore it is unnecessary for the home ever to have been brought into being, and this trust is now valid. The two purposes, if they be purposes, and not one general purpose, are charitable, and come within the general terms of the preamble to the Statute of Elizabeth, which will be found described in Tyssen's Charitable Bequests, 2nd ed. (1921), p. 28. "The list contained in the "statute is as follows: (1) The relief of aged, impotent and poor "people." Pausing there, the testator has practically used the same phrase as regards the second purpose, and that is the one which the corporation desire to carry out, "for poor aged and "infirm people." "(2) The maintenance of sick and maimed "soldiers and mariners." I emphasize the word "mariners," because there is a reference here to "merchant seamen." "(3) "The maintenance of schools of learning, free schools, and "scholars in universities. (4) The repair of bridges," and so forth. "(5) The education and preferment of orphans. (6) The "relief, stock, or maintenance for houses of correction. (7) "Marriages of poor maids. (8) The supportation, aid, and help "of young tradesmen. . . . (9) The relief or redemption of "prisoners or captives. (10) The aid or ease of any poor inhabi-"tants concerning payment of fifteens, setting out of soldiers, "and other taxes."

From the last it looks as if the object of the statute was the relief of poor inhabitants rather than soldiers, but the decisions have gone a long way from that interpretation in a number of cases in which what may be called "service charities" have been held to be objects of a charitable nature. The second result is that the purposes described by the testator in this clause of his will are valid charitable purposes. The position as regards the gift of the fund will not be the same, because I have held as a result of the decision of the Court of Appeal in *In re Cole*[4] that the fund is not held upon charitable purposes in the first instance, and, therefore, suffers from the prohibition against perpetuities, and so the alternative gift will fail here as well.

Accordingly, it seems to me that the Salford Corporation are entitled to accept the gift of the house for the purposes of a home for aged and infirm people in the neighbourhood, but that the gift with regard to the fund fails.

Declarations accordingly.

Solicitors: *Skelton & Co., Manchester; Treasury Solicitor; R. Ribblesdale Thornton, Salford.*

P. P.

[4] [1958] 3 W.L.R. 447.

[PROBATE, ETC., DIVISION.]

1958
Oct. 27, 28.

Mr. Commr. Latey Q.C.

* LOCK *v.* LOCK.

Husband and Wife—Divorce—Insanity—Care and treatment—Incurable unsoundness of mind—Divorce (Insanity and Desertion) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 54), *s.* 1.

A husband petitioned for divorce on the ground of the incurable unsoundness of mind of the wife, who had been admitted to a mental hospital on March 9, 1951, in pursuance of a three-day order under section 20 of the Lunacy Act, 1890, had become a voluntary patient on March 18, 1951, and had remained as such ever since. The Official Solicitor, as guardian ad litem of the wife, by an answer filed in June, 1957, denied that the wife was incurably of unsound mind or had been continuously under care and treatment within the meaning of section 1 (2) of the Matrimonial Causes Act, 1950. The Divorce (Insanity and Desertion) Act, 1958,[1] became law during the pendency of the suit.

At the hearing of the petition the medical superintendent of the hospital at which the wife was a voluntary patient was unable to state that the wife was incurably of unsound mind. By the consent of both counsel the report of a specialist who had examined the wife on behalf of the Official Solicitor was, exceptionally, admitted in evidence. This report was to the effect that the wife was incurably of unsound mind:—

Held, (1) that the general definition of care and treatment contained in the Act of 1958 avoided the objection raised in the answer.

(2) That, although the purpose of the Act of 1958 was to do away with certain technical bars to a divorce on the ground of incurable unsoundness of mind, it was none the less necessary to establish in all cases that the respondent was incurably of unsound mind and that matter was one for the court; that on the facts of the present case the wife was incurably of unsound mind and, having been under care and treatment for upwards of five years prior to the filing of the petition, the husband was entitled to a decree.

[1] Divorce (Insanity and Desertion) Act, 1958, s. 1: "(1) Notwithstanding anything in subsection (2) of section 1 of the Matrimonial Causes Act, 1950, or subsection (3) of section 6 of the Divorce (Scotland) Act, 1938, a person shall be deemed to be under care and treatment for the purposes of the said section 1, and under care and treatment as an insane person for the purposes of the said section 6, at any time when he is receiving treatment for mental illness—(*a*) as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands; or (*b*) as a resident in a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in paragraph (*a*) of this subsection. (2) For the purposes of the foregoing subsection a certificate by the Admiralty or a Secretary of State that a person was receiving treatment for mental illness during any period as a resident in any naval, military or air-force hospital under the direction of the Admiralty, the Army Council or the Air Council shall be conclusive evidence of the facts certified. (3) In determining for the purposes of the said section 1 or the said section 6 whether any period of care and treatment has been continuous, any interruption of such a period for twenty-eight days or less shall be disregarded."

Randall v. *Randall* [1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696 applied.

PETITION for divorce on the ground of a wife's incurable unsoundness of mind.

The marriage took place in 1926. There were three children of the marriage, two of whom were grown up and a third, aged 13 years, was in the husband's care. The wife became a victim of alcoholism which became accentuated when the parties were living in a distant colony where the husband was working. In 1951 she had to be sent home to England. On March 9, 1951, the wife was admitted to a mental hospital in Somerset under an order in pursuance of section 20 of the Lunacy Act, 1890, on the certificate of the medical officer. On March 18, 1951, she became a voluntary patient at that institution, and on July 24, 1951, she entered the Tone Vale Hospital, Taunton, still as a voluntary patient, and as such had been there ever since.

The husband presented his petition in December, 1956, and, in accordance with practice, the medical superintendent in charge of the patient swore an affidavit that it would not be detrimental to the mental condition of the wife to communicate the contents and purport of the petition to her, which he did. An answer was filed by the Official Solicitor as guardian ad litem for the wife in June, 1957, submitting in defence that she was not incurably of unsound mind and had not been continuously under care and treatment within the meaning of section 1 (2) of the Matrimonial Causes Act, 1950. During the pendency of the suit the Divorce (Insanity and Desertion) Act, 1958, became law.

In the course of the hearing the husband gave evidence, inter alia, that some years after the wife's original entry to hospital he began to live as husband and wife with his housekeeper, whom he now wished to marry. In respect of that relationship he prayed for the exercise of the court's discretion.

The medical superintendent of the Tone Vale Hospital, who gave evidence as to the wife's mental condition felt some difficulty as to the question whether a voluntary patient such as the wife was necessarily incurably of unsound mind. He gave medical evidence of certain ill effects on the wife's brain as the result of alcoholism and of her delusions as to persecution and thefts, but said that her mental condition improved, so that in 1952 he suggested that her husband should have her home under supervision. But the husband, with three children to look after with the aid of his housekeeper, did not see his way to accept the suggestion. The medical superintendent said that she was suffering from dementia and no further improvement was possible, though he did not think that she should be certified.

In those circumstances and since the present case was the first to be decided under the Act of 1958 Mr. Commissioner Latey Q.C., with the consent of both counsel, took the exceptional course of considering the report of a specialist deputed on behalf

1958

Lock
v.
Lock.

of the official solicitor to examine the patient. He reported that the patient had become a feeble-minded and childish person. She made unfounded accusations of theft, had no memory for anything, could not concentrate on any occupation, was quarrelsome and aggressive, her speech was slurred and her gait shuffling. In his opinion she needed much nursing attention, and in the light of present day medical knowledge was incurably of unsound mind.

Roger Ormrod Q.C. for the husband.

James Comyn for the Official Solicitor as guardian ad litem of the wife.

The case cited in argument is referred to in the judgment.

Cur. adv. vult.

Mr. Commissioner Latey, Q.C., reading his judgment, referred to the pleadings and continued: Under section 1 of the Matrimonial Causes Act, 1950, so far as it is relevant to the present case, a person of unsound mind was deemed to be under care and treatment while detained, inter alia, in pursuance of any order under the Lunacy and Mental Treatment Acts, 1890 to 1930, or while receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, provided that such treatment followed without any interval a period during which he was detained under any order under the Lunacy and Mental Treatment Acts, 1890 to 1930. As the pleadings stood, Mr. Comyn, for the Official Solicitor, was prepared to ask the court if the original three days order made on March 9, 1951, could or could not be regarded as an order within the meaning of the Matrimonial Causes Act, 1950. Since incurable unsoundness of mind was introduced as a ground for divorce by the Matrimonial Causes Act, 1937, there have been a number of judicial interpretations of what constitutes an order under the Lunacy and Mental Treatment Acts, 1890–1930, but it is unnecessary for me to dwell on this point because a new Act has been passed with the object of doing away with many of the technical bars to a petitioner's remedy in divorce for incurable unsoundness of mind, which have existed up to now. This is the Divorce (Insanity and Desertion) Act, 1958, which was passed and came into force on July 23, 1958. [The Commissioner referred to the terms of section 1 of that Act and continued:] Mr. Ormrod, for the husband, submits, and Mr. Comyn agrees, that the general definition of "care and "treatment" in section 1 avoids the objection raised in the answer. There is no doubt in my mind that that is the effect of the new section.

In all these cases, however, the court has to be assured that the patient is incurably of unsound mind within the meaning of the Matrimonial Causes Act, 1950, and usually that assurance is

given by the medical superintendent of the particular hospital, or his deputy. In this case, however, the medical superintendent at Tone Vale Hospital, felt some qualms about this, having regard to the question whether a voluntary patient like this woman was necessarily of unsound mind. This point under the new Act, by which care and treatment as a voluntary patient for five years without any certification facilitates a divorce on the ground of incurable unsoundness of mind, is clearly a matter of public importance, and I felt that I must consider it before giving judgment.

[His Lordship referred to the facts and the evidence of the medical superintendent of Tone Vale Hospital pointing out that certification was usually considered necessary when a patient became a danger to himself or others or was absolutely non compos mentis and helpless and continued:] In this case the wife, as a voluntary patient, must be considered at the present moment to have volition to stay in or leave the institution.

In all these cases where the Official Solicitor represents a patient, both in the latter's and the public interest, a specialist's report is always obtained on the patient's condition. By consent of both counsel I have seen the report of a well-known psychiatrist who examined the wife on behalf of the Official Solicitor and came to the conclusion that she was incurably of unsound mind.

There is no statutory definition of the formula "incurably of "unsound mind" in the Act of 1950. When this jurisdiction started in the hands of Lord Merriman P. he decided that it must be given a wide interpretation and decided on the facts of each case, and in *Randall* v. *Randall*,[1] which has been cited to me, Lord Merriman P. gave cogent reasons for this view. Though doctors may differ as to what is unsoundness of mind and whether or not it is incurable, it is for this court to follow the terminology of the statute and judicial authority thereon.

I, therefore, find on the facts here that this patient is incurably of unsound mind, and having been, for upwards of five years before the petition, under care and treatment as defined in the 1958 Act, I pronounce a decree nisi of divorce in the exercise of my discretion.

Finally, perhaps I ought to point out that, having regard to the recent policy of extending the range of voluntary patients and decertifying certified patients, it may well be that a large proportion of mental patients, whether voluntary or even certified, do not come under the category of persons incurably of unsound mind within the meaning of the Act. Each case of divorce in this class must be considered on its merits.

I ought also to add that it is not customary for the report of the specialist deputed on behalf of the Official Solicitor to examine the patient to be put in evidence, but in view of the fact that,

[1] [1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696.

1958

Lock
v.
Lock.

so far as I know, this is the first case which falls to be decided under the new Act, and owing to the peculiar circumstances, I thought it right to see that report and, indeed, to strengthen my judgment with its contents.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co. for Risdon, Weston, Witham & Hancock, Taunton; The Official Solicitor.*

E. J.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 21, 23, 24, 27, 28.

Paull J.

* DINIZULU *v.* ATTORNEY-GENERAL AND ANOTHER.

[1945 C. No. 728.]

Husband and Wife—Marriage—Register—Amendment—Court's jurisdiction — Whether mandamus lies to correct or erase entry — Authority to register marriage—Void marriage—Meaning of "marriage"—Marriage Act, 1836 (6 *&* 7 *Will.* 4, *c.* 85), *s.* 23—*Marriage Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 76), *s.* 61.

Crown Practice—Mandamus—Marriage register—Whether mandamus lies to correct entry.

The plaintiff, a British subject by birth, married a French subject in France in 1939 but retained her British nationality. In 1941, when that marriage still subsisted, she went through a form of marriage in England with a Pole. The entry in the marriage register contained a false statement, signed by both parties, that they had been previously married in Poland in 1938. On the question whether the plaintiff was entitled to an order of mandamus directing the registrar-general to correct or erase the entry in the register relating to the 1941 marriage:—

Held, (1) that the word "marriage" in section 23 of the Marriage Act, 1836, which section authorized the registrar to register all marriages solemnized, covered ceremonies of marriage even if the marriage was null and void because the spouse of one of the parties was still alive, and therefore the registrar was not acting ultra vires his powers in making the entry in the register since he was unaware that there was an impediment to the marriage.

(2) That although the words in section 61 of the Marriage Act, 1949,[1] giving power to correct an error in the form or substance of the entry, might cover a mistake in the conditions, they did not cover a situation where a party wanted to strike out the

[1] Marriage Act, 1949, s. 61: "(1) "A person required to register a mar- "riage under this Part of this Act "who discovers an error in the form "or substance of an entry made in "a marriage register book kept by "him shall not be liable to any "penalty by reason only that, within "one month after the discovery of "the error, he corrects the erroneous "entry in the presence of the parties "to the marriage to which the entry "relates or, in the case of the death "or absence of either of those parties, "in the presence of the superintendent registrar and two other credible witnesses, by entry in the "margin of the register book, without any alteration of the original "entry."

entry altogether or to make a note in the margin that the marriage was a void marriage, and mandamus would be refused.

ACTION.

The plaintiff, Princess Alexandria Albertina Palmer Dinizulu, was born a British subject in Zululand, South Africa, in 1913. On May 25, 1939, she married Marmaduke Maihai Sambra Cisse, a Senegalese French subject in France by a civil ceremony of marriage but did not thereby acquire French nationality and under the provisions of the British Nationality and Status of Aliens Act, 1933, retained her British nationality. At the outbreak of war the plaintiff was in England. She tried to rejoin her husband in France but was unable to do so. In December, 1940, she met a Pole named Dobrowolski who suggested that she could be taken out of the country by a Polish destroyer if she paid him £500. From information in a letter written subsequently by the plaintiff's solicitors it appeared that Dobrowolski had suggested that if she could obtain a certificate of marriage as his wife that would enable her to obtain a passport as a Polish subject.

The register of marriages solemnized in Holborn showed that a man named Dyouniz Dobrowolski married on January 16, 1941, Alexandria Albertina Dobrowolski formerly Palmer-Dinizulu at the register office at Holborn; under column 4 it stated: "Previously married at St. Patrick's Roman Catholic Church, "Warsaw, Poland on September 17, 1938." That entry was signed by Dyouniz Dobrowolski and Alexandria A. Dobrowolski. There were two witnesses names and the name of the registrar who performed the ceremony.

The plaintiff claimed, inter alia, an order of mandamus directed to the registrar-general directing him to correct or erase the entry in the marriage register, and alleged that the entry was completely false and that she had never attended the register office at all.

W. T. Wells, Q.C., F. M. Drake and *Roland Brown* for the plaintiff.

G. D. Roberts, Q.C., Rodger Winn and *J. G. Hull* for the defendants.

The judgment is reported solely on the question whether an order for mandamus would lie against the registrar-general. No cases were cited in argument on this point.

PAULL J. stated the facts, found that the plaintiff was lawfully married to Cisse on May 25, 1939, that she did go through a ceremony of marriage with Dobrowolski at the Holborn Register Office on January 16, 1941, but that she did so in order to try to join her husband, and that the statement as to the previous marriage in Warsaw was false, and continued: There

1958

Dinizulu v. Attorney-General.

Paull J.

has been an interesting argument on the right to grant an order of mandamus against the registrar-general to correct or to erase the entry in the marriage register. It is said, on behalf of the plaintiff, that the only power to make an entry in the register is contained in the provisions of the Marriage Act, 1836. By section 20 of that Act, a marriage may only be solemnized provided there is no lawful impediment to the marriage. Here, it is said that there was a lawful impediment and, therefore, no marriage was in fact solemnized. By section 23, the registrar is only authorized to register all marriages solemnized. The plaintiff's counsel says, therefore, that the registrar-general was acting ultra vires when he made the entry on January 16, 1941, and that that is not affected by the fact that he was acting in perfect good faith.

It is contended, therefore, that there is a power in the court to order the erasure of the entry as an act done ultra vires the power of the registrar-general, and that the court ought to exercise its power to order a mandamus since the act of the registrar-general was ultra vires his powers.

It is pointed out, however, by Mr. Roberts that in earlier Acts of Parliament the words "married" and "marriage" are used where a ceremony of marriage has taken place which is afterwards declared void. Thus, in the Marriage of Lunatics Act, 1811, it is declared that if a lunatic shall marry, the marriage is null and void. The words are "shall marry" and not "shall go through a ceremony of marriage." Similarly, section 22 of the Marriage Act, 1823, provides that " . . . where "persons inter-marry in other than authorized buildings or "acquiesce in the solemnization of marriage by persons not in "holy orders such marriages shall be void."

It follows, says Mr. Roberts, that the word "marriage" in section 23 of the Marriage Act, 1836, covers ceremonies of marriage even if the "marriage" is one which is null and void because the husband of one of the parties is still alive.

In my judgment, this argument prevails. I cannot think that the registrar was acting ultra vires in making the entry in the register unless he knew that there was an impediment to the marriage, and there was no suggestion of that fact.

The next argument was that I ought to grant a mandamus ordering the registrar-general to correct the entry by either striking it out or making an entry in the margin deleting the condition and stating that one of the parties was already married to another person. I was referred to section 61 of the Marriage Act, 1949, and certain regulations made under that Act. Section 61 is the only section giving the registrar-general power to correct entries.

I hold that the words in that section which give the power to correct an error in the form or substance of the entry may cover a mistake in the conditions—I make no decision as to that—but do not cover a situation where a party wants to strike

out the entry altogether, or to make a note in the margin that the marriage was a void marriage.

With regard to the argument as to correcting the register, in any event mandamus is a discretionary remedy, and I should not exercise my discretion in favour of the plaintiff in this case on the question of correcting the entry since she, herself, clearly consented to that entry being made.

That means that the action as framed fails.

Order of mandamus refused.

Solicitors: *Spector & Spector; Treasury Solicitor.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

* WOODWARD *v.* KOESSLER.

1958
July 30.

Lord Goddard C.J., Donovan and Ashworth JJ.

Criminal Law—Carrying offensive weapon—"Offensive weapon"—Boys breaking into cinema—Sheath knife used to frighten caretaker—Whether knife an offensive weapon—Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (4).

A boy, who was under 16 years of age, was charged with having an offensive weapon, namely, a sheath knife, in a public place contrary to the Prevention of Crime Act, 1953.[1] The boy had attempted, together with some other boys, to break into a cinema, and had been using a sheath knife to force open the door. When the caretaker accosted them, the boy went up to the man and threatened to strike him with the knife.

The justices found that the knife was not an offensive weapon and dismissed the charge. On appeal:—

Held, that, since intimidation was a form of injury and the boy had obviously intended to frighten the caretaker with the knife, the knife was an offensive weapon within the Prevention of Crime Act, 1953; it mattered not that the boy's initial intent in carrying the knife was only to use it for breaking into the cinema.

CASE STATED by Reading justices.

The following facts are taken from the judgment of Lord Goddard C.J.: On March 20, 1958, a boy, who was under 16 years of age, was charged before the Reading justices, sitting as the

---

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Prevention of Crime Act, 1953, s. 1: "(1) Any person who without "lawful authority or reasonable "excuse . . . has with him in any "public place any offensive weapon "shall be guilty of an offence . . . "(4) In this section . . . 'offensive "'weapon' means any article made "or adapted for use for causing "injury to the person, or intended by "the person having it with him for "such use by him."

1958

WOODWARD v. KOESSLER.

Reading juvenile court, that he, "without lawful authority or "reasonable excuse, had with him in a public place called Thorn "Street an offensive weapon, namely, a sheath knife, contrary "to section 1 of the Prevention of Crime Act, 1953."

The boy, together with some other boys, had tried to break into the Odeon Cinema at Reading by means of an iron bar and a sheath knife. The sheath knife was of a type commonly used by boy scouts and was very much like a dagger. The boy had taken the knife out of its sheath, and had used it in an endeavour to force the door of the cinema. When the elderly caretaker came to the door, the boy, who was holding the knife in his hand, went up to the caretaker in a threatening manner, as if to strike with the knife, and said to the man: "Can you see this?"

It was contended for the prosecutor that the knife was an offensive weapon per se, or alternatively, that it was proper to infer that the boy intended to cause personal injury with it. It was contended for the boy that, on the facts, there was no evidence of intent to injure, or alternatively, intent to injure did not form part of his initial intent in carrying the knife.

The justices were of opinion that the boy was not carrying an offensive weapon.

Victor Durand Q.C. and *Gilbert Rowntree* for the prosecutor.
Anthony McCowan for the boy.

The following cases were cited in argument: *Reg.* v. *Jura*,[2] *Reg.* v. *Hodgson*.[3]

LORD GODDARD C.J. stated the facts and continued: The words of the definition of "offensive weapon" in section 1 (4) of the Prevention of Crime Act, 1953, are rather obscure: "'Offensive "'weapon' means any article made or adapted for use for "causing injury to the person, or intended by the person having "it with him for such use by him." Perhaps it could be said that the sheath knife was not made for the purpose of causing injury, though I do not know what other use these sheath knives or flick knives have, but, assuming it is like a razor, which is made primarily for the purpose of shaving and not causing injury, where I think the justices have gone wrong is in holding, because the boy said he did not intend to cause injury, that that was conclusive. The fact is that they have taken much too narrow a view of the words "causing injury," because obviously the boy did intend to cause injury; frightening a person, intimidating a person, is causing injury. If we were to hold that this young boy with this shocking weapon going up to an elderly man and saying: "Can you see this?" was not being in possession of an offensive weapon for causing injury, it would be driving a coach

[2] [1954] 1 Q.B. 503; [1954] 2 W.L.R. 516; [1954] 1 All E.R. 696.

[3] [1954] Crim.L.R. 379.

and four through this useful Act. It would mean that it would hardly ever be possible to secure a conviction. We know perfectly well that the reason why the definition is rather obscure and is not a very easy one in some respects to construe is because one of the weapons, which these young hooligans like to use as much as another, is a bicycle chain. Of course that is not made for injury, but if a boy swinging a bicycle chain and saying, "Look out" is not using an offensive weapon, then I do not know what is an offensive weapon.

In my opinion, this appeal must be allowed and the case must go back to the justices with an intimation that the offence was proved, and a reminder to the boy that there are such places as detention centres.

As this is the last case we shall be trying these sittings, I should like to say that we wish those who have the power of making rules could find some way of speeding up the stating of cases. This case was before the justices as long ago as March 20. The offence, indeed, was committed on February 18, and it is not disposed of and has been hanging over this boy till now. I am not thinking of him so much, but it is so much better that these cases should, if possible, be disposed of quickly. I am not blaming anybody in this case because the decision of the justices was given on March 20, 1958, so that they have had till June 20 to state a case, though I should think that this case, if anybody had sat down to it, could have been stated within a week of the hearing and the case would have been heard last sittings. However, that is no reason for not sending the case back with an intimation that an offence has been committed and some penalty must be imposed.

DONOVAN J. I agree. Mr. McCowan founds himself on the words "having it with him," and says that it must be found that the boy took the knife out with him with the intention of causing injury, and Mr. McCowan says that in the present case he took it out for the purpose of breaking into the cinema. I do not agree with that narrow interpretation of the words "having it with him." I think all one has to do is to look and see, for the purpose of ascertaining what the intention is, what use, in fact, was made of it. If it is found that the person did, in fact, make use of it for the purpose of causing injury, he had it with him for that purpose, and I think that is good enough and, to reinforce what my Lord has said, the evidence shows that he did have it with him for the purpose of causing injury. I might only add that, after he was taken into custody, he handed the knife unseen to one of his companions, so that when he was searched it would not be found on him. One wonders why, if he knew it was not for causing injury, he threatened the caretaker with it saying: "Can you see this?"

1958

Woodward v. Koessler.

Ashworth J. I agree with both judgments which have been delivered.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for G. F. Darlow, Reading; Dennis Berry, Reading.*

[PROBATE, ETC., DIVISION.]

1958 *Nov.* 20.

* PRACTICE DIRECTION (APPEAL).

Husband and Wife—Justices—Appeal to Divisional Court—Certificate of other pending matrimonial proceedings.

The President has directed that to enable the clerk of the rules, when listing a Divisional Court appeal against a magistrates' court order, to have due regard to any other matrimonial proceedings pending between the same parties, the appellant's solicitor should certify whether any such proceedings exist.

B. LONG,
Senior Registrar.

November 20, 1958.

[CHANCERY DIVISION.]

1958 *Oct.* 24.

Vaisey J.

* *In re* NORTH OF ENGLAND ZOOLOGICAL SOCIETY. NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL.

[1957 H. No. 968.]

Charity — Education — Zoological Society — Objects — Advancement of education—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

Rates and Rating—Social welfare, etc.—"Main objects"—Meaning—Distinction between objects and powers — Education — Zoological Society—Memorandum—Main objects to encourage study of zoology and kindred sciences—Whether main objects "charitable or . . . "otherwise concerned with the advancement of . . . education"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The plaintiff society was incorporated on May 9, 1934, as a company limited by guarantee. Clause 3 of the society's memorandum of association provided: "The objects of the society are:—"(a) To acquire and take over . . . and conduct as a scientific and "educational undertaking the business heretofore carried on as

"the Chester Zoological Gardens . . . (b) To promote, facilitate "and encourage the study of biology, zoology and animal "physiology . . . botany and horticulture and all kindred sciences "and to foster and develop among the people an interest in "and knowledge of animal life. (c) To establish, equip and "carry on and develop zoological parks or gardens and living "zoological collections . . . (d) To establish sanctuaries for all kinds "of wild life, particularly animal and bird sanctuaries . . ." Then followed a long list of other objects, including, inter alia, the building and provision of cafés, reading-rooms and other buildings for the convenience of visitors, the holding of public meetings, publishing books, raising funds, etc.

On a summons to determine whether on the true construction of section 8 (1) (*a*) [1] of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society was an organization which was not established or conducted for profit, and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare:—

Held, (1) that it was first necessary to distinguish the society's objects properly so-called from objects which were not in fact objects but merely powers, the objects properly so-called being "main "objects" within the meaning of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Cotman v. *Brougham* [1918] A.C. 514, 523, *per* Lord Wrenbury, applied.

(2) That the first three objects set out in clause 3 of the society's memorandum of association were the society's main objects, the remainder being not objects properly so-called but ancillary powers enabling the society to give effect to its main objects.

(3) That the main objects of the society were plainly charitable, being concerned with the advancement of education, and the society, therefore, came within the ambit of the section.

In re Lopes [1931] 2 Ch. 130 applied.

ADJOURNED SUMMONS.

The plaintiff society was incorporated on May 9, 1934, under the Companies Act, 1929, as a company limited by guarantee. It had owned and managed zoological gardens of about 145 acres containing some 730 animals, birds and reptiles, and situate at Upton-by-Chester, on the outskirts of the city of Chester. The capital value of the society's property was about £130,000, the principal sources of this being legacies, bank overdraft and an annual surplus of income over expenditure. The whole of such surplus had been spent on the society's property and no part had ever been distributed to members of the society. The main objectives of the society were to maintain livestock under proper conditions and to breed them and display them to the public in an instructive manner. To attain these objectives the society had built specially designed living quarters and enclosures in

[1] S. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides: "(1) This section "applies to the following hereditaments, that is to say—(*a*) any "hereditament occupied for the purposes of an organization (whether "corporate or unincorporate) which is "not established or conducted for "profit and whose main objects are "charitable or are otherwise concerned with the advancement of "religion, education or social welfare; . . ."

1958

North of England Zoological Society, *In re.*

which were cultivated tropical and other exotic vegetation as like as possible those natural to the species. Further, the society had built up a permanent and expert staff of keepers and gardeners. The gardens were visited annually by over 500,000 persons, of whom about 45,000 were school-children visiting as part of their school curriculum. The principal source of the society's income was from admission fees. The society had also built and equipped cafés where visitors could obtain refreshments, there being no other catering establishment on the necessary scale within a distance of two miles.

The memorandum of association of the society provided by clause 3 as follows: "The objects of the society are:—(a) To "acquire and take over as a going concern and conduct as a "scientific and educational undertaking the business heretofore "carried on as the Chester Zoological Gardens . . . by Chester "Zoological Gardens Limited, together with any part of the "real or personal property and assets of the company used in "connection with that business. . . . (b) To promote, facilitate "and encourage the study of biology, zoology and animal "physiology, aviculture, aquaria, ichthyology, entomology, "botany and horticulture and all kindred sciences and to foster "and develop among the people an interest in and knowledge of "animal life. (c) To establish, equip and carry on and develop "zoological parks or gardens and living zoological collections at "such places as the society shall determine. (d) To establish "sanctuaries for all kinds of wild life, particularly animal and "bird sanctuaries and to police in such manner and do all "things necessary for the protection of all animal and plant life "therein." The other objects as set out in the memorandum lettered from (f) to (aa) included taking leases of and purchasing property, and building houses and other buildings; to act as trustees of the society's funds; to send out expeditions to foreign countries to investigate animal life; to take any gifts of property for the purposes of the society; to raise contributions to the funds of the society by appeals and so on; to establish museums, libraries, aquaria, laboratories and lecture rooms for the advancement of knowledge; to create and award honours for services to the society; to publish the transactions of the society; to borrow money for the purposes of the society; to acquire businesses which the society is authorized to carry on; to advertise the parks and gardens; to invest the society's moneys in securities authorized by law; to hire orchestras and bands; to build and equip reading-rooms, lounges, cafés and shops for the sale of food, postcards and books required for the convenience of visitors, and to adopt a badge for the society. Clause 4 provided that the income and property of the society should be applied solely towards the promotion of the society's objects and no part should be paid by way of profit to members.

The society claimed to be entitled to the benefit of the provisions of section 8 of the Rating and Valuation (Miscellaneous

Provisions) Act, 1955, in respect of their zoological gardens and took out a summons to determine whether on the true construction of section 8 (1) (*a*) of that Act they were an organization which was not established or conducted for profit, and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

H. I. Willis Q.C. and *J. F. Coplestone-Boughey* for the society.

G. D. Squibb Q.C., D. G. Widdicombe and *D. M. Trustram Eve* for the rating authority.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Mellody*[2]; *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[3]; *Oxford Group* v. *Inland Revenue Commissioners*[4]; *Keren Kayemeth Le Jisroel* v. *Inland Revenue Commissioners*[5]; *Berry* v. *St. Marylebone Borough Council.*[6]

VAISEY J. This summons is issued by the North of England Zoological Society, as plaintiffs, against the Chester Rural District Council as defendants. The plaintiffs carry on an organization in the neighbourhood of the city of Chester, which is commonly known as the Chester Zoo. The summons seeks to ascertain the true meaning and construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and especially the words which I will now quote. Section 8 (1) tells us to what hereditament, that is, property, the section applies, namely, "any "hereditament occupied for the purposes of an organization "(whether corporate or unincorporate) which is not established "or conducted for profit and whose main objects are charitable or "are otherwise concerned with the advancement of religion, "education or social welfare."

The only question which arises is, what are the plaintiffs' main objects? In other words, which of their objects are main objects and which of their objects are not main objects? When I have found what the main objects are, I then have to ask myself, are those main objects charitable or not? If they are charitable, then the plaintiffs are within the ambit of section 8.

In memoranda of association one often finds a clause (to which great exception has been taken) saying that every object is to be read independently of all the other objects and is to have equal force with every object, and is not to be controlled or construed by reference to any other object or to the aim of the company, and is to be read in isolation as meaning exactly what it says, without any sort of qualification. No such clause or provision

[2] [1918] 1 Ch. 228.

[3] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

[4] [1949] 2 All E.R. 537.

[5] [1932] A.C. 650.

[6] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

1958

North of England Zoological Society, *In re.*

Vaisey J.

is to be found in the memorandum of association of the plaintiffs. Clause 3 of the memorandum enumerates what it calls the objects, and says nothing about their being construed independently of any other objects. It simply sets them out, lettered from (a) to (aa), one after the other, and from those I have to determine which of them are the main objects.

The expression "main objects" is nowhere defined, as far as I know. There is a fairly simple answer to this problem, because, in my view, there are two kinds of "objects"—I put the word "objects" in inverted commas—in this familiar kind of document, that is to say, objects properly so-called, as distinguished from objects which are not in fact objects so much as powers. That is the point which is dealt with in *Cotman* v. *Brougham* [1] in the speech of Lord Wrenbury [2]—and no greater authority on companies and the laws of companies can be found. I may perhaps mention that the same comment was made by myself some years ago in *In re E. K. Cole Ltd.*[3] In that case I called attention to the importance of not inserting a clause, which had become so common, making every sub-clause, heading or objects clause, independent of the other objects and, therefore, to be construed in isolation. When I try to find out which of the objects in a memorandum are properly to be regarded as main objects, Lord Wrenbury's speech gives me the requisite clue, and the proper significance to be attached to the phrase "main objects" is to be found in his speech. I think what is meant by "main "objects" in section 8 (1) (*a*) of this Act of 1955 is those objects which are really objects, excluding those objects so-called which are in fact nothing more or less than powers. The distinction has been drawn on other occasions, but I am quite content to base my decision on the conclusions of Lord Wrenbury in *Cotman* v. *Brougham*.[4]

Looking at the memorandum of association of the plaintiffs, I find that the first object (a) is to acquire, take over and conduct as a scientific and educational undertaking the business formerly carried on as the Chester Zoological Gardens by a previous limited company. Those words seem to me to be plainly indicative of a charitable purpose. Then we have (b) the second object: "To "promote, facilitate and encourage the study of biology, zoology "and animal physiology [and other subjects of a similar kind] "botany and horticulture and all kindred sciences and to foster "and develop among the people an interest in and knowledge of "animal life." That object seems to me to be plainly charitable. Then (c): "To establish, equip and carry on and develop zoo-"logical parks or gardens and living zoological collections at such "places as the society shall determine." In my judgment, those three paragraphs give the proper objects of the plaintiffs, and the other paragraphs in the memorandum, though they are objects in

[1] [1918] A.C. 514.
[2] Ibid. 523.
[3] [1945] 1 All E.R. 521.
[4] [1918] A.C. 514.

a sense, are not really objects so much as powers. I think that the remainder of these enumerated activities, to use a neutral word, with the possible exception of the reference to bird sanctuaries, are all of them not objects, and not main objects. They are ancillary powers to enable effect to be given to the main objects, which, to put it briefly, are to establish and carry on a zoological gardens or park. There, I think, one can stand on firm ground. Why were the plaintiffs incorporated? To take over and to run a zoological garden and park. That, I believe, is the answer to the question which I posed. When we come to the subsidiary objects, which, as I say, I regard not so much as objects but powers, all kinds of things are enumerated, for example, holding public meetings, publishing books, investing the moneys, engaging bands and orchestras, building and equipping restaurants and other buildings for the convenience of visitors to the society's undertaking, raising funds, applying to the authorities for licences, adopting a badge, and so forth. These are not objects for which the company was formed; they are merely powers.

When I get as far as that, I have some guidance from a well-established decision of Farwell J. in *In re Lopes*,[5] which related to the Zoological Society of London. There the headnote says[6]: "The objects of the Zoological Society of London as defined by "its Charter are 'The advancement of zoology and animal "'physiology and the introduction of new and curious subjects "'of the animal kingdom.' *Held*, that the first object was "clearly educational and the second object being on construction "merely in aid of the first, was also educational and (*semble*) it "was educational in itself. The society was therefore an educa-"tional charity, although in carrying out its objects it was "found necessary to provide its pupils with food and amuse-"ment. *Held*, also, that the second object necessitated and "involved the upkeep and improvement of zoological gardens."

I do not want it supposed that I am holding that anything which calls itself a zoo or zoological garden is necessarily charitable, and that it necessarily comes within the authority of *In re Lopes*.[7] I can imagine all kinds of cases where the presence of animals in an enclosed park or grounds is merely colourable. However, I see no ground whatever for differentiating the Chester Zoo from the London Zoo.

The question has been raised as to whether or not this is a profit-making organization in spite of the protestation against the making of profit which is to be found in its memorandum, but I am not convinced about that. I think that there was no question of profit here, and that the making of profit does not really enter into this matter at all. Mr. Squibb has argued that there was a serious point there, but he did not elaborate it to any great extent. He referred me to *Brighton College* v. *Marriott*[8] but I do not

[5] [1931] 2 Ch. 130.
[6] Ibid.
[7] Ibid.
[8] [1926] A.C. 192.

1958

North of England Zoological Society, *In re.*

Vaisey J.

propose to go into that part of the argument, because Mr. Squibb did not put it forward as the main point in his case, and, indeed, I do not think that it arises. If this case is carried to a higher court, however, he could advance an argument based upon the question of profit or no profit there.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [9] and *Berry* v. *St. Marylebone Borough Council* [10] show that I have to find that all, not merely some, of the main objects are charitable. I have come to the conclusion that all the main objects, which I have identified as being those under the headings of (a), (b), (c) and possibly (d) of clause 3 of the memorandum, are charitable, and that they together constitute what section 8 (1) (*a*) refers to as the main objects of the plaintiffs. That seems to me to conclude in their favour their claim to come within the subsection. I need not consider whether those objects are otherwise concerned with the advancement of education when once I have concluded that the main objects are charitable. It is quite clear, however, that those objects are concerned with the advancement of education, and in consequence I have come to the conclusion that the plaintiffs are within the purview of the subsection.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co. for Ouseley-Smith & Co., Chester; Preston, Lane-Claypon & O'Kelly for Gamon & Co., Chester.*

P. P.

[9] [1957] 2 Q.B. 573; [1958] 2 All E.R. 601.

[10] [1958] Ch. 406; [1957] 3 All E.R. 677.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1958 *Nov.* 17.

Lord Parker C.J., Cassels and Diplock JJ.

* REGINA *v.* AYU.

Criminal Law—Sentence—Overseas, sending offender back—Binding over—Recognizance—Power to make term of order that Nigerian offender should return to Nigeria.

A condition that a person should return to a specified country and not come back to England for a certain period cannot be inserted in a binding-over order made under the Justices of the Peace Act, 1361. Such a condition can be inserted in an order binding a person over to come up for judgment when called upon.

Where, therefore, a Nigerian was sentenced to 12 months' imprisonment and bound over at the expiration of that imprisonment to return to Nigeria and not to land in England for five years thereafter:—

Held, that such a condition could not be inserted in that binding-over order, and an order binding the appellant over to come up for judgment when called upon could not be made in addition to the 12 months' imprisonment; accordingly, the order would be quashed.

Reg. v. *McCartan* [1958] 1 W.L.R. 933; [1958] 3 All E.R. 140 explained.

APPEAL against sentence.

The appellant, James Ayu, a native of Lagos, Nigeria, came to this country in 1939. Since 1948 he had done no regular work whatsoever. He had some 16 previous convictions. He was convicted at a magistrates' court at Brighton of being found in a dwelling-house for an unlawful purpose and was committed to quarter sessions for sentence as an incorrigible rogue. The recorder (C. J. Doughty, Q.C.) sentenced him to 12 months' imprisonment and made an order "that at the end of any "imprisonment which he may undergo or at such earlier date as "the Home Secretary may direct he is bound over in his own "recognizance in the sum of £10 to accompany an escort to the "train, boat or aeroplane where he will be sent to Nigeria as soon "as arrangements can be made and that he does not land again "in this country for a period of five years thereafter. In default "of his so entering into such recognizance he will be imprisoned "for six months."

The appellant appealed against his sentence.

M. D. L. Worsley for the appellant.
C. J. T. Pensotti for the Crown.

LORD PARKER C.J. stated the facts and continued: Quite clearly if it is possible to make an order imposing a condition that he goes back to his country and stays there, so much the better, but the whole question is whether there is any power to make such an order. It seems clear that this is possible and, indeed, it has been done, in the case of an order binding a man over to come up for judgment when called upon. That is a bind-over to keep the peace and come up when called upon, given in lieu of sentence. Such a condition has been imposed in one or two cases and approved by this court, but we know of no case where such a condition can be inserted in a binding-over order under the Justices of the Peace Act, 1361. Indeed, when one comes to think of it, it would be rather startling if the jurisdiction which can be exercised by a single magistrate to bind over under that Act could be made on conditions of any sort.

The recorder here went into the matter with very great care, and he was minded if he could to make this order. As I understand it, he was anxious that the matter should come before this court to see whether it could be done. It may be that he was to some extent misled by *Reg.* v. *McCartan.*[1] That was a case

[1] [1958] 1 W.L.R. 933; [1958] 3 All E.R. 140.

C. C. A.
1958
REGINA
v.
AYU.
Lord Parker C.J.

which had been referred to the Court of Criminal Appeal under section 19 of the Criminal Appeal Act, 1907, by the Home Secretary. The real question there upon which the advice of the court was sought was whether it was possible to make it a condition of a probation order that a man should leave the country and go in that case to Northern Ireland, and the court in saying that they were clearly of opinion that no such condition could be made did go on to say it could be made a condition of a binding-over. Lord Goddard C.J.[2] quoted the words which he had used in *Reg.* v. *Flaherty*[3] in these terms: "I then called on the boy "and said: 'The court is going to bind you over in your own "'recognizances in the sum of £10 that you accompany an escort "'to the train, where you will be sent to Eire tonight or as "'soon as arrangements can be made, and you do not land again "'in this country for at least three years.'" On the face of that it might be thought that a condition was being inserted in a binding-over under the Act of 1361, but when one looks at the record it is quite clear that the order made in that case was an order made after the sentence had been quashed providing that he was to come up when called upon for judgment, and in effect by way of condition saying: "You will not be called up for judgment "if you go to Eire and reside there for three years without coming "back." That form of order, a binding over to come up for judgment when called upon, could not be made in this case in addition to the 12 months' imprisonment, and there being no power to make that condition part of a binding over under the Act of 1361 which the recorder could make as a magistrate, the order he made must be quashed leaving the sentence on this appellant as one of 12 months' imprisonment. I should add that this case shows very clearly the need which has already been canvassed, I understand, in other quarters for there being power to deport a man such as this.

Sentence varied.

Solicitors: *Registrar of the Court of Criminal Appeal; Town Clerk, Brighton.*

C. J. E.

[2] [1958] 1 W.L.R. 933, 935. [3] *The Times*, June 24, 1958.

[CHANCERY DIVISION.]

* VIENIT LTD. *v.* W. WILLIAMS & SON (BREAD STREET) LTD.

1958
Oct. 24.

Wynn-Parry J.

[1958 V. 752.]

Landlord and Tenant—Assignment of lease or underletting—Covenant not to assign or underlet without consent—Not to be unreasonably withheld—Refusal on grounds of superior landlords' refusal—Whether reasonable—Superior landlords not before the court—Relief—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 56 (1).

The plaintiffs were tenants of the defendants under a lease which contained a covenant not to assign, part with possession or underlet the demised premises "without the previous consent in writing "of the lessors or their superior lessors which consent shall not be "unreasonably withheld in the case of a respectable and responsible "assignee or underlessee . . ."

The plaintiffs were desirous of assigning the remainder of their term to a company of whom the uncontradicted evidence was that they were respectable and responsible assignees. The defendants stated that they were prepared to grant their consent provided that the superior lessors also consented; the superior lessors, however, were only willing to give their consent on conditions which were plainly unacceptable to the plaintiffs.

The plaintiffs, by this summons (to which the superior lessors were not made a party), asked for the following relief: that on the true construction of the lease, and in the events which had happened, (a) the failure and/or refusal of the defendants to consent to grant a licence to the plaintiffs to assign the said lease was unreasonable; (b) the refusal of the superior lessors to consent to the said assignment except subject to certain conditions was unreasonable, and (c) that, notwithstanding such refusal as aforesaid, the plaintiffs were entitled to assign the said lease:—

Held, (1) that the refusal of the superior lessors to give their consent to the assignment was unreasonable, but that it was not the practice of the court to make a declaration against a party in his absence.

(2) That, as the refusal of the superior landlords was unreasonable, the continued refusal of the defendants to give their consent was in itself unreasonable, and in the circumstances there would be a declaration on the basis of paragraph (a) of the summons.

ADJOURNED SUMMONS.

By a deed dated April 24, 1951, the defendants W. Williams & Son (Bread Street) Ltd. granted to the plaintiffs a sublease (hereafter referred to as the plaintiffs' lease) of the first floor of premises situate at No. 1, Berners Street, Oxford Street, for a term commencing on April 25, 1951, and ending on March 22, 1964. By clause 12 thereof the plaintiffs covenanted " . . . not at "any time during the said term to assign part with possession or "underlet lend deal with or grant any exclusive right of user of "the demised premises or any part thereof without the previous "consent in writing of the lessors or their superior lessors which

1958

Vienit Ltd.
v.
W. Williams & Son (Bread Street) Ltd.

"consent shall not be unreasonably withheld in the case of a "respectable and responsible assignee or underlessee . . ."

The defendants' lease was granted to them by a deed dated March 25, 1943, by J. Cowen & Co. Ltd. for a term of 21 years, and contained in clause 12 thereof a covenant similar to that in clause 12 of the plaintiffs' lease, except that the consent required was that "of the company" and not that of "the lessor or "superior lessors."

By a deed dated March 25, 1957, the plaintiffs granted an underlease to Bonny Bodices Ltd. of five rooms of the first floor of the said premises for a term ending on March 19, 1964, for which they obtained the consent of the defendants and of the superior lessors. That underlease contained a covenant against underletting or assignment without consent similar to that contained in clause 12 of the plaintiffs' lease.

The plaintiffs were now desirous of assigning the remainder of the term granted to them by the defendants in 1951 to a limited company, S. Walters & Co. Ltd., who were, the plaintiffs stated in an affidavit, a respectable and responsible assignee. Correspondence for the purpose of obtaining the necessary consents passed between the solicitors for the plaintiffs and defendants and those of J. Cowen & Co. Ltd., the superior lessors. By letters of June 25 and 30, 1958, the solicitors of J. Cowen & Co. Ltd. stated that that company were not prepared to grant a consent to an assignment by the plaintiffs to S. Walters & Co. Ltd. of the residue of the term of their (the plaintiffs') lease unless S. Walters & Co. Ltd. entered into a covenant with J. Cowen & Co. Ltd. that they would not assign, underlet or consent to any parting with possession or sharing of the premises and would not consent to Bonny Bodices Ltd. assigning, underletting or parting with possession or sharing of the said premises, such covenant to be guaranteed by Mr. Walters, a director of S. Walters & Co. Ltd. By a letter dated July 17, 1958, the plaintiffs' solicitors informed the solicitors of J. Cowen & Co. Ltd. that the conditions subject to which their clients were prepared to grant a licence were unreasonable and accordingly that they intended to take legal proceedings to obtain the appropriate declaration. J. Cowen & Co. Ltd. had not at any time withdrawn that condition.

The defendants through their solicitors had stated originally that they were willing to consent to the assignment if their superior lessors, J. Cowen & Co. Ltd., were also willing to grant the licence. By a letter of July 30, 1958, the defendants' solicitors were informed by the solicitors of J. Cowen & Co. Ltd. that they (the defendants) were prohibited by clause 12 of their lease from granting to the plaintiffs the licence to assign unless they had obtained the consent from J. Cowen & Co. Ltd., and that if the defendants did in fact grant such licence without the consent of J. Cowen & Co. Ltd. they would be committing a breach of their own lease. The defendants were aware that the conditions imposed by J. Cowen & Co. Ltd. were unacceptable

to the plaintiffs, but in a letter of September 4, 1958, their solicitors stated that the defendants were prepared to grant the licence but subject only to the consent of J. Cowen & Co. Ltd. On September 5, 1958, the plaintiffs' solicitors replied to that letter, stating that if their consent was subject to that of the superior lessors, then obviously it was tantamount to a refusal.

By this summons the plaintiffs asked for a declaration (a) that on the true construction of the lease dated April 24, 1951, made between the plaintiffs and the defendants and in the events which had happened, the failure and/or refusal of the defendants to consent to grant a licence to Vienit Ltd. to assign the said lease to S. Walters & Co. Ltd. was unreasonable; (b) that on the true construction of the lease and in the events which had happened, the refusal of the superior lessors to consent to the said assignment, except subject to certain conditions, was unreasonable and (c) that notwithstanding such refusal as aforesaid the plaintiffs were entitled to assign the said lease to S. Walters & Co. Ltd.

Leonard Lewis for the plaintiffs.
Christopher Heath for the defendants.

Cases cited in argument not referred to in the judgment: *Mills* v. *Cannon Brewery Co. Ltd.**; *F. W. Woolworth & Co. Ltd.* v. *Lambert.*†

WYNN-PARRY J. It will be observed that in the covenant by the defendants in the lease of 1943, there is no reservation for the benefit of "the superior lessors" such as is to be found in clause 12 in the lease of 1951, between the plaintiffs and the defendants. The first point with which I must deal is to consider whether or not the act of the superior lessors in refusing permission to the defendants to assign to S. Walters & Co. Ltd. is reasonable or unreasonable. In my judgment, having regard to the case in the Court of Appeal of *In re Gibbs & Houlder Bros. & Co. Ltd's Lease*,[1] such refusal was unreasonable. In that case it was held that the refusal of the licence was unreasonable, as the reason given for it was one which had no reference either to the personality of the proposed assignee or to the subject-matter of the lease. In the course of his judgment Pollock M.R. said[2]: "In *Bates* v. *Donaldson*[3] A. L. Smith L.J. says: 'It is not, in "'my opinion, the true reading of this clause that the permission "'can be withheld in order to enable the lessor to regain "'possession of the premises before the termination of the term. "'It was in my judgment inserted alio intuitu altogether, and "'in order to protect the lessor from having his premises used "'or occupied in an undesirable way or by an undesirable tenant

* [1920] 2 Ch. 38; 36 T.L.R. 513.
† [1937] Ch. 37; 52 T.L.R. 732; [1936] 2 All E.R. 1523.
[1] [1925] Ch. 575; 41 T.L.R. 487.
[2] [1925] Ch. 582.
[3] [1896] 2 Q.B. 241, 247; 12 T.L.R. 485.

1958

Vienit Ltd.
v.
W. Williams & Son (Bread Street) Ltd.

Wynn-Parry J.

"'or assignee, and not in order to enable the lessor to, if "'possible, coerce a tenant to surrender the lease so that the "'lessor might obtain possession of the premises.' His judg- "ment differs, in some important respects, from the judgment "which had been delivered by Kay L.J. in the same case. For "my part, I agree with A. L. Smith L.J. and I think that one "must look at these words in their relation to the premises, and "to the contract made in reference to the premises between the "lessor and lessee . . ."

Warrington L.J. said[4]: "When you look at the authorities— "I do not propose to go through them—this, at any rate, is plain, "that in the cases in which an objection to an assignment has "been upheld as reasonable it has always had some reference "either to the personality of the tenant, or to his proposed user "of the property." There is no evidence before me that the intended assignee is not respectable and responsible and it follows therefore that the action of the superior lessors in refusing their consent is unreasonable.

The question then arises whether I can proceed to deal with the matter in the absence of the superior lessors. It was said that this is a case to which section 56 (1) of the Law of Property Act, 1925,[5] applied. [His Lordship read the subsection and continued:]

The superior lessors were well aware of the dispute but so far from taking any steps with a view to being made a party to these proceedings for the purpose of invoking section 56 (1) they have in correspondence disclaimed the existence of any contractual right between them and the plaintiffs on this summons. It appears to me, therefore, that it is quite unnecessary for the purposes of this judgment to consider further whether section 56 (1) has any application in this case.

It was argued on behalf of the defendants that although it would have been possible under R.S.C., Ord. 54A, to make a declaration on the summons I ought not in the absence of the superior lessors to make the second declaration asked for on the summons.

It was pointed out that rule 1 of Order 54A is in very general terms and that on the face of it rule 2 is also couched in very general terms. It provides: "The court or a judge may direct "such persons to be served with the summons as they or he may "think fit." But I think that there must be some limit to the class of persons who can be joined on a summons asking for a declaration. The answer is to be found under the note to Order 55, r. 5, in the Annual Practice. That makes it clear to my mind that it is limited to parties who have some interest, in the sense

[4] [1925] Ch. 575, 585.

[5] Law of Property Act, 1925, s. 56 (1): "A person may take an immediate or other interest in land or "other property, or the benefit of any "condition, right of entry, covenant "or agreement over or respecting land "or other property, although he may "not be named as a party to the "conveyance or other instrument."

that it is an interest which can be enforced in a court of law, in the document in question.

Both the plaintiffs and defendants are objects of sympathy, neither of them wanted to join the superior lessors. The defendants, I apprehend, could have done so by bringing third party proceedings, since that procedure is open on an originating summons. The plaintiffs could have done so by adding them as defendants. In both cases it was said that a not unsubstantial question of costs would arise.

The provision in clause 12 in the plaintiffs' lease which I have to construe represents the contractual rights between these two parties. I think that I am justified in dealing with the matter as between the two parties now before me. The principle that should be applied is whether the defendants' consent has been unreasonably withheld within the meaning of clause 12. That clause was introduced by agreement between the parties: if the defendant lessors had unreasonably withheld their consent then the plaintiffs would be entitled to an order as of course that they might assign without the defendants' consent, so it must equally follow as between the parties to this summons if the superior lessors were acting unreasonably (as I hold that they have done in refusing to give consent) then the defendants cannot now refuse to give their consent in this way and rely on the refusal of the consent of their superior lessors. In those circumstances, are the defendants entitled to say, relying on the refusal of the superior lessors, that they, the defendants, are at peril if they give their consent? I think not, because as I have held that the superior lessors were unreasonable, the continued refusal by the defendants to give their consent is in itself unreasonable.

An argument was urged on me that, on construction, the words "deal with" where they appear in clause 12 did not include the giving of a licence to assign but meant creating some proprietary title or the giving in some way of the use of the land. There appears to be no authority on the point and I do not propose to resolve it. I have construed it so far as it is material for the first part of my judgment and I shall assume that "deal with" as used in clause 12 includes the granting of a licence to assign.

The plaintiffs are entitled to some relief, but I am not prepared to grant the second declaration asked for in the summons because it is not the practice of the court to grant a declaration in the absence of the party against whom the declaration is sought or to grant a declaration as to the conduct of a party not before it. It is sufficient for the plaintiffs' purpose that I have clearly expressed my view that the refusal of the superior lessors to consent to the assignment is unreasonable. It will be sufficient in those circumstances if I make a declaration in the plaintiffs' favour in the form of the first declaration sought on the basis that I have shown that the refusal of the superior lessors to

1958

Vienit Ltd. v. W. Williams & Son (Bread Street) Ltd.

grant a licence constitutes no excuse for the refusal of the defendants on their part to grant a licence.

Declaration accordingly.

Solicitors: *Fletcher, Napper & Co.; Biddle, Thorne, Welsford & Barnes.*

I. G. R. M.

[CHANCERY DIVISION.]

1958 *Nov.* 24.

Harman and Danckwerts JJ.

* *In re* MANN, A DEBTOR. *Ex parte* THE DEBTOR *v.* HARRODS LTD.

[No. 15 of 1958.]

Bankruptcy—Receiving order—Payment of debt relied on—Application for withdrawal of original petition on debt being paid—Proceedings adjourned to ascertain position of other creditors—Receiving order made without substitution of another petitioner—Validity—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 111.

One of the creditors of a debtor presented a bankruptcy petition on July 3, 1958, based on an act of bankruptcy when execution had been levied against the debtor by seizure of his goods, which had been held by the sheriff for 21 days from May 19, 1958. The debt was paid by a third party on July 23. When the petition came on for the first hearing before the registrar on July 30, he refused leave to the creditor to withdraw the petition, but demanded evidence that there were no other creditors. The case was adjourned until August 19, when some other creditors appeared, but as there was a possibility that all the debts would be paid the case was again adjourned. At a third hearing on October 17, since the debts had not been paid the registrar made a receiving order on the ground that it was not in the general interest of the creditors that the petition should be dismissed. On an appeal by the debtor against the receiving order:—

Held, (1) the registrar had no power to make a receiving order when there was no petitioner with a debt before him.

(2) The proper course in such cases was to substitute another creditor as petitioner under the power given by section 111 [1] of the Bankruptcy Act, 1914.

(3) The receiving order would therefore be discharged and the petition remitted to the registrar for him to consider whether substitution could be ordered, having regard to the fact that more than three months had elapsed since the act of bankruptcy.

[Reported by Miss Margaret Thomas, Barrister-at-Law.]

[1] Bankruptcy Act, 1914, s. 111: "Where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor."

APPEAL from a county court registrar.

Harrods Ltd., the creditor of one Richard Mann for a sum of £239, on July 3, 1958, presented a bankruptcy petition in Kingston-upon-Thames county court founded upon an act of bankruptcy when execution had been levied by seizure of the debtor's goods, which had been held by the sheriff for 21 days from May 19, 1958. There were several other creditors with debts amounting to about £1,900. The debt of £239 was paid by a third party on July 23, and at the first hearing on July 30 the petitioning creditor asked for leave to withdraw the petition. The registrar refused leave in order to ascertain whether there were other creditors who wished to proceed in the matter, and he adjourned the hearing in order to obtain evidence of other creditors. At a second hearing on August 19, several other creditors appeared and were told by the debtor's solicitor that if there were another adjournment there was a possibility that they would all be paid in full. At a third hearing on October 17, since the outstanding debts had not been paid, the registrar came to the conclusion that it was not in the general interest of the creditors that the petition should be dismissed and he accordingly made a receiving order.

The debtor appealed against the receiving order on the ground that the registrar had no power to make it, since (1) the debt was not proved to have existed both at the time of the petition and at the time of the hearing and making of the order, and (2) the debt had been satisfied, and at the hearing of the petition the creditor had applied to have it withdrawn.

D. A. Thomas for the debtor.

B. L. A. O'Malley for the petitioning creditor.

The following cases and authority were cited in argument: *In re Bebro* [2]; *In re Maugham* [3]; *In re Maund* [4]; Williams on Bankruptcy, 17th ed., p. 59.

HARMAN J. The petitioner had, when he filed his petition on July 3, 1958, an undoubted debt, founded on an available act of bankruptcy, namely, the execution, which ended sometime in June. Before the petition came on for hearing, the debt and costs were paid by a third party, and the petitioner had no longer any interest in the matter. When the matter came on he applied to be allowed to withdraw his petition. It will be remembered that, under the Bankruptcy Act, 1914, section 5 (7), a creditor may not take that step without the leave of the court.

At the hearing, what the registrar did was not to give leave to withdraw the petition, but to demand evidence that there were no other creditors. That was probably the right course to take;

[2] [1900] 2 Q.B. 316.
[3] (1888) 21 Q.B.D. 21.
[4] [1895] 1 Q.B. 194; 11 T.L.R. 126.

1958

Mann, A Debtor, *In re. Ex parte* The Debtor *v.* Harrods Ltd.

Harman J.

it would not be correct to allow the petition to be withdrawn if there were other creditors who wished to take the matter up. The hearing was adjourned until August 19 for that purpose.

On August 19 several other creditors appeared, and the right procedure, in my judgment, was to exercise the jurisdiction given under section 111 of the Bankruptcy Act and substitute another creditor as petitioner, if any of the creditors wished to be so substituted. In the event that did not happen, because the prospect was laid before the creditors generally that, if another adjournment were granted, everybody might be paid in full; and that is a glad sound to creditors in a bankruptcy.

The matter stood over until October 17, and, by that time, as in many other cases, the money was not forthcoming. The registrar then took what seems to me to be a course which it is established he could not take: he made a receiving order on what he called "his discretion"; there was no petitioner with a debt before him and I do not think that he could make a receiving order. On the other hand, he does not appear to have given any opportunity to the other creditors to apply to be substituted, or to agree to be substituted, under section 111. Thus, the matter has got into a state of confusion.

We shall discharge the receiving order and remit the cause to the registrar for him to ascertain whether any creditor desires to be substituted. That will leave the point to be taken, which was mentioned but not argued before us, that no such substitution could be made now, because there is no available act of bankruptcy owing to the dates.[1] I do not know whether that argument will prevail, having regard to the history of the matter and the adjournments, with the reasons for them; but the debtor will be entitled to put that point before the registrar, who will make an order either substituting a new petitioner, or will, having found nobody willing or able to sustain that role, give the petitioner leave to withdraw his petition.

Danckwerts J. I agree.

Receiving order discharged; petition remitted to the registrar.

Solicitors: *Cardew-Smith & Ross; McKenna & Co.*

[1] Bankruptcy Act, 1914, s. 4 (1): "A creditor shall not be entitled to "present a bankruptcy petition "against a debtor unless . . . (c) the "act of bankruptcy on which the "petition is grounded has occurred "within three months before the pre-"sentation of the petition."

[PROBATE, ETC., DIVISION.]

* BERNARD v. BERNARD (SUTTON CITED).

1958
Oct. 13, 17.

Barnard J.

Estoppel—Per rem judicatum—Husband and wife—Divorce—Petition for divorce on the ground of adultery and desertion dismissed in exercise of court's discretion—Contents of the petition "sufficiently "proved"—Whether parties estopped in subsequent suit for divorce from repeating and denying same charges.

At the hearing of a husband's petition for divorce on the ground of the wife's adultery and desertion, which was undefended save as to custody, the court, in March, 1953, found the contents of the petition "sufficiently proved," but refused to exercise its discretion in the husband's favour in respect of his own adultery. A transcript of the hearing showed that a finding of adultery had, in fact, been made, but that there was no reference to the charge of desertion. The suit was stayed and the petition was subsequently dismissed by consent in June, 1955.

In February, 1956, the wife filed a petition for divorce on the ground of the husband's adultery with two named women, and sought the exercise of the court's discretion in her favour. The husband, by his answer, repeated the charges of adultery and desertion made in his previous petition and also asked for the exercise of the court's discretion.

At the hearing of an issue to determine whether the husband was estopped from repeating the charges contained in his petition, and whether the wife was precluded from denying desertion prior to that petition:—

Held, that the principle that once a matrimonial offence had been litigated and decided by a competent court neither party could claim as of right to reopen the issue, did not prevent a party repeating a charge in which he had already been successful; the husband was, therefore, entitled to repeat the charge of adultery in his answer. As to the charge of desertion, no adjudication which would support a plea of estoppel had been made and the husband could, therefore, repeat that charge in his answer and the wife deny it in her reply.

Thompson v. *Thompson* [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161 explained.

ISSUE.

On July 29, 1952, the husband filed a petition praying, in the exercise of the court's discretion, for divorce on the ground of adultery by the wife with one Sutton on March 2, 1947, at the Regent Palace Hotel, and of the wife's desertion. The suit was undefended save as to custody, and was heard on March 31, 1953, by His Honour Judge Howard, sitting as a special commissioner, who found that the husband "had sufficiently proved the contents "of the petition," but refused to exercise the court's discretion in his favour. He rejected the prayer of the petition and gave the wife leave to file an answer, with leave to the husband to file a reply, and stayed the suit to enable this to be done. The wife, thereupon, filed an answer admitting the act of adultery charged in the petition, but denying the charge of desertion; she cross-charged adultery against the husband and cross-prayed for

1958

Bernard v. Bernard (Sutton cited).

divorce, in the exercise of the court's discretion. The husband did not file a reply. On June 14, 1955, on the wife's application, the husband consenting, the petition was dismissed in the registry.

On February 2, 1956, the wife presented a petition for divorce on the ground of the husband's adultery with two named women, and prayed for the exercise of the court's discretion in her favour. By his answer, filed on December 31, 1956, the husband admitted some of the adultery alleged in the petition, cross-charged desertion and an act of adultery on March 2, 1947, at the Regent Palace Hotel with Sutton, the party cited, and cross-prayed, in the exercise of the court's discretion, for divorce. By her reply, filed on February 6, 1957, the wife denied the charge of desertion, and pleaded that the husband was estopped from repeating it. She further admitted the act of adultery alleged, but pleaded that the husband was also estopped from repeating it.

On February 17, 1958, Wallington J. ordered that an issue be tried. The issue was in the form of two questions: (1) whether the husband be estopped from making the allegations of desertion and adultery contained in his answer, by reason of the decision of His Honour Judge Howard on March 31, 1953; (2) whether the wife be estopped from denying desertion prior to July 24, 1952, by reason of the same decision.

At the hearing of the issue a transcript of the hearing of March 31, 1953, was put in, from which it appeared that the court had found that the wife had committed one single act of adultery but made no reference whatsoever to the charge of desertion.

F. J. Cridlan for the wife.

J. G. Syms and *Bryan Anns* for the husband.

The following cases were cited in argument: *Finney* v. *Finney* [1]; *Dixon* v. *Dixon* [2]; *Lake* v. *Lake* [3]; *Hoystead* v. *Commissioner of Taxation* [4]; *Bright* v. *Bright* [5]; *Cooper* v. *Cooper* (*No.* 2) [6]; *Hudson* v. *Hudson* [7]; *Thompson* v. *Thompson.* [8]

Cur. adv. vult.

October 17. Barnard J. referred to the facts, the form of the issue and the pleadings in the present suit, and continued: The question which I have to decide involves applying the law as to estoppel to the facts of this particular case, and to do that one has to consider the charges made in the former suit which was brought by the husband, and the charges made in the present suit which

[1] (1862) L.R. 1 P.D. 483.

[2] [1953] P. 103; [1953] 1 All E.R. 910.

[3] [1955] P. 336; [1955] 3 W.L.R. 145; [1955] 2 All E.R. 538.

[4] [1926] A.C. 155; 42 T.L.R. 207.

[5] [1954] P. 270; [1953] 2 All E.R. 939.

[6] [1955] P. 168; [1954] 3 All E.R. 358.

[7] [1948] P. 292; [1948] 1 All E.R. 773.

[8] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161.

has been brought by the wife, in the light of the order made on March 31, 1953.

[His Lordship then referred to the husband's petition of July, 1952, and the course followed by the court at the hearing thereof, and continued:] Mr. Cridlan, on behalf of the wife, relies on the order made on June 14, 1955, as creating an estoppel. I do not agree that this is so. That order does not show, on the face of it, that there has been any hearing; it does not show that any charges have been established or that any charges have failed to be established, and to dispose of that argument one has only to look at the old case of *Hall* v. *Hall and Richardson.*[1] That was a decision of Sir James Hannen P. It was a case in which a husband had filed a petition for divorce and later the petition was dismissed, before the hearing, on the petitioner's application (I do not think that makes any difference) and with the consent of the respondent and co-respondent. Later, the husband filed a fresh petition which included the same charges of adultery, and Sir James Hannen P. held that he was not precluded by the dismissal of the first petition from repeating those charges, because they had never been adjudicated upon.

The facts of this case are, of course, a little different, and it is only fair to Mr. Cridlan to say that he was not relying solely on that order, but referred me to *Thompson* v. *Thompson*,[2] and he relies very strongly on the words of Denning L.J. dealing with the question of estoppel[3]: "The situation has been neatly summarized by saying that in the Divorce Court 'estoppels bind 'the parties but do not bind the court': but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties)." I am satisfied that Denning L.J. did not intend what he said to be construed so widely as to preclude a party who has made a charge and succeeded in proving it, from repeating it; and one has only to look at a few passages in the rest of his judgment to see that he never intended it to bear such a wide interpretation as that.

Before I refer to those other passages I think it is clear that, if one assumes that the husband had put forward this charge of adultery and had failed to prove it, the rule of estoppel would apply. But, in the present suit, he is making a charge of adultery which was admitted by the wife and on which he succeeded: it is repeated in the present proceedings and again admitted by the wife. Unfortunately, the first proceedings being an undefended suit there was no judgment, and the order only says that the contents of the petition were sufficiently proved; but I have a

[1] (1879) 48 L.J.P. 57.
[2] [1957] P. 19; [1957] 1 All E.R. 161.
[3] [1957] P. 19, 29.

1958

Bernard v. Bernard (Sutton cited).

Barnard J.

transcript of that hearing in which I find the special commissioner saying: "I have no doubt that the respondent has committed "adultery, as she says" (and he is referring to a letter which was put in), "one single slip. We do not have any more information "than that," and then he goes on to say what a bad case it was for the exercise of discretion and asks himself why he should exercise his discretion in the husband's favour; but nowhere in the transcript does the commissioner say anything about the charge of desertion. Putting aside the question of discretion, once the husband had proved an act of adultery he was prima facie entitled to a divorce, and it is often in those circumstances a sheer waste of time to go on with the other charges.

Denning L.J. makes clear what he meant by the statement in his judgment which I have already read, because he says [4]: "Such being the principles, let me show how they have been "applied. The cases fall into three categories. The first "category consists of those cases where a charge of a matrimonial "offence has been established in previous proceedings. One party "has been found guilty. In such a case, as between the parties, "the strict rules of res judicata would seem to apply; but the "Divorce Court, being bound by no estoppels, often allows a "departure from them. The best illustration" (and I do not think he gives all the illustrations) "is where a party has obtained "a decree of judicial separation on the ground of cruelty and "follows it up with a petition for divorce on the same ground." In the circumstances a successful party is merely repeating a charge on which he has succeeded. Mr. Syms, on behalf of the husband, gave me another example: If a husband were to file a petition for divorce charging adultery and the wife pleaded condonation, the court might find the adultery proved, and at the same time find that it was condoned and dismiss the petition. If, later on, the parties came together again, something might arise which would amount to a revival; in those circumstances the husband could not be estopped from repeating the charge of adultery, on which he had succeeded, and then alleging that it had been revived and he was therefore entitled to a divorce. I think it is clear that Denning L.J. never meant what he was saying to apply to someone repeating a charge which had been proved to the satisfaction of the court. Denning L.J. then goes on with the second category [5]: "The second category is where a charge of "a matrimonial offence has been made unsuccessfully in the High "Court. The charge has failed and the accused person has been "acquitted. The complainant then repeats the charge in a "subsequent suit for divorce. The court will not as a rule allow "him to do this." Then the third category, with which I need not deal in detail, is where there has been a finding before the justices, and the Divorce Court does not consider itself bound by any rule of estoppel. I am, therefore, satisfied that the husband is not estopped from repeating this charge of adultery.

[4] [1957] P. 19, 29. [5] Ibid. 30.

As regards the charge of desertion in the first suit, Mr. Cridlan says that I ought to hold, by implication, that the court rejected the charge of desertion and found it not proved. Mr. Syms, on the other hand, says that I ought to hold, by implication, that the court accepted the husband's evidence, and that the facts proved established desertion and, therefore, the wife ought not to be allowed to deny it again. I am not prepared to imply anything either way. There is nothing in the transcript which shows that the court was either satisfied or not satisfied that desertion was proved. There was no adjudication on the charge of desertion, and, therefore, it is open to the husband to make that charge again, and it is also open to the wife to deny it.

I have, therefore, come to the conclusion, so far as the issue is concerned, that the answer to both questions is in the negative.

Order accordingly.

Solicitors: *Callingham, Griffith & Bate for Varley Hibbs & Co., Coventry; Wainwright & Co.*

E. J.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (AUCTIONEERS' REMUNERATION).

1958
Nov. 17.

Agency—Auctioneer—Remuneration—Sales of freehold and leasehold properties—Variation of basic scale.

Under the authority of the Lord Chancellor the basic scale of remuneration to be allowed in the Chancery Division to surveyors, auctioneers and estate agents on sales of freehold and leasehold property has been varied and is now:

£3 15s. 0d. per cent. on the first £500 realized.

£1 17s. 6d. per cent. on the excess beyond £500 up to £5,000.

£1 2s. 6d. per cent. on the excess beyond £5,000 up to £25,000.

In other respects the existing directions of the Lord Chancellor and the judges of the Chancery Division as to auctioneers' remuneration remain unaltered.

MAURICE WILLMOTT,
Chief Master.

November 17, 1958.

[PROBATE, ETC., DIVISION.]

1958
Oct. 29, 30, 31; *Nov.* 5.

Davies J.

* PAROJCIC (orse. IVETIC) *v.* PAROJCIC.

Husband and Wife—Nullity—Duress—Petitioner forced to go through marriage ceremony by her father's threats.

After many hardships the petitioner and her mother were allowed to leave Yugoslavia and come to England in 1956, where they were met by the father, who had reached England in 1947 and had acquired a domicile of choice in this country. At their meeting the father introduced the respondent, also a Yugoslav, and told them that he was the man whom the petitioner was to marry. Notwithstanding her opposition and the opposition of the mother, the father thereafter continued to insist that the marriage should take place, and also terrified the petitioner by threatening to send her back to Yugoslavia. Six weeks after the petitioner's arrival in England a ceremony of marriage was performed at a register office in Oxford. Immediately after the ceremony the petitioner went home, locked herself in her bedroom and wept. The only occasions on which she and the respondent met were on her arrival in England and at the marriage ceremony, and the marriage was, accordingly, never consummated:—

Held that, although the evidence would not support a contention by the petitioner that she had been mistaken as to the nature of the ceremony and that she had believed it merely to have been a betrothal ceremony, she had never in fact consented to the marriage, but had been driven to go through the ceremony by her father, and she was, accordingly, entitled to a decree nisi of nullity on the ground of duress.

Scott v. *Sebright* (1886) 12 P.D. 21 applied.

Per curiam. I am inclined to think that the effect of duress on a marriage is the same as it is on a contract, namely, to render it not void but voidable.

Undefended petition by wife for nullity on the grounds of duress and of mistake as to the true nature of the marriage ceremony, which was in fact performed in England in December, 1956.

The following statement of facts is substantially as stated in the judgment. The petitioner's family came from a small village called Jaruga in Bosnia, now part of Yugoslavia. The population of the village was largely Communist. The petitioner's family were not Communists. They were smallholders, farming some 17 acres of land with some 40 head of sheep and cattle. During the war the petitioner's father fought in the anti-Communist forces and with their remnants left Yugoslavia in 1944. His wife and children (including, of course, the petitioner) were left behind. He reached England in 1947 and had remained here ever since, and the court held that he had plainly acquired a domicile of choice here. At the time of the events with which this case is concerned, he was working on the railway at the Ordnance Depot at Bicester, where there is a considerable colony of Yugoslavs and other foreigners.

In Yugoslavia his family went through a very bad time. Their cattle were taken from them. On two occasions his wife was sent to forced labour, as was the petitioner on at least one occasion. His wife's father was several times beaten up and eventually died. Two of his wife's brothers were shot.

After enduring many hardships, the petitioner and her mother were allowed to leave Yugoslavia and come to England. They arrived here on November 11, 1956. The court held that there was no doubt that, whatever their technical position had been up until then, when they came here they had abandoned any domicile of origin and acquired a domicile of choice in England.

At Victoria Station they were met by the petitioner's father and the respondent. The respondent was also a Yugoslav. He came from a village near Jaruga and was an old friend of the petitioner's father, but the petitioner had never met him before. He was 14 years older than the petitioner, their respective ages at that time being, according to the marriage certificate, 35 and 21. He worked in a chocolate factory in Birmingham. The petitioner's father had promised to the respondent the petitioner's hand in marriage; and at Victoria Station the petitioner's father introduced the respondent to her as the man she was going to marry. This proposal the petitioner flatly refused then and there. After that the four of them travelled to Bicester, where the respondent left the others. According to the evidence, the petitioner never saw the respondent again until December 29, 1956, the date of the ceremony.

On December 29, 1956, the petitioner and respondent, accompanied by the petitioner's father, a cousin of the respondent, Nicola Parojcic, and a friend, Milos Balach, travelled by omnibus to Oxford for the ceremony. The respondent had given notice of intended marriage the previous week. The ceremony was conducted by Mr. Barre, the superintendent registrar, in the presence of and assisted by Mr. Farr, the registrar of marriages. Immediately after the ceremony the petitioner, according to her own evidence and that of her father, on being told that she was married, said that it could not be so and that she did not agree. She went home, locked herself in her bedroom, and wept. Since then she had never seen or, apparently, communicated with the respondent. The marriage was, of course, never consummated.

A few weeks after the marriage, the respondent went to the superintendent registrar to ask for advice, because, as he said, his wife would not live with him. The registrar told him to consult a solicitor. On March 11, 1957, the petitioner first consulted solicitors. Shortly afterwards she met another Yugoslav, with whom she was living at the date of the hearing and by whom she was pregnant.

From the time when the marriage was first mooted by the petitioner's father at Victoria Station on November 11, 1956, to the date of the ceremony on December 29, 1956, the subject of the marriage was the cause of constant quarrels between them. The

1958

Parojcic (orse. Ivetic) v. Parojcic.

father was always insisting that she should marry the respondent, and the petitioner was constantly refusing. On more than one occasion he threatened that, if she persisted in her refusal, he would send her back to Yugoslavia, a threat which terrified the petitioner, who told her father that she would rather commit suicide than return. She was very unhappy and constantly crying, as also was her mother, who was equally opposed to the match. On the day before the ceremony her father hit her in the course of an argument about the matter.

By her petition dated January 20, 1958, the petitioner alleged that she "went through the ceremony [of marriage] under a "mistake as to the true nature thereof in that she believed it to "be a form of a ceremony of betrothal and was induced to take "part in the aforesaid ceremony in fear of the threats of her "father to send her back to Yugoslavia and by her own knowledge "of the results likely to flow from such action."

The evidence relating to the ceremony of marriage itself is considered in the judgment.

John Wood for the petitioner.

The following cases were referred to in argument in addition to those cited in the judgment: *Ramsey-Fairfax* (*orse. Scott-Gibson*) v. *Ramsey-Fairfax* *; *Way* v. *Way* †; *Apt* (*orse. Magnus*) v. *Apt* ‡; *H.* v. *H.* §; *Silver* (*orse. Kraft*) v. *Silver* ¶; *Ford* v. *Stier* ||; *Hall* v. *Hall* **; *Mehta* v. *Mehta* ††; *Hussein* v. *Hussein.* ‡‡

Cur. adv. vult.

November 5. Davies J., reading his judgment, referred to the pleading set out above and said that it was contended that the petitioner (*a*) had been mistaken as to the nature of the ceremony, in that she believed that it had merely been a betrothal service, and (*b*) had been induced to go through it by duress on the part of her father. His Lordship continued:

Cases of this sort are unquestionably important. To illustrate their importance it is unnecessary to go further than the judgment of Lord Merrivale P. in *Kelly* (*orse. Hyams*) v. *Kelly*,[1] where he said[2]: "In a country like ours, where the marriage "status is of very great consequence and where the enforcement "of marriage laws is a matter of great public concern, it would "be intolerable if the marriage law could be played with by

* [1956] P. 115; [1955] 3 W.L.R. 849; [1955] 3 All E.R. 695.

† [1950] P. 71, 79; 65 T.L.R. 707; [1949] 2 All E.R. 959.

‡ [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677.

§ [1954] P. 258, 267; [1953] 3 W.L.R. 849; [1953] 2 All E.R. 1229.

¶ [1955] 1 W.L.R. 728; [1955] 2 All E.R. 614.

|| [1896] P. 1.

** (1908) 24 T.L.R. 736.

†† [1945] 2 All E.R. 690.

‡‡ [1938] P. 159.

[1] (1932) 49 T.L.R. 99.

[2] Ibid. 101.

"people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it."

[His Lordship stated the facts and continued:] In the course of his most interesting and helpful argument, Mr. Wood submitted that the effect of each limb of the petitioner's attack on the validity of this marriage would be, if successful, to render it void. The importance of the submission is, of course, that if the alleged defect in the marriage renders it void, then the court of the wife's pre-marriage domicile has jurisdiction to annul the marriage; but if the effect of the alleged defect is merely to render the marriage voidable, then the appropriate court is that of the husband's domicile (*De Reneville* v. *De Reneville* [3]).

There is, of course, a statutory exception to this rule now in section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. But this has no application to the present case.

Mr. Wood was, therefore, concerned to argue not only that a party's ignorance of the nature of a marriage ceremony renders such a ceremony void, but also that the effect of coercion or duress is the same. With the former proposition I agree; but, as at present advised, I am doubtful about the latter. I am inclined to think that the effect of duress upon a marriage is the same as it is upon a contract, viz., to render it not void but voidable. This is the view taken by the editors of the title Divorce in Halsbury, 3rd ed., vol. 12, p. 225.

But for the purpose of the present case it is unnecessary to express a concluded opinion on this point. For it seems to me, though there is no direct evidence on the point, that it is the only reasonable assumption that the respondent, like the petitioner's father and many other of his anti-Communist emigrés compatriots, has abandoned his domicile of origin and acquired a domicile of choice in England.

This court has, therefore, jurisdiction over the whole of the present case. And it is plain that the law by which the validity of this marriage has to be tested is English law, the lex loci contractus.

On the effect of ignorance as to the nature of the ceremony on the validity of marriage it is not, I think, necessary to cite any authority at all; there are abundant cases on the point, a number of which were quoted to me by Mr. Wood. So far as duress is concerned it is sufficient, I think, to cite one passage in the judgment of Collins J. in *Cooper* v. *Crane*,[4] where he said: "The next point urged before me was that the facts showed that her will was overmastered by the influence of the respondent, and that there was, therefore, no contract. In order to hold that the ceremony so performed was not binding, I think I should have to infer as a fact one of two things—either that she was so perturbed by terror that her mind was unhinged,

[3] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[4] [1891] P. 369, 376.

1958

Parojcic (orse. Ivetic) v. Parojcic.

Davies J.

"and she did not understand what she was doing—and this, I "think, is what is meant by the words 'not know what she is "'about' in the passage from Bishop, cited in the argument, "and which is based on *Fulwood's Case* [5]—or that though she "understood what she was doing her powers of volition were so "paralysed that, by her words and acts, she merely gave expres-"sion to the will of the respondent, and not her own." It is the second point of that that is really the basis of the duress argument in the present case.

Chronologically the point as to duress precedes the point as to want of knowledge and consent. But logically it is more convenient to deal first with the latter.

The case for the petitioner commenced by an attempt to show that in Yugoslavia all or many marriages are preceded by a betrothal ceremony and that—at any rate in country districts—all marriages take place in church. But the evidence on this point was most imprecise and I was not impressed by it.

Next, it is said, there was no trousseau, no bridal feast and no plan for a honeymoon. The absence of all these normal adjuncts to a wedding is indeed odd. But it must be remembered that these people were living in what might be described as unusual and emergency conditions and surroundings, so that perhaps these lacunae are not as significant as they might be in normal circumstances.

But the head and front of the petitioner's case on this part of it is the evidence which she gave and called as to what took place at the register office. Her witnesses as to this were herself, her father and Balach. This evidence was so startling that I expressed the wish that the registrars should attend and give evidence.

The petitioner's evidence as to what took place at the register office was that the ceremony took place wholly in English, that she could not understand a word of it, that she could not remember whether any part was translated, that she could not remember the respondent or herself saying anything and that nobody asked her if she would take the respondent for her husband. Balach said that there was no interpretation except by the respondent, that the respondent spoke to the registrars in English, that at one stage the respondent turned to the petitioner and said in Serbian, semble by way of a question, "You marry "Rade Parojcic?", but that the petitioner said nothing at all from first to last. The petitioner's father said that the respondent was the only one who could talk English and that he spoke to the registrars. "If there was any interpretation," he said, "it was very little, and I cannot remember. If there was any, "the respondent did it."

It seemed inconceivable that registrars of any experience and appreciation of their responsibilities would permit such a

[5] (1638) Cro.Car. 482, 488, 489.

ceremony to take place. Mr. Barre, the superintendent registrar, and Mr. Farr, the registrar of marriages—each of them with some 15 years' experience in the Oxford register office—gave an entirely different account of the matter. They remember this particular marriage because of the call subsequently made upon Mr. Barre by the respondent and also because the police made some inquiries into the matter in the early part of this year. According to their evidence, this little party of five Yugoslavs were taken up to Mr. Barre's room by Mr. Farr. Mr. Barre was told by the petitioner's father, as was the fact, that she had been in England only a short time and could speak no English. Mr. Barre was told by Mr. Farr, repeating what had been said to him by the respondent downstairs, that Balach was the interpreter. Mr. Barre asked Balach if he would interpret, and Balach replied that that was what he had come for. The first declaration of the ceremony was repeated after Mr. Barre by the respondent in English. Mr. Barre then asked Balach to get the petitioner to repeat it word for word after Mr. Barre in English, which was done, and then to translate it into Serbian for her and get her to repeat it in that language, which was also done. The same procedure was then followed with regard to the second declaration. And at the end of it all Mr. Barre got Balach to interpret to the petitioner a little message of good luck, which was done.

One wonders incidentally why a foreigner who cannot talk or understand English is asked to repeat the declarations in English before doing so in his or her own language. What advantage is to be gained from this parrot-like repetition of what must to the person making them be meaningless noises it is difficult to imagine. But Mr. Barre told me that this is regular practice.

It is the case for the petitioner that the evidence of the registrars is untrue and indeed impossible; for it is said that Balach can speak very little English and could not possibly have managed to do what the registrars say that he did. But I cannot help feeling that Balach, and very probably the petitioner's father as well, can get along in English a good deal better than they now pretend. Their account of the matter is one which cannot, in my judgment, be accepted. It is quite impossible to believe that those two experienced registrars, whom I saw in the box and whom I considered were truthful witnesses, would allow a wedding ceremony to be performed without assuring themselves so far as they could that the bride was having everything interpreted and explained to her and that she was repeating the declarations and expressing her assent thereto. They are not unfamiliar with marriages of foreigners, Yugoslavs in particular, as the settlement at Bicester is in the Oxford district. I find myself quite unable to accept the evidence of the petitioner and her witnesses on this part of the case. They were not, in my opinion, telling the truth. I accept the evidence of Mr. Barre and Mr. Farr as in substance an accurate account of what took place.

1958

Parojcic (orse. Ivetic) v. Parojcic.

Davies J.

Despite the subsequent conversation between the petitioner and her father outside the register office, which I have already related, I have come to the conclusion that the petitioner knew at the time that the ceremony which she was going through was a marriage ceremony. The facts proved by the evidence of Mr. Barre and Mr. Farr are not perhaps wholly inconsistent with a belief on the part of the petitioner that the ceremony was a ceremony not of marriage but of betrothal, when one makes allowances for the petitioner's ignorance of English. But the attempt by the petitioner and her witnesses to mislead the court as to what did take place at the register office makes it, in my opinion, wholly unsafe to credit the petitioner with the ignorance which she claims to have enjoyed.

The petitioner's case, therefore, so far as it depends on the contention that she did not understand the nature of the ceremony, fails.

In my judgment, however, the other part of her case stands on a different footing. It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case.

The evidence on this part of the case impressed me. The best witness was the petitioner's mother, and she, it is to be noted, gave no evidence about the actual marriage ceremony and so escapes any criticism on that score.

I am quite satisfied and find that from and after November 11, 1956, when this marriage was first mooted by the petitioner's father at Victoria, right up till December 29, 1956, the subject was the cause of constant quarrels between them. The father was always insisting that the petitioner should marry the respondent, and the petitioner was constantly refusing. On more than one occasion, as he himself admits, he threatened her that if she persisted in her refusal he would send her back to Yugoslavia. Whether he could have done so or not, both of them believed it was possible, and the threat, not unnaturally after her past experience, terrified the petitioner. She told her father that she would rather commit suicide than return to Yugoslavia. There is no doubt that during this period of six weeks the petitioner was very unhappy and constantly crying, as also was her mother, who was equally opposed to the match. Finally on the day before the wedding he hit her in the course of an argument about the matter, no doubt when he was telling her that she must go to Oxford on the following day.

On this evidence, which I accept, there is no doubt that this young woman was terrified into obedience by her father, who was almost a stranger to her after years of separation and who may well have been imbued with ideas of patria potestas which were

fundamentally foreign to his daughter. In the words of Butt J. in *Scott* v. *Sebright*[6]: "Long before the ceremony was gone "through the feelings of this young lady towards the respondent "were such that of her free and unconstrained will she never "would have married him; that she had been reduced by mental "and bodily suffering to a state in which she was incapable of "offering resistance to coercion and threats which in her normal "condition she would have treated with the contempt she must "have felt for the man who made use of them; and that, there-"fore, there never was any such consent on her part as the law "requires for the making of a contract of marriage." Of course, every single word of that is applicable to the present case, except that in this case it was the father who exercised the duress on her.

I am quite satisfied, in accordance with that and the other authorities, that this petitioner has shown that she never in fact consented to this marriage and that she was driven to go through the ceremony by the terror instilled in her by the threats exercised and made to her by her father in the course of the six weeks preceding the marriage, indeed, the only six weeks of her life that she had spent in this country.

The petitioner has therefore made out her case and is entitled to a decree.

Decree nisi of nullity.

Solicitors: *Lovell, Son & Pitfield for Alfred Trueman & Son, Bicester.*

J. B. G.

[6] (1886) 12 P.D. 21, 31.

[PROBATE, ETC., DIVISION.]

* STONE *v.* STONE.

1958
Oct. 31;
Nov. 7.
Collingwood J.

Conflict of Laws—Domicile—Change—Soldier—Divorce—Acquisition of domicile of choice by soldier.

A husband, whose domicile of origin was in Ohio, U.S.A., and who, at all relevant times, was serving in the merchant marine or armed services of the U.S.A., first came to England in 1944, and married there in 1950. From 1951 he was posted to and served in countries other than England, where the wife continued to live. In November, 1957, he spent a leave in England at the home of the parents of an English woman for whom he had formed an attachment and whom he desired to marry if granted a decree, and at that date formed the intention, which continued, to remain in England for the rest of his life. Thereafter, he spent all his available periods of leave in England, using a room at the same address in which he kept all his civilian clothes and possessions, and having his own key to the premises. He planned to purchase a house in England when able to do so.

1958

Stone
v.
Stone.

On the hearing of the husband's petition for divorce on the ground of the wife's desertion:—

Held, that, since it had been established that a serviceman could acquire a domicile of choice in the country where he was stationed, in which his residence was enforced and from which he might be removed at any time, a fortiori, he could acquire a domicile of choice in any other country.

Donaldson v. *Donaldson* [1949] P. 363; 65 T.L.R. 233 applied.

Undefended petition.

The husband first came to England in 1944, when he was in the merchant marine service. In 1946 he joined the United States Army and on November 11, 1950, he was married at Beamish in Durham. At the time of the marriage the husband's domicile was that of his origin, namely Ohio in the United States of America.

The parties cohabited at Stanley in Durham, and a child was born in January, 1951. In October, 1951, the husband was posted to Korea, his wife remaining at Stanley, though not at the matrimonial home. He was subsequently posted to Japan, and in 1955 to Paris, where he was serving when the proceedings were heard. In November, 1957, he was in England on leave from Paris and he stayed at an address at Mitcham, the home of the parents of an English woman for whom he had formed an attachment and whom he desired to marry if granted a decree. Since that date all his periods of leave were spent there. His leave amounted to 30 days a year, plus an additional three days each month. He had a room at that address, a key to the premises, and he kept his civilian clothing and possessions there. His evidence was that in November, 1957, he decided to remain in England for the rest of his life and not to return to the United States, and that he had ever since had that intention. He spoke of this determination to three witnesses who were called, and he also expressed the intention of purchasing a house in England when he was able to do so.

A. Richard Ellis for the husband.

In addition to the cases cited in the judgment, reference was made in argument to Dicey, Conflict of Laws, 7th ed., p. 108.

Collingwood J. referred to the facts and continued: It is now clear, though it was at one time doubted, that a member of the armed forces of one country can acquire a domicile of choice in the country in which he is stationed, that is, where he is compulsorily resident, and whence he is liable to be removed at any moment by superior orders, provided he has established the necessary residence and formed the necessary intention to settle there when he becomes a free agent. The authority for that is

to be found in *Donaldson* v. *Donaldson*.[1] The headnote to that case reads: "A Royal Air Force officer was divorced by his first "wife in Florida while he was stationed there on active service. "The wife later petitioned for divorce in the English courts, "alleging by her petition that the respondent had committed "adultery with a woman with whom he had gone through a "ceremony of marriage subsequent to the American decree. "The respondent by his answer denied adultery, alleging that his "marriage with the petitioner had already been dissolved. *Held*, "that although the respondent had been on active service he "had not been prevented thereby from acquiring a domicile of "choice abroad; that he had acquired a domicile of choice in "Florida at the time of the aforesaid decree; and that as that "decree was therefore valid, there was in consequence no sub-"sisting marriage between the petitioner and the respondent."

I would refer to two passages from the judgment of Ormerod J. The first, after stating the circumstances leading to the American decree of divorce, reads[2]: "The case resolves itself "into a comparatively short point. If the parties were domiciled "in Florida in June, 1944, the American decree was a valid "decree and the marriage was dissolved then. If, on the other "hand, the parties were not domiciled in Florida in June, 1944, "it was not a valid decree, and the marriage still remains in "being. The question, therefore, which I have to decide is "whether or not the parties were domiciled in Florida at that "time. The respondent gave evidence that he went to Florida "in the course of his service duties, he took a great liking to the "country, and arranged for his wife and children to join him "there. He said that at that time he had no intention of "leaving the service, to which he was devoted, and that he "intended to remain in it. But he also told me that when it "became clear that his marriage was breaking up and that "there would in all probability be a divorce, he considered from "his knowledge of service conditions in peacetime that although "he would probably be allowed to remain in the service, he "would have lost his chance of promotion. I am satisfied that "view was genuinely formed by the respondent."

The second passage is that in which Ormerod J. went on to say[3]: "Counsel for the respondent must satisfy me that at the "time of this divorce, which was in June, 1944, the respondent "was not only residing in Florida but had made up his mind to "reside there permanently and had thereby acquired a domicile "of choice. The fact that his service duties would take him "away from Florida for some considerable time—probably so long "as he was serving—would not as I see it affect the matter so "long as he was then living in Florida and had determined to "continue to live there when he could; and I am satisfied having "heard his evidence that this is what he did."

[1] [1949] P. 363; 65 T.L.R. 233.
[2] [1949] P. 363, 364.
[3] Ibid. 365.

1958

Stone
v.
Stone.

Collingwood J.

In the present case I accept the husband's evidence that in 1957 he conceived the desire to remain in England and formed the intention to make this country his permanent home. I am satisfied that this intention has persisted ever since, and that, but for the exigencies of his service, he would be living here permanently. Owing to these exigencies his residence here is restricted to the periods of his leave.

On these findings, in my opinion, the case is covered by Ormerod J.'s decision in *Donaldson* v. *Donaldson*,[4] because it seems to me that once it is held that a domicile of choice can be acquired by a person in a country in which his residence is enforced, and from which he may be removed at any time, then, a fortiori, he can acquire such a domicile elsewhere.

I know of no authority on this point in the English courts, but there is a decision of the Appellate Division of the Supreme Court of South Africa, *Baker* v. *Baker*.[5] In that case the trial judge found as a fact that an officer in the Indian Army had decided in 1939, when he was in England, that he would settle in South Africa, but before he could leave England he was recalled to India on active service. In 1943 he obtained leave and went to South Africa where he spent three weeks at Cape Town with his wife, who had gone there after her husband's departure for England. This was the latter's first visit to South Africa. In 1945 he spent another leave there, but at no time was he ever stationed in South Africa.

The trial judge held that he had not proved that he was domiciled in the Cape Province, inasmuch as he was a soldier on active service. The Court of Appeal held that, as the evidence showed that the husband, when he arrived in Cape Town, came with the intention of making his home there, notwithstanding the fact that he knew that during the continuation of hostilities he would be generally absent therefrom, it had been proved that he had acquired a domicile in Cape Province. It is to be noted that the question whether a soldier can acquire a domicile of choice in the country in which he is stationed was considered but was not decided. *Donaldson* v. *Donaldson*[6] had not then been decided.

In the present case it is true that at the time when the husband first formed the final and deliberate intention to abandon his domicile of origin and establish a new one in this country, he was here as a soldier on leave. That is, of course, an element to be taken into consideration in deciding whether he did in fact firmly decide to make his home here. But accepting, as I do, that he then formed that intention, then the character and duration of his residence here becomes immaterial—see *Bell* v. *Kennedy*.[7]

[4] [1949] P. 363.
[5] (1945) App.D. 708.
[6] [1949] P. 363.
[7] (1868) L.R. 1 Sc. & Div. 307.

For these reasons I find that the husband was at the institution of this suit domiciled in England. The desertion by the wife in 1952 having been proved, there will be a decree nisi.

1958

STONE v. STONE.

Order accordingly.

Solicitors: *Henry Pumfrey & Son.*

E. J.

[QUEEN'S BENCH DIVISION.]

* PRACTICE DIRECTION (TRIALS IN MIDDLESEX).

1958 *Dec.* 9.

Lord Parker C.J.

Practice—Trial—Appropriate list—Fixed dates.

The following directions for trials in Middlesex are given by Lord Parker C.J.:—

1. (1) Every action ordered or required to be set down in the Queen's Bench Division for trial in Middlesex shall be set down in the appropriate list.

(2) The appropriate list for actions in the Queen's Bench Division for trial in Middlesex shall be:—

(*a*) Where the action is ordered to be tried by a judge and jury, the Jury List:

(*b*) Where the action is ordered to be tried by a judge alone, the Non-Jury List:

(*c*) Where the action is ordered to be tried by a judge alone, but the time estimated for the trial does not exceed two hours, the Short Cause List:

(*d*) Where the action is transferred for trial in the Commercial Court, the Commercial List:

(*e*) Where the action includes a claim by or against the Crown which relates to taxes or duties or to penalties provided for by the enactments relating to revenue, the Revenue List:

(*f*) Where the action consists of a motion for judgment, the Motions for Judgment List:

(*g*) Where the action comprises any of the following matters, the Special Paper List, namely:—

(i) A special case under R.S.C., Ord. 34, r. 1 or r. 2, other than a special case ordered to be tried in the Commercial Court:

(ii) A trial of questions of fact under R.S.C., Ord. 34, r. 9:

(iii) Awards in the form of a special case under section 21 of the Arbitration Act, 1950:

(iv) Motions under section 22 of the Arbitration Act, 1950, to remit an award, or under section

1958

PRACTICE DIRECTION (TRIALS IN MIDDLESEX).

23 of the Arbitration Act, 1950, to remove an arbitrator or umpire or to set aside an award:

(v) Points of law under R.S.C., Ord. 25, r. 2:

(vi) Any other special case or case stated under any statute except such as are required to be entered in the Divisional Court List.

2. (1) All actions in the Non-Jury List shall in the first instance be set down in a Non-Jury General List:.

(2) As soon as an action is set down in the Non-Jury General List, any party may, on obtaining an appointment from the Clerk of the Lists for this purpose, give notice to the other party or parties of his intention to apply to the Clerk of the Lists to fix a date for the trial of the action. Such notice shall be in writing and shall state the date proposed by the party giving it, and the party to whom such notice is given may suggest an alternative date. Suitable forms of notice may be obtained at the office of the Clerk of the Lists.

(3) On the hearing of the application for a fixed date the Clerk of the Lists shall, in default of agreement between the parties and subject to the provisions of sub-paragraph (6) hereof, fix a date for the trial of the action. All actions in the Non-Jury General List so allocated fixed dates for trial shall be placed in a Non-Jury Fixture List; and all other actions shall remain in the Non-Jury General List.

(4) A list will be posted outside the office of the Clerk of the Lists (Room 419) showing the fixtures for each day as they are allocated and the vacant dates. This list will be brought up to date each day at or after 4 p.m.

(5) (*a*) The Non-Jury Fixture List will be maintained in four parts, and actions will be placed in any part of the Non-Jury Fixture List in which there is a vacant date.

(*b*) Four judges will be available each Sittings to take actions in the Non-Jury Fixture List, but no list or part of a list will be allocated to a particular judge.

(6) If, on the hearing of an application for a fixed date, one of the parties objects on the ground that the hearing of the action will or might thereby be delayed, the Clerk of the Lists may, instead of fixing a date for trial, leave the action in the Non-Jury General List and direct that the action be marked not to come on for trial before a date agreed between the parties or in default of agreement a date specified by him. In specifying such a date, the Clerk of the Lists will have regard to the time reasonably necessary to enable the parties adequately to prepare for trial.

(7) If any party is dissatisfied with the date fixed by the Clerk of the Lists or with his direction under the last

preceding sub-paragraph hereof, he may, on giving two days' notice in writing to the other party or parties, apply to the judge in charge of the Non-Jury List to vary the date so fixed or the direction so given. Such application to the judge shall be made within seven days of the hearing before the Clerk of the Lists and on the hearing of such application the judge may vary the date fixed, or the direction given by the Clerk of the Lists or may order the case to remain in the Non-Jury General List or make such other order or give such other direction upon such terms as to costs or otherwise as he shall think fit.

(8) If an application under sub-paragraph (2) of this paragraph be not made within four weeks from the date when the action is set down for trial the action shall remain in the Non-Jury General List.

(9) (*a*) When an action in the Non-Jury Fixture List is settled, withdrawn or discontinued, it shall be the duty of the solicitors for the parties so to inform the Clerk of the Lists forthwith. In this event the Clerk of the Lists will remove the action from the Non-Jury Fixture List and the fixed date will be vacated.

(*b*) When a date in the Non-Jury Fixture List has been vacated for any reason the parties in any action fixed for a later date may, if they agree, apply for their action to be fixed for the date so vacated.

(10) Once an action has been allocated a fixed date for trial and has been placed in the Non-Jury Fixture List no alteration (except on an application to take an earlier vacated date) will be granted without the leave of the judge in charge of the Non-Jury List. Leave to alter a date by postponement will be given only for good cause shown, and the judge may in any case order as a condition of postponement that the action should be placed in the Non-Jury General List and should not be allocated a fixed date.

3. (1) On the hearing of the summons for directions the court or judge may, if it appears that the action ought to have an early trial, give a direction (to be called "an order for speedy trial") that an application be made to the Clerk of the Lists to fix a date for the hearing.

(2) Within one week from the making of an order for a speedy trial, or within such other time as may be specified in the order, the parties shall apply for a date to the Clerk of the Lists who shall, in default of agreement between the parties, arrange as early a date for the trial of the action as practicable.

1958

Practice Direction (Trials in Middlesex).

(3) If any party is dissatisfied with the date so arranged he may make application to the judge in charge of the Non-Jury List and the provisions of sub-paragraph (7) of paragraph 2 shall apply to such application.

4. (1) Except in cases dealt with under paragraphs 2 and 3 hereof, every application to fix, vacate, alter or otherwise determine the date of trial of an action in any of the Lists of actions in the Queen's Bench Division for trial in Middlesex shall be made:—

(*a*) In the case of an action in the Jury List to the judge in charge of the Jury List:

(*b*) In the case of an action in the Non-Jury General List, in the Short Cause List, the Revenue List, the Motions for Judgment List or the Special Paper List, to the judge in charge of the Non-Jury List:

(*c*) In the case of an action in the Commercial List, to the judge in charge of the Commercial List.

(2) Any party making an application under this paragraph shall give the other party or parties notice of his intention to apply to the judge in charge of the appropriate List. The notice shall be not less than one clear day before the date on which such application is proposed to be made, and shall specify the nature of the application and the grounds thereof.

(3) On the hearing of an application under this paragraph the judge shall have regard to the wishes and interests of the parties, the state of the Lists and all the circumstances of the case. The judge may grant or refuse the application or make such other order or give such other direction upon such terms as to costs or otherwise, as he shall think fit.

(4) All applications to the judge in charge of the appropriate List shall be made at the sitting of the court or at such other time or times as may be specified by such judge for the time being.

5. The lists of actions in the Queen's Bench Division for trial in Middlesex shall be kept by the Master of the Crown Office, and shall be included in the General List of Appeals and Causes in the Supreme Court of Judicature published for each sittings.

6. (1) For each week of each sittings there shall be published a list of Non-Jury actions to be called the "Pending "List of Non-Jury Actions."

(2) The Pending List shall be printed on the first day and on every subsequent Monday of each sittings, and on the day of its publication delivery of the Pending List at the addresses of subscribers in London will be made by Attendants of the Royal Courts of Justice.

(3) The Pending List shall contain:—

(*a*) A number of actions in both the Non-Jury General List and the Non-Jury Fixture List which are likely to be tried or have been fixed for trial during the next succeeding week, which will be listed together under the denomination of the "Week's "List."

(*b*) The remaining actions in the Non-Jury General List which have been set down on or before the end of the previous week, except actions which have by order or by consent been stood out from the Non-Jury General List. The Pending List will, if possible, contain an intimation that actions in the Non-Jury General List will not be taken before a date or dates to be specified.

(*c*) The remaining actions in the Non-Jury Fixture List fixed for hearing during the current sittings.

7. (1) A number of actions which are likely to be taken on the following day will be listed together and printed in the Daily Cause List under the denomination of the "Warned List." Such actions will be taken from those standing at the head of the "Week's List."

(2) No action in the Warned List will be removed from it by stay or postponement or will have its position altered except by leave of the judge in charge of the appropriate List.

8. The Regulations and Directions issued by the Lord Chief Justice in September, 1888, March 24, 1948, October 5, 1948, January 14, 1957,[1] and April 1, 1957,[2] are hereby revoked.

9. These Directions shall come into operation on the first day of January, 1959.

PARKER OF WADDINGTON
C.J.

December 9, 1958.

[1] [1957] 1 W.L.R. 183; [1957] 1 All E.R. 219.

[2] [1957] 1 W.L.R. 558; [1957] 2 All E.R. 97.

[COURT OF APPEAL.]

C. A.

1958
Oct. 3, 6, 27.

Jenkins, Romer and Willmer L.JJ.

* LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD.

[1956 L. No. 789.]

Town and Country Planning—Development—Assessment of development value—Land intended to be developed to be viewed as a whole—Land acquired for building purposes—High cost of making part of land suitable for building exceeding value of the whole—Whether development charge payable—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 69, 70—*Town and Country Planning (Development Charge) Regulations,* 1948 (*S.I.* 1948, *No.* 1189), *Sch.*

Practice and Procedure — Arguments of counsel — Construction of a statute—Practice notes on working the statute issued by Government Department—Not to be quoted in argument.

A local authority by virtue of the Housing Act, 1936, and in pursuance of a local order, acquired some 231 acres for development as a building estate. They submitted to the local planning authority detailed plans for the development of the whole estate, including the construction of houses, roads, factories and various public buildings. Planning permission in respect of the plans so submitted was granted, and the development indicated was practically completed by November 18, 1952; by virtue of the provisions of section 1 (1) of the Town and Country Planning Act, 1953, development charges were abolished in respect of operations begun on or after that date.

Part of the estate was suitable for building purposes, but to render the remainder suitable heavy engineering work had to be carried out at a cost which considerably exceeded the value of the land as a whole for building purposes.

When the Central Land Board sought to assess a development charge, the council objected, contending that the development had been onerous and not profitable, so that the grant of planning permission had added nothing to the existing use value of the land and no charge was accordingly payable. The board contended that the permission was of an optional nature, and that a hypothetical purchaser would only develop such parts of the land as were profitable, in which case the charge should be £22,500 (an agreed figure).

Danckwerts J. made a declaration in favour of the council that the land with the benefit of the planning permission ought to be valued on the footing that the council would proceed to carry out the whole of the planned operations within a reasonable time ([1958] 2 W.L.R. 807; [1958] 1 All E.R. 806). During the hearing he permitted counsel for the council to read, as part of their argument, certain "Practice Notes, being notes on Development "Charges" compiled by the defendant board for the assistance of their staff.

On an appeal by the board:—

Held, dismissing the appeal, that in accordance with the scheme of the Act a development charge was exigible on actual and not on hypothetical operations; so that, in assessing such a charge, regard must be had to the amount by which the value of the entirety of the land concerned, with the benefit of planning permission for the whole of the proposed operations, exceeded the existing use value, on the footing that the whole of such operations would in fact be carried out. Further, the execution by the council, or by any purchaser from them, of only the profitable parts of the scheme would

have constituted a breach of faith with the local planning authority, and involved the risk of the cancellation of the planning permission. The declaration appealed from was, accordingly, right.

Per curiam: Explanatory notes regarding the working of an Act, issued by a Government Department for the assistance of their officials, are wholly inadmissible for the purpose of construing the Act, and should not be quoted as part of counsel's argument. Such notes inevitably derive some persuasive force by reason of their source, and their use may well result in a court, albeit unconsciously, being influenced by official opinion on questions of construction, which are for the court alone.

APPEAL from Danckwerts J.

The facts are more fully set out in the report of the hearing below.[1]

G. D. Squibb Q.C. and *Denys Buckley* for the board.
H. E. Francis for the council.

The following cases were referred to in argument: *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer Vizagapatam*[2]; *Inland Revenue Commissioners* v. *Clay*.[3]

Cur. adv. vult.

October 27. JENKINS L.J., in the course of reading the judgment of the court, after citing sections 12 (1) (2), 14 (1), 18 (4), 21 (1), 69, 70, 72 (1) and 102 (1) of the Town and Country Planning Act, 1947, regulation 2 and the Schedule to the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189) and regulation 3 (1) of the Town and Country Planning (Making of Applications) Regulations, 1948 (S.I. 1948, No. 711), said that the planning permission under which the council had developed the estate had been granted with express reference to an application to develop the whole estate accompanied by detailed plans showing a carefully balanced layout of the whole area, so as to provide not merely housing accommodation of homes of different sizes and types in suitable proportions, but also sites for industry to ensure employment for the occupants, shops, schools, a church or churches, a community centre, open spaces and recreation grounds, and other amenities.

The contentions for the appellant board were that the development charge payable was the amount by which the value of the land with the benefit of planning permission exceeded the existing use value, such additional value being measured by normal processes of valuation. Planning permission merely permitted, but did not oblige, the owner to develop in a particular way. The hypothetical purchaser must be considered, and he would want to make the largest profit possible. Apart from the question

[1] [1958] 2 W.L.R. 807.
[2] [1939] A.C. 302.
[3] [1914] 3 K.B. 466.

C. A.
1958
London County Council v. Central Land Board.

of notional sale, the council, if so minded, could have confined their operations to such parts of the estate as could profitably be developed. If it were otherwise, it would mean that the council, having bought the site at existing use value after their predecessors in title had been compensated for loss of development value, would have got planning permission free; whereas if they had purchased the land before the Act they would have paid a price commensurate with unrestricted rights of user, such a result being inconsistent with the scheme of the Act.

For the council it was argued first that the planning permission was sought and obtained on the footing that the estate as a whole would be developed in a balanced and integrated manner as indicated on the plans, and that the development by the council, or assignees from them, of parts only of the estate selected by reference to economic considerations, would have involved a radical departure from the permitted proposals and would not be within the permission at all. That was putting the case too high, in the court's opinion, but this much could be said; that such an expedient of selective development would have been a breach of faith and might have exposed the council or the hypothetical purchaser to a risk of revocation of the planning permission under section 21 (1).

But there was a second and more powerful argument. It was said that, having regard to sections 69 and 70, a development charge was exigible in respect of actual operations in the way of development, and not in respect of mere permission to develop, so that a development charge was to be ascertained on the footing that the permitted operations would in fact be carried out. That contention was fully justified. Under the provisions of those sections, a charge was to be levied "in respect of the carrying "out of any operations"; the application for planning permission must be by a person having a sufficient interest in the land; the board had power to refuse to assess the charge unless satisfied "that the applicant is able to carry out those operations, and "that he will do so within such period as the board consider "appropriate"; the provisions of those sections were in some points only consistent with, and in no point inconsistent with, the council's view. That view was supported also by the provisions of the statutory regulations, and by the wording of the statutory form of application for planning permission issued thereunder. It followed, therefore, that the declaration made by Danckwerts J. was right, and that the appeal should be dismissed.

There was, however, a further point. At the hearing below, counsel for the plaintiffs had been allowed to read as part of his argument certain "Practice Notes, being notes on Development "Charges" under the Act, provided by the board for the assistance of their officials. Such notes were wholly inadmissible for the purpose of construing the Act, and the judge should have declined to consider them. It was not a desirable practice to

allow such inadmissible matter to be read as part of counsel's argument in a case involving the construction of statutory provisions. Such notes inevitably derived persuasive force from the fact that they represented the views of the persons charged with the administration of the Act, and, therefore, possessing special knowledge of its provisions, and however much counsel might disclaim reliance on them otherwise than as part of his argument, their use might well result in the court being influenced by official opinion, albeit unconsciously, on questions of construction, the decision of which properly rested on the court alone.

Appeal dismissed.
Leave to appeal refused (it having been stated that there was only one case outstanding which involved the same question).

Solicitors: *Treasury Solicitor; J. G. Barr, Solicitor, London County Council.*

F. R. D.

[RESTRICTIVE PRACTICES COURT.]

* PRACTICE DIRECTION (APPLICATIONS).

1958
Dec. 2.

Restrictive Practice—Practice—Interlocutory applications—To be dealt with by clerk of court—Restrictive Practices Court Rules, 1957 (*S.I.* 1957, *No.* 603), *r.* 49.

By virtue of the power conferred upon me by rule 49 of the Restrictive Practices Court Rules, 1957, I hereby give the following general direction:—

All applications in England and Wales in interlocutory matters (other than applications under rules 33 and 65), where the terms of the proposed order have been agreed by the parties, shall until further order be dealt with by the clerk of the court, who may at his discretion, after or without hearing the parties, either dispose of the same himself or adjourn them to the judge.

In all such applications a draft of the proposed order indorsed with a consent by all parties shall be left with the proper officer of the court.

PATRICK DEVLIN,
President.

December 2, 1958.

[COURT OF APPEAL.]

C. A.

1958
Oct. 20, 21, 22, 23; *Nov.* 4.

Lord Evershed M.R., Sellers and Pearce L.JJ.

* AUTEN *v.* RAYNER AND OTHERS.
AUTEN *v.* BAKER TODMAN & CO. (SUED AS A FIRM) AND ANOTHER.

SAME *v.* SAME.

[X 1956 A. No. 1699.]
[X 1956 A. No. 1698.]

Crown — Privilege — Evidence — Police reports and other documents falling within privileged class—Public interest—Minister's certificate—Whether conclusive—Nature of Minister's function.

Objection was made on the "grounds of public interest" to the production of certain official police records in an action in which three defendants were charged, inter alia, with conspiracy, false imprisonment and malicious prosecution. The third defendant, on whose behalf the objection was made, was at the material time a detective constable in the company fraud department of the Criminal Investigation Department. The objection was supported by an affidavit sworn by the Home Secretary. In interlocutory proceedings before the master, counsel for the plaintiff submitted that the Home Secretary should not have been a deponent to the supporting affidavit because he was connected with the first two defendants, and the plaintiff might reasonably have supposed him to be biased. (It was not suggested that he was in fact biased.) The connexion complained of was an indirect relationship by marriage and a past directorship and shareholding in a company, C. Ltd., which was connected with companies in which the first defendant held office as director or secretary. Subsequently the Home Secretary swore a further affidavit affirming his objection and stating that at the time when his decision was made he was unaware that C. Ltd. was connected with any of the issues in the action. It appeared subsequently that a document containing the material information had not been supplied to him.

The master refused to order production of the documents and the judge confirmed his refusal. The plaintiff appealed submitting that the right of the Crown to withhold production of documents was not exercisable if a prima facie case of fraud was made out, and the documents had come into existence as ingredients in a fraudulent conspiracy, such as that alleged for the present case:—

Held, (1) that, assuming that the Home Secretary, in weighing the interests of the public service against the interests of the administration of justice and of individual litigants, was to some degree acting judicially, the plaintiff ought on the facts reasonably and without reserve have accepted that the Home Secretary's determination was without taint of bias.

Cottle v. *Cottle* [1939] W.N. 205; [1939] 2 All E.R. 535 distinguished.

(2) That, accordingly, there was no objection to the Home Secretary having personally determined the question of disclosure, and on the authorities he, as the Ministerial head of the Department had, save in exceptional cases not applicable, to take the decision and the responsibility for it.

Duncan v. *Cammell, Laird & Co.* [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587 applied.

(3) That the decision had on the facts been made after consideration of the nature of the action, and the allegations which had been made and of the effect on all the litigants of his decision, and the Minister had concluded that the public interest and the proper functioning of the public service required that the documents should be withheld; that, accordingly, the form of the decision was unimpeachable, and the court was bound to treat it as conclusive, without considering what might be the effect of the allegation of fraud or of establishing a prima facie case of fraud.

O'Rourke v. *Darbishire* [1920] A.C. 581; 36 T.L.R. 350 distinguished.

Semble. The observations of Jenkins L.J. in *Ellis* v. *Home Office* [1953] 2 Q.B. 135, 146; [1953] 2 All E.R. 149 were merely by way of advice and admonition.

APPEAL from Ashworth J. (sitting in chambers).

On September 1, 1956, the plaintiff, Harold William Auten, issued a writ against Colonel Gordon W. G. Rayner, his wife, Eileen Mowbray Rayner, and Patrick Bolongaro, a detective constable (afterwards detective sergeant) stationed at Scotland Yard and employed in the company fraud department of the Criminal Investigation Department. Damages were claimed for conspiracy, malicious arrest and prosecution, abuse of process, false imprisonment and injurious falsehood. There was also a second action, consolidated with the first, by the plaintiff against a firm of accountants and a partner in that firm.

On April 23, 1958, Master Harwood refused to order that the detective should produce for inspection his reports to senior officers and communications between the Metropolitan Police Force and other forces. The objection to produce the documents was supported by an affidavit sworn on March 14, 1958, by the Home Secretary, Mr. R. A. Butler, in which he said that after personally examining the documents he had "carefully considered "the contents . . . and . . . formed the view that on the grounds "of public interest they ought not to be produced because they "belong to a class which it is necessary in the public interest for "the proper functioning of the public service to withhold produc-"tion. Accordingly, I object to the production of the said docu-"ments on the grounds aforesaid." When the matter first came before the master, counsel for the plaintiff observed that it was inappropriate for the Home Secretary to object on behalf of the Crown to production of the documents, because he was indirectly related by marriage to the first defendant and had been at one time a director of Courtaulds Ltd. and was still a shareholder. It was said that Courtaulds Ltd. and some of its directors were closely connected with companies, particularly companies engaged in the film industry, in which the first defendant held office as director or secretary. On April 18, 1958, Mr. Butler swore a second affidavit in which he said, inter alia, that such documents were invariably withheld from production in evidence in civil proceedings, and that he had been advised, and believed that it was his duty as Home Secretary to swear the first affidavit.

C. A.
1958
Auten
v.
Rayner.

At the time when he swore that affidavit he said that he was wholly unaware that Courtaulds Ltd. were alleged to be in any way connected with the issues raised. "The circumstances that "any party to these actions was connected by marriage or at all "with the Courtauld family and so indirectly through my late "wife with myself was not present to my mind at the time." (The marriage relationship was that the wife of the first defendant's brother was the second cousin of Mr. Butler's late wife.) He said that if he had been aware of the connexion it would "nevertheless have been my duty as Home Secretary to decide "whether the public interest required that the police documents "should be withheld from production, and it would have been a "serious breach of my duty as Home Secretary to have allowed "such considerations to influence me in the performance of my "public duty to form an impartial judgment." He concluded by saying that he saw no reason to alter his previous opinion that the documents should be withheld from production.

The plaintiff appealed to the judge, but Ashworth J., by an order made in chambers on July 9, 1958, dismissed the appeal. The plaintiff appealed.

D. N. Pritt Q.C. and *J. Platts-Mills* for the plaintiff.

Sir Reginald Manningham-Buller Q.C., *A.-G.* and *Rodger Winn* for the Home Secretary.

H. K. Woolf for the first and second defendants.

G. de P. Veale Q.C. and *W. W. Stabb* for the third defendant, the detective constable.

G. W. Cheyne for the defendants to the second appeal.

In addition to the cases referred to in the judgment, the following were cited in argument: *Williams* v. *Quebrada Railway, Land and Copper Co.*[1]; *Marks* v. *Beyfus*[2]; *M'Kie* v. *Western Scottish Motor Traction Co.*[3]

Cur. adv. vult.

November 4. Lord Evershed M.R. The judgment which I am about to read is the judgment of the court.

The question in this appeal is whether the plaintiff in two consolidated actions can successfully challenge the decision of the Secretary of State for Home Affairs to withhold from production certain documents comprised in the second part of an affidavit sworn on January 16, 1958, in the first of the two actions by the third defendant therein, one Patrick Bolongaro. The documents in question are reports made by the defendant as a detective constable in the Criminal Investigation Department to superior officers, and communications passing between the Metropolitan Police Force and other police forces. By their inclusion in this part of the detective's affidavit, the documents must be

[1] [1895] 2 Ch. 751, 755.
[2] (1890) 25 Q.B.D. 494.
[3] 1952 S.C. 206.

taken to be in the detective's possession or power, and to be relevant to some subject-matter in the action. But, as appears from their brief description, the documents appear at first sight clearly to be of the class that may be described as official police records; and as such the Secretary of State has determined that they should be withheld from production.

The question is one of the kind of which from time to time examples have come before the courts in recent years, and in which there is an apparent conflict between what is called "the "public interest" on the one hand and, on the other, the interests of the due administration of justice and of the parties to particular litigation. As such, the case has, as have other like cases, called for anxious consideration; since although the right and duty of the Crown in certain cases to withhold documents from production is undoubted, the court is bound to look with somewhat jealous care upon any exercise of executive powers which have the effect of overriding or ousting the jurisdiction of the courts in matters which are prima facie peculiarly within their province. These anxieties were forcefully expressed by Lord Radcliffe, with the concurrence of Lord Somervell, in the recent case *Glasgow Corporation* v. *Central Land Board.*[1] Where the "public interest" is that concerned, for example, with the protection of State secrets, as commonly understood, or with matters related to international diplomacy, the primacy of the "public interest" is readily accepted; but the problem is, at first sight, at any rate, less easy when the "public interest" is that of the proper functioning of some aspect or department of the public service. In such cases, indeed, the expression "public "interest" is perhaps not an altogether happy formula, since it seems on the face of it to overlook the obvious fact that the requirements of the due administration of justice are themselves in the highest degree in the public interest. Nevertheless, it is undoubtedly also of the first importance to the good order and government of the nation that those concerned in all departments of the public administration should not be embarrassed or restricted in the loyal and conscientious discharge of their duties by fear that what they may confidentially record in the course of those duties should thereafter be made public. These are the considerations which may justify in such cases as the present the right of the Crown to withhold documents from production.

The case being, then, one calling for anxious consideration, as well as of some public interest, we are much indebted for their arguments to counsel for the plaintiff and for the defendants, as also to the Attorney-General and Mr. Winn, who have assisted the court on behalf of the Crown.

In the consolidated actions the plaintiff has made very serious charges against the respective defendants thereto. In the first

[1] 1956 S.C.(H.L.) 1.

C. A.
1958
Auten
v.
Rayner.

action (with which we are particularly concerned and in which the detective is joined) the charges are, briefly, of conspiracy to injure and defraud, of false imprisonment and of malicious prosecution. Those charges are of the gravest character, and it is obvious that, if they are to be made good, they will have to be clearly and strictly proved. Mr. Pritt, in opening the case for the plaintiff, quite properly indicated the nature of the case he was making; for it was one of his main arguments that if he showed a prima facie case of the fraud he alleged, then the principle which might otherwise justify the Crown's claim to withhold documents from production without challenge was inapplicable. Mr. Veale, for the detective, strongly contended that, at least as against his client, no such prima facie case had been shown. The Attorney-General, on behalf of the Crown, without, of course, conceding (as not being a party to the action, he could not in any case do) that a prima facie case of fraud had been established on the plaintiff's part, was content to argue the question of the validity and conclusiveness of the Secretary of State's decision on the hypothesis that it had. In the circumstances, it is unnecessary for us to express any view whether on the material so far available there is a prima facie case of fraud against the detective; and we express no view accordingly. For we are in no sense trying the action. But having regard to the publicity which, naturally enough, a case like the present is apt to attract, we think it right to make it plain that by a prima facie case is meant no more than a case which calls for an answer. We repeat that we express no view whether such a case has been made out. Certainly the defendants, including the detective, have not so far had the opportunity of answering any such case. We think it also right to make clear that, as Mr. Pritt very readily conceded, the effect of the non-disclosure of the documents in question may, if sustained, be by no means to the exclusive disadvantage of the plaintiff.

With this introduction it will be both logical and convenient for us to deal first with Mr. Pritt's claim to disqualify the affidavits sworn by the Secretary of State on the ground that the latter's connexion with or interest in the first two defendants, Colonel and Mrs. Rayner, and the businesses with which they are connected, infects the Secretary of State with such liability to bias as would reasonably be regarded as disabling him from personally arriving at a fair judgment upon the question of disclosure of the documents; for if this point is made good, then it would, according to the argument, follow that the affidavits so far sworn by the Secretary of State could not be regarded in any case as conclusive of the matter.

It should be said at once that Mr. Pritt has not suggested that Mr. Butler was in fact so biased: but it was said, nevertheless, that a man in the situation of the plaintiff (having been the defendant in an action brought against him by the defendants Rayner, which had been abandoned after nearly two years, and

having been charged in criminal proceedings arising out of the same subject-matter, which proceedings had been stopped at the trial by the judge) would reasonably regard the Secretary of State as being so biased. We agree entirely with the judge that these suggestions of bias should be wholly rejected.

The justification for the suggestion of bias arises from the circumstances that the late wife of the Secretary of State was a member of the well-known Courtauld family (having been a daughter of the late Samuel Courtauld); that he holds a number of shares in Courtaulds Ltd.; and that he was a director of that company before becoming a Minister of the Crown. For the defendant Colonel Rayner's brother is also married to a member of the Courtauld family, namely, the daughter of Samuel Augustine Courtauld, first cousin to the late Mrs. Butler's father; and the defendant Rayner is also a director of and shareholder in certain companies (connected with the film industry) in which other members of the Courtauld family (namely, J. S. and S. L. Courtauld) were during their lives co-directors with him, their shareholdings being now vested in their estates. We thought it right in the circumstances to look at two affidavits sworn since the hearing before Ashworth J., one by the plaintiff himself and one by a chartered accountant. To the former is exhibited a "pedigree" of the Courtauld family, and other exhibits showing, inter alia, the devolution of the estates of members of the family. These exhibits show that the members of the family were and are persons of substance who may be said to be closely linked together as a family. To the accountant's affidavit one of the exhibits consists of what he has called a "Schedule of brief "particulars of companies in which the defendants" (meaning the defendants Colonel and Mrs. Rayner) "and/or associates of "theirs . . . have been concerned as directors, secretaries or in "other ways." We have examined this material, but we do not refer in greater detail to it. For, as Mr. Pritt fairly conceded, "It does not amount to very much." In our view, the judge was well justified in describing the link between the Secretary of State and the defendants Rayner, by marriage and otherwise, as "extremely slender." We have already observed that no bias in fact is alleged. Indeed, if the matter is viewed dispassionately, it is, in our judgment, extravagant to suppose that one holding the responsible position which Mr. Butler holds, having his long experience of public affairs, and having also available to him the skilled advice which his department can provide, would, in such a matter as this, relating to reports by junior to senior police officers and communications between police forces, be in the least disabled or disqualified by reason of the private interests to which we have alluded.

But it was contended that the Secretary of State was exercising a duty and a function which was in some degree judicial, since it involved a weighing up of the interests of the public service on the one hand, and, on the other, those of the due

C. A.
1958
AUTEN
v.
RAYNER.

administration of justice and of individual litigants in a law suit; and this being so, that the test of reasonableness must be that fairly attributable to one in the situation of the plaintiff in that litigation: in other words, that the question is whether the plaintiff, in the light of the experience which he alleges, would reasonably suspect the Secretary of State of bias. For this proposition Mr. Pritt referred to *Cottle* v. *Cottle*.[2] In that case a husband who was an applicant before magistrates in a matrimonial dispute objected to the propriety of the chairman of the bench adjudicating in the matter. The objection was based on the admitted fact that the chairman was a close friend of the wife's mother and also, on evidence given by the husband, that his wife had told him she would bring the dispute before the chairman, who would "put him" (the husband) "through it." In the circumstances, the conclusion of the Divisional Court is not surprising to the effect that the husband might reasonably lack confidence in the chairman's impartiality, and that in the interest of the due administration of justice, including the principle that justice should appear manifestly to be done, the chairman should be regarded as disabled from adjudicating in the case.

We refer again later to the question whether in a case such as this the Secretary of State should be regarded as in any sense exercising a judicial, as distinct from a purely executive, function. But assuming that he is in any sense "adjudicating," it is plain that the circumstances of the present case are, for present purposes, very widely different from those in *Cottle* v. *Cottle*.[2] As we have said, the link between the interests of the Secretary of State and those of the defendants Rayner is extremely slender. Moreover, in reaching his determination he is not adjudicating upon the issues between the plaintiff and the defendants Rayner, and he is not alleged to have any community of interest at all with the detective. His function (so far as the question of alleged bias is relevant) is to decide between interests of a department of the public service and those of the parties (defendants as well as plaintiff) to certain litigation.

If there is justification for the charges made in the action by the plaintiff, he no doubt feels and is entitled to feel strongly about the events narrated in his statement of claim. But, allowing for all this, and assuming that the test of reasonableness is to be applied in reference to one in the plaintiff's position; and assuming also, as we have done, that the Secretary of State should be regarded as having in some degree acted judicially, still we are quite unable to accept the plaintiff's contention that the Secretary of State's determination must be treated as disqualified from finality on the ground of liability to bias. In his second affidavit of April 18, 1958, Mr. Butler has sworn that at the time when he swore his former affidavit the circumstances above

[2] [1939] W.N. 205; [1939] 2 All E.R. 535.

mentioned alleged to justify the suggestion of bias were not present to his mind; and that, having had his attention since drawn to them, he none the less remains of opinion that in the public interest the documents should be withheld from production. In our judgment, making the allowances and assumptions above mentioned in his favour, the plaintiff ought reasonably and without reserve to accept it that the Secretary of State's determination is without taint of bias.

The question of bias being out of the way, it must follow that the objection to the Secretary of State having personally determined the question of disclosure is also disposed of. It was the contention of the Attorney-General, founding himself on the language of Viscount Simon L.C. in *Duncan* v. *Cammell, Laird & Co.*,[3] and his citation of the judgment of Wills J. in *Hennessy* v. *Wright*[4] (see *Duncan* v. *Cammell, Laird & Co.*[5]), that in all these cases the decision and the responsibility for it must be taken by the ministerial head of the department, save in the exceptional circumstances mentioned by Lord Simon, which have no present application. We think this is the correct view: and, in any case, as Mr. Pritt observed, the Secretary of State has in the present case himself in fact assumed the responsibility. The only question then remaining is whether the decision of Mr. Butler, expressed in his two relevant affidavits, must be taken as conclusive: for Mr. Pritt has not before us proceeded with either of the two grounds suggested before Ashworth J. for showing that the *Cammell Laird* case[5] is no longer binding authority.

It was again a contention of the Attorney-General's, founded on Lord Simon's speech, and particularly[6] that the decision is conclusive; that the function of the Minister is merely executive and in no sense judicial, and therefore not liable or capable of review in the courts; and, indeed, that the Minister was not at all concerned with the details or nature of the litigation in which the question of disclosure has arisen. If the certificate of the Minister is on the face of it, that is, in form, valid, that (according to the submission of the Attorney-General) is the end of the matter.

On the other side, Mr. Pritt contended, first, that where the action charged fraud and, particularly, where a public servant was alleged to be party to the fraud, and where a prima facie case for such fraud had been made out, then the principles which would or might ordinarily render sacrosanct a ministerial decision were displaced; with the result (as we assume) that it would then be competent for the court to determine whether in truth the "public "interest," that is, the interest of the department concerned as a department of State or its equivalent, outweighed the requirements of the due administration of justice. In support of this contention Mr. Pritt argued that if it were prima facie shown

[3] [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587.
[4] (1888) 21 Q.B.D. 509; 4 T.L.R. 597.
[5] [1942] A.C. 624, 637, 638.
[6] Ibid. 642.

C. A.
1958
AUTEN
v.
RAYNER.

that the documents concerned had been contrived in pursuance or furtherance of the fraud, then it followed that there was no room for, or relevance in, the argument that the public interest required that the completeness and candour (and particularly the latter) of official reports and the like should be treated as confidential.

Secondly, and more broadly, Mr. Pritt disputed the proposition that the Minister was in no sense acting judicially in his determination. He particularly relied on the observations of Jenkins L.J. in *Ellis* v. *Home Office*.[7] Jenkins L.J. said: "But I would "urge that in the interests of justice—particularly in a case like "the present, which concerns a claim by one of Her Majesty's "subjects against a Government Department—documents within "the ambit of privilege should be most carefully scrutinized, and "the person entrusted with that task should, in regard to each "document, ask himself whether it is relevant to the plaintiff's "case, whether the plaintiff's case will be hampered or impeded "if it is not made available, and, if so, whether the probability "of any harm being done to the public interest by disclosing it is "sufficient to outweigh those other considerations." It was argued that if effect were to be given to those requirements, it followed that the Minister must acquaint himself with the relevant facts of the case in suit and must weigh, and form a judgment upon, the relative claims of the departmental interest on the one hand, and the administration of justice on the other.

We do not propose to attempt any exposition of the principles laid down in the cases, and particularly in *Duncan* v. *Cammell, Laird & Co.*,[8] which would or might be applicable to other than the circumstances of the present appeal—except to express the opinion which we have clearly formed that *O'Rourke* v. *Darbishire*[9] cannot be regarded as authority for the view that the Crown's ordinary right of withholding disclosure of documents is altogether displaced wherever fraud is alleged or prima facie proved. *O'Rourke's* case[9] dealt with the right to privilege from discovery which the private individual in certain circumstances has. In our judgment, its principles are not applicable to the right of the Crown to withhold documents from discovery, a right somewhat misleadingly called "Crown privilege."

Where in an action between private individuals fraud is alleged, the parties concerned lose the benefit of their private right to privilege. But here there is no right which a private person can forfeit. It is a public right required and justified by the administration of public affairs.

Notwithstanding the argument of the Attorney-General, we were informed by Mr. Winn that in the present case the Secretary of State had in fact informed himself of the nature of the present action and of the allegations made therein, and had also borne in

[7] [1953] 2 Q.B. 135, 146; [1953] 2 All E.R. 149.

[8] [1942] A.C. 624.

[9] [1920] A.C. 581; 36 T.L.R. 350.

mind the effect upon the presentation of the cases both of the plaintiff and of the detective of the withholding of the documents in question, including the consequence that the latter would not be able to give secondary evidence of their contents; and that, having considered those matters, the Secretary of State had reached his decision for non-disclosure. The form of language of Mr. Butler's two relevant affidavits reflects what Mr. Winn said; for the Secretary of State speaks (see paragraph 8 of his affidavit of April 18) of having formed "an impartial judgment" and he states clearly the conclusion that in his view in the public interest, and for the purpose of the proper functioning of the public service, the documents in question should be withheld from production.

In those circumstances we are of opinion that the form of the Secretary of State's "certificate," being on the face of it unimpeachable, and the conditions to which Lord Simon referred in the *Cammell Laird* case [10] at least not being shown not to have been satisfied, the court is bound to treat the certificate as conclusive. Even if the language of Jenkins L.J. be regarded as indicating a Minister's duty in reaching his conclusion (upon which we express no view), then again it is in our judgment not shown that such duty was not in this case performed; and the result is the same. For we observe that the language of the Lord Justice which we have quoted followed immediately his statement that it was right that the decision of the responsible Minister on the question of disclosure or non-disclosure should be final.

If the two passages are read together, the result lends support to the view that the observations on which Mr. Pritt relied were merely by way of advice or admonition; that the Minister is in no way concerned as such with the issues between the parties or the relative importance in an action of the material sought to be disclosed. The Minister should no doubt accept and recognize that the proper administration of justice may be impeded or may be unattainable if any document or any evidence which the court would allow to be seen by the parties or which the court would allow to be put or given in evidence is withheld. Nevertheless his sole concern is whether the interests of the State in the sphere for which he is the responsible official would be so affected that the Crown should withhold documents or evidence from the parties and the court.

In our judgment, therefore, the result in the present case is not affected by the consideration that fraud is alleged or, as has been assumed for the purposes of the present argument, prima facie established. Nor is the result affected, if it was the duty of the Minister to weigh in the balance the considerations to which Lord Simon referred in the *Cammell Laird* case,[11] or to which Jenkins L.J. alluded in the *Ellis* case.[12] That, as we

[10] [1942] A.C. 624, 642.
[11] Ibid.
[12] [1953] 2 Q.B. 135, 146.

C. A.
1958
AUTEN
v.
RAYNER.

think, is sufficient to dispose of the present appeal. As we have said, it is not necessary, nor do we think it useful, for us to express further views which would only be applicable in circumstances other than those of the present case. In particular, we express now no view on the question (which in our judgment does not arise on this appeal) what the result might be in a case where the Secretary of State's certificate or conclusion were on the face of it expressly based on the premise that the document or documents which he had determined to withhold was or were of a particular character or class and it were then shown aliunde that in fact he had been mistaken in the premise.

First appeal dismissed. Leave to appeal to House of Lords refused. Form of order in second appeal as agreed between the parties.

Solicitors: *W. H. Thompson; Treasury Solicitor; Herbert Baron & Co.; Solicitor for Commissioner of Police of the Metropolis; Chamberlain & Co.*

E. D.

END OF VOLUME 1.